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Abdulrehman Husain Esmail v Republic

[1965] 1 EA 1 (SCK)

Division: Supreme Court of Kenya at Nairobi

Date of judgment: 24 December 1964

Case Number: 994/1964

Before: Sir John Ainley CJ and Miles J

Sourced by: LawAfrica

[1] Criminal law – Obtaining by false pretences – Charge of obtaining two air line tickets from

employee of travel agency – One ticket made out in name of accused and other in his wife's name – Payment for tickets made by post-dated cheque of Shs. 13,680/- *– Cheque made payable day after receipt of tickets – When tickets delivered accused's bank balance was only Shs.* 80/- *– Whether accused should have been separately charged for wife's ticket – Whether offence as charge committed.*

Editor's Summary

The appellant was convicted of obtaining by false pretences in that on January 3, 1964 with intent to defraud he obtained from one S. a travel agent two airline tickets by falsely pretending that his cheque was a valid order for the payment of Shs. 13,680/- and that the accused had authority to draw the said cheque. The tickets were made out by Ethiopian Airlines on the request of S., one to the appellant and the other to his wife and both were marked "non-transferable". The tickets were ready at the office of the travel agency after 4 p.m. on January 3, 1964. S. said "What about cash" and the appellant replied that a cheque would be all right and made out a cheque for Shs. 13,680/- dating it January 4, 1964. There was evidence that at the time of the transaction the appellant's bank balance was in credit to the amount of Shs. 80/- and had never been greater than Shs. 800/-. The cheque was dishonoured. On appeal it was argued that there should have been a separate charge dealing with the wife's ticket because the wife was the owner of the second ticket and that the appellant only "obtained" possession of it; that there cannot be an "obtaining" of a travel ticket which is merely evidence of a chose in action, and is normally returnable at the end of journey; that the tickets were not "obtained" from S. who never owned them but were issued by Ethiopian Airlines who passed the property in the tickets to the appellant and his wife before S. took delivery of those tickets; and that as the cheque was a post-dated cheque the appellant only represented that he had power and authority to draw on the bank concerned, but not for any particular amount.

Held –

(i) when a man buys air tickets, or railway tickets, if the property in the tickets passes at all, then the property passes to the person who puts the money down, picks up the tickets and walks off with them; if the tickets may be regarded

as chattels passing from the ownership of the seller, then the seller passes complete dominion and control to the person to whom he hands the tickets on payment;

(ii) an airline ticket can be "obtained" by false pretences: *R. v. Boulton* (1849), 1 Den. 508 and *R. v. Chapman* (1910), 4 Cr. App. R. 276 followed.

(iii) the appellant "obtained" both the tickets and the property in them could pass and did pass to the appellant;

(iv) When after banking hours on 3rd January the appellant handed over a cheque which could be presented for payment the following morning he was making a false representation as to existing facts and the appellant knew perfectly well that this representation was false; accordingly he was properly convicted of the offence charged.

Appeal dismissed.

Cases referred to in judgment

(1) *R. v. Boulton* (1849), 1 Den. 508.

(2) *R. v. Chapman* (1910), 4 Cr. App. R. 276.

(3) *R. v. Ball*, [1951] 2 K.B. 109.

(4) *R. v. Maytum-White* (1958), 42 Cr. App. R. 165.

(5) *R. v. Hazelton* (1874), L.R. 2 C.C. R. 134.

Judgment

Sir John Ainley CJ: read the following judgment of the court:

In this case, which has been argued with elaboration and care, the appellant was convicted of obtaining two airline tickets by false pretences. He was sentenced to 30 months imprisonment. What in fact he did was to get his hands on two airline tickets by presenting to one Mr. Salvesen a worthless cheque for Shs. 13,680/-. At the time of the transaction the appellant's bank balance was in credit to the amount of some Shs. 80/- and had never been greater than Shs. 800/-. On the face of things there was here a bare faced fraud. But for a large number of reasons it is said that the conviction cannot stand. The charge read as follows:

> "Obtaining by False Pretences Contrary to Section 313 of The Penal Code:
>
> Abdulrehman Husain Esmail, on the 3rd day of January, 1964, at Nairobi within the Nairobi Area, with intent to defraud, obtained from Mr. R. E. Salvesen of J. W. Kearsley (E.A.) Limited two airline tickets by falsely pretending that a certain cheque which he, the said Abdulrehman Husain Esmail, then produced and delivered to the said Mr. R. E. Salvesen of J. W. Kearsley (E.A.) Limited was a good and valid order for the payment of Shs. 13,680/- and that he, the said Abdulrehman Husain Esmail, then had authority to draw a cheque for the payment of Shs. 13,680/- upon the Bank of India Limited situate at Nairobi."

Now the appellant wished to travel, with his wife, upon a long air trip which would enable him and his wife to visit many foreign countries. One ticket was made out in the appellant's name, and the other in the name of his wife. Both were marked "non-transferable". It is argued that if the appellant "obtained"

anything at all, he “obtained” only the ticket which bore his name and which he required for his own use. We agree that if a man by means of a false representation persuades another to give him mere temporary possession of an article he

does not "obtain" that article. The dupe must be persuaded to give full ownership of the article, before there is "obtaining". Such is the law. If Mr. Salvesen was persuaded to give ownership of one ticket only to the appellant, then, it is argued, the charge is defective. It is said that the appellant induced Mr. Salvesen to give him mere possession of what may be called "the wife's ticket". Upon delivery of the ticket to the appellant, it is argued, the wife became the owner, if indeed she was not the owner before delivery. Accordingly it is said that there should have been a separate charge dealing with the matter of the wife's ticket.

Such a charge would have been easy to draft under s. 32(1) of the English Larceny Act. Section 313 of the Penal Code appears at first glance to be an incomplete copy of the English sub-section. It is an offence in England for a man by a false pretence "to cause . . . any chattel . . . to be delivered to himself . . . for the use or benefit . . . of any other person". In Kenya it is an offence for a man by a false pretence to induce "any other person to deliver to any person anything capable of being stolen", and the case of a man who induces the prosecutor to transfer mere possession of a chattel to him while the property in the chattel is passed to another, is not perhaps very clearly covered by our law.

However to our minds the criticism of the charge is not valid. If, when a man buys air tickets, or railway tickets, the property in the tickets passes at all, then it is reasonably clear to us that the property passes to the person who puts the money down, picks the tickets up, and walks off with them. The tickets may bear the names of other people, they may be "non-transferable", but if they may be regarded as chattels passing from the ownership of the seller, the seller, to our way of thinking passes complete dominion and control to the person to whom he hands the tickets on payment.

In the present case it is clear that the appellant could do what he liked with this chattel which bore his wife's name. It was clearly not his wife's property. Had the appellant torn the ticket up he would have done his wife no legal wrong. If he had handed it to some other lady that lady would perhaps have received something useless to her, though of that we are not certain, but the appellant would not have committed a breach of trust, nor would he have been guilty of conversion. Subject to the point next considered we hold that the appellant "obtained" both tickets.

But then it is argued that there cannot be an "obtaining" of a travel ticket which may be regarded merely as evidence of a chose in action, and is normally returnable at the end of the journey. The question is no doubt of interest, but we regard the law as settled so far as we are concerned. So long ago as 1849 the matter was fully considered in *R. v. Boulton* (1). In that case Pollock, C.B., said that the judges were unanimously of the opinion that a railway ticket, returnable at the end of the journey, came within a statute making it criminal to obtain a chattel by a false pretence. This decision was followed, perhaps with hesitation, but it was followed, by the Court of Criminal Appeal in *R. v. Chapman* (2), Lord Alverstone, C.J., saying. "It is a reasonable decision, and it binds this court."

We have decided that we should follow those cases which appeal to our sense of reality. It may be the custom of air lines to collect the "original" ticket in the booklet issued at the journey's end or during the journey. We do not think however that the servants of the air line when doing so are in truth making a demand for their employers' property, or that a charge of theft or conversion would lie against the passenger who in some way converted the ticket and refused or was unable to deliver it at the journey's end. We hold then that the property in both tickets could pass and did pass to the appellant.

But then it is said that the tickets were not “obtained” from Mr. Salvesen in that he never owned the tickets. Mr. Salvesen was the servant or agent in this matter of a concern known as J. W. Kearsley (E.A.) Ltd. The tickets which are the subject of the charge were tickets which enabled the holders to travel on the aeroplanes of a concern known as Ethiopian Airlines. We use the word “obtain” not as a term of art, but before Salvesen on behalf of Kearsley Ltd., could hand the required tickets to the appellant he had to obtain the tickets from Ethiopian Airlines. He did so, Ethiopian Airlines having made out the tickets in the name of the appellant and his wife, before they delivered the tickets to Mr. Salvesen.

It is not said that there would have been error in naming Mr. Salvesen in the charge if Kearsley Ltd., were the owners of the tickets. What is said is this that Ethiopian Airlines passed the property in the tickets, not to Kearsley Ltd., but to the appellant and his wife, before Kearsley Ltd., received them.

We do not consider that this argument is valid. Ethiopian Airlines were approached by Mr. Salvesen with a request that two air tickets should be delivered to him. It is true that he asked that the tickets should be made out in the names of two individuals, and the Airline complied with that request. At that stage however there was clearly no contract between the Airline and the appellant, or between the Airline and the appellant’s wife. At that stage the tickets were the property of the Airline, or so we think. Had the appellant gone to the Airline and paid for the tickets no doubt they would then have become his property, but he did not do so. He looked to Kearsley Ltd., for his tickets. It was Kearsley Ltd., whom he purported to pay. The Airline made no transaction with the appellant. They made their bargain with Kearsley Ltd., for it is clear that they looked to that concern for payment, and Kearsley Ltd., did in fact pay them for the tickets. The Airline delivered the tickets to Kearsley Ltd., in return for an undertaking to pay for them. We consider and the learned magistrate considered that upon delivery to Mr. Salvesen the tickets became the property of Kearsley Ltd. However as the learned magistrate pointed out, if Mr. Salvesen, or Kearsley Ltd., was in effect selling these tickets for the Airline, Mr. Salvesen had authority to pass the property in the tickets co-equal with that of the Airline, and the appellant was properly charged with obtaining them from Mr. Salvesen. The situation in short, was covered by *R. v. Ball* (3).

Next our attention has been called to the detail of what took place when the appellant obtained the tickets. Not long after 4 p.m. on January 3, 1964, Mr. Salvesen was in possession of the tickets, and the appellant was in Mr. Salvesen’s office.

Mr. Salvesen said that the tickets were ready. The appellant started to make out a cheque. Mr. Salvesen said, “What about cash”. The appellant said that the cheque would be all right, and completed the cheque, dating it January 4, 1964. He then made some calculation on the stub of the cheque and according to Mr. Salvesen made the observation that there was now Shs. 3,000/- left in the bank. He then handed the cheque over. Mr. Salvesen swore, no doubt truly, that he was satisfied that the cheque was good, and that all was in order, though he noted that the cheque was dated January 4, 1964. He accepted the cheque, and gave the appellant the tickets. The cheque as we know was worthless, and when presented was dishonoured. It may be added that Mr. Salvesen had made some enquiries about the appellant previously, and had gathered that his financial position was sound. In cross-examination he said, “I agree that is was largely, or really because of my own independent enquiries that I parted with the tickets against the cheque.”

Mr. Salvesen was clearly saying no more than that he believed the appellant to be a man of substance. Because, as he thought, the appellant was a well to do

man he accepted as true the representations which were made by the tender of the cheque in payment for the tickets. Few men accept the representations made by the tender of a cheque without some reflection, and the exercise of judgment, particularly when the cheque is for a very large sum. A man may form a judgment of the likelihood of a cheque being met from the customer's dress or bearing or from the size of the car in which he arrives and so on. He may have heard much good of the customer previously; he may know the customer and may trust him. It is possible to go on indefinitely in this way.

The dupe's reasons for believing the representations made by the tender of a cheque are however irrelevant so long as those representations are believed and are false. Such cases are entirely different from those cases where a man relies wholly upon his own skill and knowledge in assessing the value of an article, or in deciding the substance of which it is made. Mr. Salvesen did not assess the value of the cheque, he assessed the value of the representations made to him, wrongly as it turned out. He was deceived in short by untrue representations made by the appellant, and the attempt by Mr. Zool Nimji for the appellant to persuade us to the contrary fails.

Then it is said that Mr. Salvesen in his evidence spoke of representations and pretences not set forth in the charge, and that such evidence should not have been permitted to appear on the record.

To our way of thinking there was no impropriety in the admission of this evidence. The appellant was said to have represented falsely that the cheque was a good and valid order for the payment of some Shs. 13,000/-. The basic representation relied on was no doubt that which flowed from the tender of the cheque. But we do not think that the omission from the charge of reference to the play acting and assertions of the appellant by which he may have supported that representation was in any way fatal to the conviction. It was clearly unnecessary to set out in the charge a proof of Mr. Salvesen's evidence. The appellant was told in effect that he had fraudulently pretended that his cheque was a good cheque, and that as we think was all he needed to be told. If we are wrong the appellant suffered no injustice. Long before he was called on for his defence he knew precisely the case he had to meet.

We come now to the arguments based upon the fact that the cheque was a "post dated" cheque.

To our minds nothing whatever turns upon the fact that after banking hours on January 3, the appellant dated his cheque January 4. To our way of thinking the representation made to Mr. Salvesen would have been precisely the same if the date January 3, had been inserted.

We do not hold as counsel for the State asked us to hold, that the editors of Archbold err when in reliance upon the case of *R. v. Maytum-White* (4) they state:

> "The drawer of a post dated cheque represents that he has power and authority to draw on the bank concerned, but not for any particular amount."

The proposition, if it be regarded as a general proposition is undeniable. Of course a man who draws a cheque for £100 on May 1, and dates it June 1, does not represent on May 1, that he has authority there and then to draw on the bank for £100 or for an hundred pence. He represents merely that he has authority to draw on the bank named in the cheque. We do not decide the point, but it may be that the representation "the cheque will be met on June 1" savours over much of futurity to sustain a conviction. It may be that in such a case there is no representation as to an existing state of facts. But there is no magic about post-dating. The question in all cases of this kind is whether there is a representation of an existing state of facts. Pollock, B., in *R. v. Hazelton*

(5) (1874) L.R. 2 C.C.R. at p. 140 pointed out that the presentation of a current cheque is a representation that the cheque will be paid and that this may be said to be a representation as to a future event. He added, “But that is not really so. It means that the existing state of facts is such that in ordinary course the cheque will be met.”

Here the appellant after banking hours on January 3, by handing over a cheque which could be presented for payment the following morning was making a false representation as to an existing state of facts in the sense referred to by the learned Baron. We do not find it necessary or proper to say that this cheque was not in reality post dated. It was post dated. But it was handed over as the equivalent of cash and the state of the appellant’s banking account, or his credit with the bank, or his overdraft facilities, were at that instant of time represented to be such that, when the bank opened the following day, this cheque would be met.

It is unnecessary to go into detail, but there is evidence that the appellant knew perfectly well that this representation was utterly false. The appellant is a swindler and was properly convicted of the offence charged. We have said little more than was said by the learned magistrate, whose judgment, if we may say so, was admirable.

The sentence now engages our attention. It was substantial, but the appellant’s record is not unblemished. He has twice been convicted of obtaining money by false pretences. We think that the sentence was proper.

We dismiss the appeal both from conviction and from sentence.

Appeal dismissed.

For the appellant:
Zool Nimji
Zool Nimji, Nairobi

For the respondent:
JR Hobbs, State Counsel, Kenya,
The Attorney General, Kenya

VH Gidoomal and others v Abed Bin Omar Abed and others
[1965] 1 EA 6 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	12 February 1965
Case Number:	754/1963
Before:	Rudd J
Sourced by:	LawAfrica

[1] Damages – Loss of profits – Advocate employed by both lessor and lessee to draw up lease – Lease executed but subsequently mislaid by advocate – Owing to great delay in registering lease lessee unable to proceed with building plans – Both lessor and lessee pressing advocate to expedite completion and registration of document – Claim by lessee against lessor – No default on lessor's part – Whether lessor liable.

Editor's Summary

The plaintiffs had originally offered and agreed to take a long lease of three plots in Salim Road, Mombasa, but when it was discovered by the defendants that a fourth plot, No. 771, which was contiguous to the other plots was not included in the lease they approached the plaintiffs and it was agreed that a second lease would be executed leasing this plot to them without premium at a rental of Shs. 100/- a year but otherwise on the same terms as the first lease. The parties had separate advocates for the preparation, execution and registration of the first lease but as regards the second lease employed only one advocate.

This second lease was executed and ready for registration a day or so after April 30, 1957 but it was not registered until February 1960 and the registered lease was not shown to the plaintiffs' advocates until August 1960. The plaintiffs had intended to build 8 shops on the plots and to this end had taken possession of the plots and plans for the building had been passed by the Municipality, a tender for Shs. 800,000/- for the erection of the new building accepted and tentative arrangements to provide for the finance or part of the finance for the building operations were made with a building society, but these arrangements were made on the basis that firm acceptance was to be intimated by the plaintiffs within a certain time which was allowed to lapse, and so was the municipality's approval to the plans. By the time that the lease of plot No. 771 was registered and available to the plaintiffs the Lancaster House Conference on the constitutional advancement of Kenya had taken place with the result that property values fell and the building society was not prepared to provide the finance. The plaintiffs then decided not to proceed with the building but they had to pay Shs. 9,500/- to their architects and Shs. 4,238/- to their building contractor for the temporary structures and hoarding on the building site. The plaintiffs now claimed damages on the ground that if they had had the registered lease in time they could have built 8 shops and let them at profitable rents. It was not in dispute that all the plots were subject to the Registration of Titles Act (K.) and that registration was essential to complete the transfer of title for the term comprised in the lease; similarly, it was common ground that both the plaintiffs and the defendants were pressing the advocate whom they had agreed should have the carriage of the transfer to expedite and finalise the matter of registration, and who had negligently mislaid the documents and so delayed the completion of the transfer of ownership.

Held –

(i) under the Registration of Titles Act (K.) and the practice thereunder the defendants were apparently bound to effect registration to complete the transfer legally but they had done nothing to prevent registration, nor had the plaintiffs;

(ii) the advocate with carriage had a duty to both parties to complete the carriage up to registration of the transaction and that being so, as between the parties to this suit the loss should abide where it had fallen; therefore,

(iii) the plaintiffs had sued the wrong persons.

Judgment for the defendants.

No cases referred to in judgment

Judgment

Rudd J: In 1954 the defendants were the owners of four plots of land in Salim Road, Mombasa as tenants in common in undivided shares. These plots devolved to the defendants by inheritance on the death of their father and included plot No. 771 which was a very small plot contiguous with two of the other plots and all four plots were contiguous in the sense that they formed a block of land which was suitable for building development.

Plot 771 had quite insignificant value as a separate plot but it had a small frontage on Salim Road and a larger frontage on a lane leading off Salim Road. It was roughly in the shape of an obtuse-angled triangle some 35 square yards or so in area and its possession by the owner of the other three plots would

increase the value of the combined holdings.

The second defendant appears to have assumed the management of his sisters interests in these lands. In 1954 he was approached by an estate agent to whom

he gave an authority on behalf of all the defendants to let three of the plots on Salim Road and another plot on another road on long lease. The authority was drafted by the agent and did not include authority to let plot 771. The plaintiffs or their predecessors agreed to take a long lease of the plots which were included in the authority given to the estate agent. At first the first defendant questioned his brother on the second defendant's authority to let these lands to the plaintiffs, by which term I include the plaintiffs predecessors, but his opposition was over-come and he eventually agreed to the lease which was executed and registered under the Registration of Titles Act (K.) on October 1, 1955.

When this lease was being arranged the first defendant seems to have thought that plot 771 was to be included in the lease and the second defendant did not know either that it was not included.

When it was discovered that plot 771 was not included in this first lease attention was directed to this and it was agreed that a second lease would be executed leasing this plot to the plaintiffs without premium at a rental of Shs. 100/- a year but otherwise on the same terms as the first lease. It is doubtful that the first defendant was a party to this agreement at first. There was some difficulty about getting his signature and I do not think he agreed until April 30, 1957 but he did agree on that date and signed the lease a day or so later.

The plaintiffs and the defendants had separate advocates for the preparation, execution and registration of the first lease. Messrs. O'Brien, Kelly and Hassan acted for the plaintiffs in this matter and Messrs. Doshi & Doshi acted for the defendants.

As regards the second lease, however, only one advocate was employed namely Mr. U. K. Doshi of the firm of Doshi & Doshi. He was to draft the lease submit it for execution and get it registered. The costs of this were to be paid by the plaintiffs. The consent of the court to each of the leases was considered necessary in the case of two of the defendants who were minors. This consent was duly obtained by Mr. U. K. Doshi who got a provision included in the order relating to the second lease that the costs of the application were to be paid by the lessees. Such an order was unusual because the lessees were not parties to the application but I accept the evidence of the second defendant that it was agreed that the lessees would bear these costs.

This second lease was executed and ready for registration a day or so after April 30, 1957 but it was not registered until February 1960 and the registered lease was not shown to the plaintiffs advocates until August 1960. Even then it was not authorised by Doshi & Doshi to be given to the plaintiffs until later and the plaintiffs did not get it until December, 1960. The reason why this lease was not delivered to the plaintiffs upon registration was according to Mr. V. K. Doshi because of some question as to payment of fees.

On the evidence I am satisfied that the reason why the lease was not registered soon after its execution was that some how or other it was mislaid by Mr. U. K. Doshi and it was not discovered until a considerable time after Mr. U. K. Doshi's death. All this time the plaintiffs were demanding this lease and eventually the second defendant also associated himself with these demands but both parties were being continually put off with assurances that the matter would be finalised in a short time. The plaintiffs tried to keep up continual pressure but without avail or any proper explanation and in course of time the plaintiffs demanded that the executed lease be delivered to their advocates O'Brien, Kelly and Hassan. Eventually some time after U. K. Doshi's death Mr. V. K. Doshi seems to have admitted that the lease could not be found and it was contemplated that a fresh instrument should be prepared by O'Brien, Kelly and Hassan but the necessary papers were not forthcoming. Ultimately the executed lease was found and

registered by V. K. Doshi in February 1960.

The four plots in Salim Road were virtually undeveloped. There were some mud and wattle buildings on it which were let to tenants. Possession was given to the plaintiffs from a very early stage and as the plaintiffs intended to build 8 shops on the plot the existing tenancies were determined. The mud and wattle buildings were dismantled. Plans for the building were passed by the municipality. The contract was put to tender and a tender for Shs. 800,000/- was accepted for the erection of the new building. A hoarding was put round the plot and temporary stores and sanitary arrangements were erected and were intended to be ancillary to the proposed building operations. Tentative arrangements to provide for the finance or part of the finance for the building operations were made with a building society but these arrangements were made on the basis that firm acceptance was to be intimated by the plaintiffs within a certain time which was allowed to elapse. By the time that the lease of plot 771 was registered and available to the plaintiffs the Lancaster House Conference took place as a result of which property values fell and the building society was not prepared to provide finance for the erection of the building.

The municipality's approval to the plans lapsed and the hoarding and temporary structures ancillary to the proposed building operation had to be dismantled because the plaintiffs decided not to proceed with the building. They had to pay Shs. 9,500/- to their architects and Shs. 4,238/- to their building contractor.

The plaintiffs now claim Shs. 126,495/40 damages from the defendants which is over 60 times more than the value of plot 771 on the basis that it was worth a rental of Shs. 100/- a year to the plaintiffs. The plaintiffs claim that if they had had the registered lease in time they could have built eight shops and let them at profitable rents. If they had done so the capital value would, however, have depreciated as a result of the effects of the Lancaster House Conference.

All the plots are subject to the Registration of Titles Act (K). The result of this is that Registration is essential to complete the transfer of title for the term comprised in the lease.

I personally have never practised as an advocate in this country so I decided to consult my brother Madan, J., who has had great experience in such matters in Nairobi and he informs me that, as counsel had stated from the bar, the universal practice in the case of transfers of land under the Registration of Titles Act is for the vendor's advocates to have carriage right up to the completion of registration provided the purchaser pays such legal fees as he may be bound to pay and the vendor is not entitled to payment of the purchase price until registration has been effected.

Ex. 12 (9) however suggests that the practice in Mombasa may be different and that a different practice was contemplated in the case of the registration of the first lease. It is of course perfectly clear that registration is essential to the transfer of title.

Now the position is this. The plaintiffs were offered and agreed to take a long lease including the three main plots on Salim Road but excluding plot 771. That is one quite separate transaction. Subsequently they decided to postpone the development of these two plots until they had obtained title to plot 771 as well and they made a separate agreement with the defendants for the long lease of plot 771 at Shs. 100/- per annum. They should have had their title to plot 771 completed by registration some time in May 1957. They had possession of all four plots long before that but their title to plot 771 was not completed until February 1960 at the earliest. In the meantime both the plaintiffs and the defendants were pressing the advocate that they had agreed should have carriage of the transfer to expedite and finalise the matter by registration. This advocate

negligently mislaid the documents and so delayed the completion of the transfer of ownership. This undoubtedly prejudiced the plaintiffs plans.

The defendants did all that they personally had to do in reasonable time. The question then is whether the plaintiffs are responsible in damages to the defendants for the advocate's default and if so what is the measure of those damages.

I have sympathy with both sides. With the defendants particularly because they did all that they could personally be expected to do. They could not be expected to register the lease themselves because that was a matter which is normally done by an advocate and which was to be done by Doshi & Doshi see Ex. 12 (39) and (66). They executed the lease in reasonable time. They gave it or left it with the advocate who was agreed to be the advocate with carriage of the matter and who was to be paid by the defendant and they gave up possession from the earliest possible stage.

For these reasons I have the greatest sympathy with the second defendants contention which was "What more could we do?" On the other hand the plaintiffs were undoubtedly clamouring and pressing for the lease. They should have got it much earlier than they did. The delay was unreasonable and led at least to the unreasonable postponement of their plans with prejudicial results.

On the evidence in the case the fault lay entirely with Mr. U. K. Doshi. If the matter had been governed by the Crown Lands Act I think that the defendants would be completely cleared of responsibility. But under the Registration of Titles Act (K) and the practice thereunder the defendants were apparently bound to effect registration to complete the transfer legally. They did nothing to prevent registration nor did the plaintiffs. This is therefore clearly a very hard case and one which I find difficult to decide.

Giving the matter the best consideration I could, I think that the advocate with carriage had a duty to both parties to complete the carriage of the transaction and that being so, as between the parties to this suit the loss should abide where it has fallen. This seems to me to be right in reason as well as in law in the circumstances of the case. I think the plaintiffs have sued the wrong persons. On this basis I dismiss the suit with costs. I think, however, that I should deal with the issue as to damages in case I am wrong on the main point.

The suit was filed on August 27, 1963. Limitation therefore runs as from August 27, 1957, and not earlier. The damages claimed were continuing damages, such damages as accrued from August 27, 1957 would therefore be claimable but not earlier damages.

The agreed rental for plot 771 was Shs. 100/- a year and it is reasonable to assume therefore that the capital value on the basis of the contract was not above Shs. 2,000/- or 20 years purchase. Assuming that a proper proportion of the rent on the other 3 plots on Salim Road was Shs. 300/- per annum, the limit of value on those plots could be found by multiplying Shs. 3,600/- by an appropriate number of years purchase plus three-eighths of the Shs. 20,000/- premium.

I mention these figures to show the extent of the inflation of the damages claimed in relation to a reasonable computation of the capital values on the basis of the contracts.

I think that the fact that if the building plans went forward the plaintiffs intended to obtain finance from a building society is a matter between the plaintiffs and the building society and no concern of the defendants. I think that the fact that finance from this source was not available in 1960 is not a matter for damages against the defendants. If the building had been erected in 1957 the plaintiffs would probably

have obtained some income from rents but

the capital value of the building would have been very substantially depreciated in and after 1960 and the plaintiffs do not appear to be active at present in trying to erect a building. I do not think they were very anxious to build after 1960. Apart from this possession was given up to the lessees at a very early stage. Transfer of the title to the other 3 plots was duly effected. There never was any suggestion that the defendants intended to repudiate their bargains to let plot 771. This plot was valueless to them once they had disposed of the other three plots. Consent to the consolidation of the four plots had been given and it would have been possible to proceed with the erection of the building on the plots before title was legally transferred.

There was a slight risk involved if that course was followed but I think it was only a slight risk because the plaintiffs right to the lease was unassailable. The contract was never repudiated. Possession had been given and the plaintiffs had a provable right to enforce a transfer. The risk was really a risk that the costs of obtaining an eventual transfer might be greater than they should have been. In fact the transfer of plot 771 was eventually effected without extra cost to the plaintiffs. The only real damage to the plaintiffs for the delay was that transfer was necessary in order to obtain finance from the building society and the unjustified delay in registration and consequent uncertainty and general inconvenience that was occasioned thereby.

In all the circumstances if the defendants were liable in damages I think they should only be required to pay nominal damages which I would assess at Shs. 500/-.

However for reasons which I have mentioned I think the defendants did all they were bound to do when they executed the lease and left it with the advocate that they were to leave it with under the arrangements between them and the plaintiffs it being then the duty of that advocate to register the lease on payment by the defendant of the charges.

For this reason I dismiss the suit with costs.

Judgment for the defendants.

For the plaintiffs:
JM Nazareth, QC and *FRS de Souza*
FRS De Souza & Co, Nairobi

For the defendants:
K Pandya
Kanu Pandya, Mombasa

Lombard Banking Ltd v JL Gandhi and another
[1965] 1 EA 12 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	3 February 1964
Case Number:	1741/1961

Before: Madan J

Sourced by: LawAfrica

[1] Bills of exchange – Promissory note – Due presentment for payment – Note made by defendants – Consideration consisted of cancellation and delivery to defendants of other notes – Defendants not parties to other notes except one – Note payable by sixty equal instalments – Payable at office of plaintiff's agent – Agreement that in default of payment of any instalment amount remaining unpaid to become immediately due – Default in payment – Action for unpaid balance – Note not physically presented to defendants – Bills of Exchange Act (*Cap*. 27), *s.* 27(1) (*K*).

Editor's Summary

The plaintiff sued the defendants for Shs. 1,181,445/84, being the balance of amount due on a promissory note, dated May 18, 1960, made by the defendants in favour of Lombard Banking Kenya Ltd. (hereinafter called the Kenya Bank) and endorsed in favour of the plaintiff. The note was payable at the office of the Kenya Bank which was the plaintiff's agent by sixty equal monthly instalments commencing June 18, 1960. The agreement expressed on the note itself provided that on default in payment of any instalment the whole amount payable or remaining payable under the note was to become immediately due and payable. This note was made by the defendants in consideration of the Kenya Bank cancelling and delivering to the defendants forty-nine other promissory notes and undertaking not to take any legal action or obtain payment from the defendants of the sums due on those notes. The defendants were party to only one of the cancelled notes and it was conceded that the Kenya Bank had no right of action against the defendants in respect of the cancelled notes except on that one. The defendants made a default in paying the instalment due on August 18, 1960.

The defendants submitted that there was no consideration for the note sued upon because they were not parties to and were not liable on the cancelled notes; that no notices of dishonour had been proved to establish liability on the part of the endorsers of the cancelled notes, therefore no liability arose on the cancelled notes; and that the note sued upon was neither physically presented to the defendants nor demand made to them for payment.

The evidence regarding due presentment was that the plaintiff's business was carried on by the Kenya Bank as its agent from the same premises where the note was payable; that S., who was in charge of the Bills Department in 1960, in accordance with his usual practice took out the note on August 20, 1960 from the safe with other bills payable on that day and notified the cashier.

Held –

(i) in order to enforce the defendants' promise to pay the amount stated in the note consideration sufficient to support a simple contract had to be established. Such consideration was not provided by the Kenya Bank in agreeing that it would not seek to obtain payment from the defendants of the sums payable under the 48 cancelled notes because nothing was payable by the defendants thereunder;

(ii) consideration for the making of the note moved in two forms from the Kenya Bank, namely, the cancellation of the replaced notes and the handing over of them to the defendants; further both these acts were done by the Kenya

Bank at the request of the defendants and the Kenya Bank acted to its detriment in cancelling and handing over the replaced notes whatever their value might have been to the defendants;

(iii) the taking of the note out of the safe by S. on August 20, 1960, putting it on his table where it lay for the whole day and notification of the payment due to the cashier constituted due presentment of the note at the place stipulated. It was not necessary for S. to find the defendants to present the note to them personally, nor should he have gone into the corridors of the bank hawking the note in the hope of seeing the defendants to demand payment from them in person.

Judgment for the plaintiff.

Cases referred to in judgment

(1) *Oliver v. Davis* [1949] 2 K.B. 727.

(2) *Wilkins v. Jadis* 109 E.R. 1113.

Judgment

Madan J: In this action the plaintiff bank seeks to gain judgment against the two defendants jointly and severally for Shs. 1,181,445/84 being the balance of amount due on a promissory note, Ex. 1, dated May 18, 1960, made by the defendants in favour of Lombard Banking (Kenya) Limited (hereafter referred to as the Kenya Bank). The Kenya Bank endorsed over the note in favour of the plaintiff.

The note sued upon was made payable by sixty equal monthly instalments of Shs. 20,714/58 each (erroneously, but, I think, inadvertently stated in the plaint to be Shs. 20,714/68) as from June 18, 1960 and thereafter on the 18th day of each succeeding month.

Also on May 18, 1960 the Kenya Bank and the defendants confirmed by a letter (Ex. 4) the arrangement arrived at between them. The letter reads as follows:

> "We, Lombard Banking Kenya Limited in consideration of your having made and delivered to us a Promissory Note dated May 18, 1960 for Shillings one million, two hundred and forty two thousand eight hundred and seventy five (Shs. 1,242,875/-) in replacement of the Promissory Notes detailed hereunder, hereby undertake that we will not seek, by legal action or otherwise, to obtain from you payment of the sums due or to become due under the said replaced Notes. The Promissory Notes detailed hereunder are hereby cancelled and are returned herewith in so far as they are at present available and the remainder will be returned to you as soon as may be practicable."

The letter then goes on to set out details of the cancelled notes delivered to the defendants including a note number 481 for Shs. 200,000/- which was made by the second defendant and endorsed by the first defendant and which would have fallen due for payment on July 11, 1960. The letter ends:

> "We, CM Patel and JL Gandhi hereby acknowledge receipt of the undertaking of which the foregoing is a copy and of the Promissory Notes noted above with the exception only of the following Notes which are to be delivered to us as soon as possible:
>
> Excepted Notes
>
> None
>
> Sd. C. M. Patel
>
> Sd. J. L. Gandhi".

The defendants made default in payment of the instalment due on August 18, 1960 and the plaintiff now seeks judgment for the entire balance owing thereon pursuant to the agreement embodied in the note itself which provides that in default of payment of any instalment the whole amount payable or remaining payable under the note is to become immediately due and payable.

The only evidence in the case is the testimony of Donald Smith an officer and attorney of the plaintiff bank who is also the Manager of the Kenya Bank. No evidence has been adduced on behalf of the defendants.

Several submissions in law have been made on behalf of the defendants.

First that the note is void for uncertainty because the total of the sixty instalments does not add up to the amount shown on the face of the note itself which is for Shs. 1,242,875/- The instalments fall short by twenty cents. Speaking arithmetically, this is correct.

The court's attention has been drawn to s. 3 and 9(1) of the Bills of Exchange Act (Cap. 27), (K). Section 9(1) provides:

> "The sum payable by a bill is a sum certain"

In my opinion however this submission must fail. The sum certain payable is the sum mutually agreed to be paid by the defendants which is a certain, definite figure. There could be no doubt about the sum payable which is clearly stated on the note itself. The subject of the attack however is the amount of the monthly instalments; the emphasis is upon the error in calculation which does not permit the instalments of reaching a total to tally exactly with the amount stated on the note and agreed to be paid by the defendants as the makers of it. Suppose a genuine error to be made in calculating the amount of instalments by which a note is stated to be paid. In my view it would be devoid of common sense to suggest that such a miscalculation renders uncertain an otherwise agreed sum certain. I regard the crux of the matter to be whether the defendants knew their exact liability in a sum certain. If this be so and in my opinion there could be no doubt that it is so in this case, then there is no uncertainty. The defendants were at all times in a position to discharge their liability by paying the amount shown on the face of the note less any instalments already paid.

Second, the defendants submit there was no consideration for the note because they owed no liability on the cancelled or replaced notes as they were not parties to them; further that notices of dishonour not having been proved to establish liability on the part of the endorsers of the replaced notes, therefore no liability in any event arises on the replaced notes.

With one exception none of the other 48 notes enumerated in the letter is shown to have been made or endorsed by the defendants. The one exception is note number 481. The names of the makers and endorsers of the 48 notes are set out and they are not the defendants. Smith admitted that there does not seem to be any connection between the defendants and the 48 replaced notes. He also agreed the Kenya Bank had no right of action against either defendant in respect of any of the 48 notes because the defendants were not a party to them. He has stated he had no knowledge in return for what the liability was purported to be passed on to the defendants. Smith also agreed that although the amounts of notes number 2936, 2937, 2938, 2964, 2965, 2272, 2273, 1676, 1677, 2288, 2289, 2290, 2291, 2742, 2287, 2741, 2740, 2367, 2368, 2268, and 2269 are included in the note sued upon, these notes are not endorsed in favour of the Kenya Bank. All 48 notes fell due for payment and were dishonoured before May 18, 1960.

Section 27(1) of the Bills of Exchange Act provides:

27(1) Valuable consideration for a bill may be constituted by:

(*a*) any consideration sufficient to support a simple contract;

(*b*) an antecedent debt or liability. . . .

This section which is in exact terms with s. 27(1) of the Bills of Exchange Act, 1882, was considered in *Oliver v. Davis* (1). The headnote states that to satisfy sub-s. 1(*b*) the antecedent debt or liability must be either that of the promisor or drawer of a bill or cheque or, if of a third party, then at least there must be some relationship between the receipt of the bill or cheque and the antecedent debt or liability such as forbearance or a promise to forbear, express or implied, on the part of the recipient in regard to the third party's debt or liability.

Somervell, L. J. said, ([1949] 2 K.B. at pp. 741–742):

> "I am prepared to assume on consideration that, reading s. 27 (1) (*a*) and (*b*) together, the natural construction of 'antecedent debt' is that it means a debt due from the person who gives the negotiable instrument in question . . . antecedent debt or liability in s. 27(1)(*b*) is a debt or liability due from the maker or negotiator of the instrument and not from a third party . . ."

A similar view was expressed by Denning, L. J., ([1949] 2 K.B. at p. 742) when he said s. 27(1)(*b*) does not apply to a promise to pay an antecedent debt or liability of a third person. In such a case in order that the promise may be enforced there must be shewn a consideration which is sufficient to support a simple contract.

The wording of the headnote would seem to be taken from the judgment of the Master of the Rolls who stated, ([1949] 2 K.B. at pp. 735–736):

> "I think for myself that the proper construction of the words in (*b*) 'an antecedent debt or liability' is that they refer to an antecedent debt or liability of the promisor or drawer of the bill. . . . This at any rate is plain – that if the antecedent debt or liability of a third party is to be relied upon as supplying 'valuable consideration for a bill', there must at least be some relationship between the receipt of the bill and the antecedent debt or liability . . . I do not myself think that that case (*Currie v. Misa*, L.R. 10, Ex. 153) can be relied on . . . as casting any doubt on the authority of other decisions particularly *Crears v. Hunter* (19 Q.B.D. 341) . . . to the effect that where the debt or liability is that of a third party you must find something in the transaction sufficient at the very least to connect the receipt of the bill with the antecedent debt or liability and, as I think, to provide some consideration for the cheque in the form of forbearance or a promise to forbear, express or implied, on the part of the recipient of the cheque in regard to the third party's antecedent debt or liability. . . ."

In order to enforce the defendants' promise in the instant case, therefore, consideration sufficient to support a simple contract has to be established except in the case of note 481 with which I deal separately.

At first sight the argument appears attractive that there was no consideration. But I think it must fail because it is based upon the fallacy that consideration could only be in a direct form between the Kenya Bank and the defendants. Consideration is not so limited. It can take the shape of any one of many forms. I do not think consideration was provided by the Kenya Bank by saying it would not seek to obtain payment from the defendants of the sums payable under the 48 replaced notes because nothing could have been payable by the defendants thereunder. Consideration did however in my view exist and move in two forms from the Kenya Bank to the defendants. The first was the cancellation of the replaced notes and, secondly, the handing over of them to the defendants. The court cannot but hold that both these acts were done by the Kenya Bank at the request of the defendants – this is the only reasonable conclusion to come to. The Kenya Bank acted to its detriment in cancelling and handing over the replaced notes whatever their value may have been, to the defendants. Lush, J. defined consideration as "some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or

responsibility given, suffered or undertaken by the other" quoted in Sheldon and Drover's Practice and Law of Banking, (8th Edn.) at p. 101. The consideration which I have stated was sufficient to support a simple contract.

Delivery of the cancelled notes is admitted by the defendants. They have not come forward to deny that cancellation and delivery was not made at their request. For the same reason it is not open to the court although perhaps strictly it is not relevant to assess for the defendants the value or inquire into the adequacy of the consideration. The defendants themselves have not established there has been failure of consideration. The defendants accepted the cancelled notes, it is not unreasonable to hold, as something of value. Looked at thus the absence of notices of dishonour to the makers and endorsers of the replaced notes and the non-endorsement of some of them in favour of the Kenya Bank become irrelevant considerations. In any event the court is not entitled to presume the Kenya Bank had lost its right of action against the makers and endorsers of the replaced notes.

In regard to note 481 to which the defendants were parties in my view on the authority of *Oliver v. Davis* (1) consideration was constituted to satisfy s. 27 (1)(*b*). I think however if the defendants' learned counsel had realised that this note had not fallen due for payment when the note sued upon was made, he may well have abandoned his stand that there was no consideration in respect of it.

The next submission on behalf of the defendants is that there was no due presentment of the note. This submission is in two parts. First that there was no due presentment taking into account the days of grace allowed; second, that the note was neither physically presented to the defendants nor a demand for payment made to them.

Now according to the note the defendants promised to pay "at the office of Lombard Banking Kenya Limited in Sadler Street, Nairobi", . . .

Smith has stated in his evidence that the plaintiff Bank's business is carried on by the Kenya Bank as its agent in Kenya from the same premises. Smith was in charge of the Bills Department in 1960 and the note sued upon came into his custody after execution. It was endorsed by the Kenya Bank in favour of the plaintiff bank on May 31, 1960, the endorsement to the plaintiff bank being a sale for value of the note. Smith states his practice was to refer to the Bills Payment Register Ex. 2 for each day and to bring out of the safe bills payable for each day. The bills would then be in his charge for the particular day. A note of the day's bills due would be given to the cashier who reported to Smith at the end of each day whether the bills were paid or not. Smith states he followed this practice in case of the note sued upon on August 18, 1960. The instalment due on that day was not paid. The note was presented for payment at the offices of the bank on August 20 because of the days of grace. August 21 was a Sunday.

It is argued that according to Smith's own evidence the note was presented on August 18, 1960 and that this is supported by the averment in para. 5 of the plaint. But this is not so. Paragraph 5 only states the defendants made default in payment of the instalment due on August 18, 1960. It goes on to state that the note was duly presented for payment at the offices of the Kenya Bank and notice of dishonour was given to the defendants by letter on August 20, 1960. In my opinion the averment in para. 5 is correct when it states the defendants made default in payment of the instalment due on August 18. An instalment was due for payment on that day although it was payable on August 20 because of the days of grace. This in no way detracts from the accuracy of the pleading. I therefore reject the argument that no alternative date than the one averred in the plaint can be relied upon. The due date for payment of the instalment is

correctly set out. It is a question of fact when the note was presented for payment. I accept Smith's evidence, indeed I see no reason to doubt it, that the note was presented for payment at the offices of the bank on August 20 – because of the days of grace. His explanation that when he spoke about August 18 he was speaking about the due date, dispels any doubt in regard to the date of presentment which he has clearly stated was on August 20. He was able to assure the court which I accept that the note was certainly presented for payment on the last day of grace. He remembered the note particularly and taking it out on the 18th day of every month to verify the days of grace because it was a big one. Smith also had in his possession the counterpart of Ex. 4 and he knew about the arrangement for payment of the note by instalments. The notices of dishonour addressed to the defendants (in Ex. 5) which are dated August 20, 1960, stand in support of accuracy of Smith's evidence.

I remain unimpressed by the second part of the submission that the note was neither physically presented to the defendants nor a demand made to them for payment. The defendants agreed the place of presentment. Smith took the note out of the safe on August 20 because an instalment was due for payment on that day. The taking of the note out of the safe by Smith, putting it on his table where it lay for the whole day and notification of the payment due to the cashier in my opinion constituted due presentment of the note at the place provided for presentment. I do not consider it was further necessary to find the defendants to present the note to them personally, neither do I think it was necessary for Smith to walk about in the corridors or outer offices of the bank hawking the note in the hope of seeing the defendants to demand payment from them in person. The defendants chose a place and mode of presentment. The holder of the bill complied with both requirements. The defendants failed to attend at their chosen place of presentment to offer payment of the instalment.

In *Wilkins v. Jadis* (2) it was held that a presentment of a bill of exchange for payment at a house in London, where it is made payable, at eight o'clock in the evening of the day when it becomes due, is sufficient to charge the drawer, although at that hour the house be shut up, and no person there to pay the bill. In the instant case the note was presented for payment at the premises of the bank within banking hours but the defendants were not there to pay the bill. The defendants do not say they appeared at the bank but the bill was not presented to them. The bill was presented at the proper place and Smith could not have exercised any more reasonable diligence than to keep it immediately available on his table for the whole day having at the same time informed the cashier about the payment due. No person authorised to pay or refuse payment could be found there; therefore, following the provisions of s. 45 (2) (*e*) no further presentment was required.

The argument that there is no evidence the Kenya Bank were the defendants' bankers or that the Kenya Bank had authority to pay or refuse payment on behalf of the defendants is I think a red herring. It presupposes the note was presented for payment to the Kenya Bank on behalf of the defendants. Smith's evidence completely negatives any such proposition.

In their written statements of defence both defendants object that notice of dishonour was not given within a reasonable time. Having been posted on August 20, it would reach the defendants on August 21. It was therefore invalid because it was not given within a reasonable time after dishonour. There was a change of tune during the trial. Defendants' learned counsel submitted that the notice of dishonour should have been given on August 21 to provide for the days of grace. With his flare for legal acumen which the defendants' learned counsel possesses it is not a little surprising that he overlooked the provisions of s. 14 (*a*) (i) of the Bills of Exchange Act which provides that when the last day of grace falls on a Sunday, the bill is due and payable on the preceding

business day which in this case was August 20. I have verified for myself that August 21, 1960 was a Sunday.

I therefore hold that the note was duly presented for payment consistent with the Rules laid down by s. 45 of the Bills of Exchange Act.

I also hold on Smith's evidence that the plaintiff was a holder for value and Smith held the note for the plaintiff bank which he duly presented for payment on its behalf.

Smith stated that the notices of dishonour in Ex. 5 are notices which purport to be notices by the Kenya Bank in their own name on their own account. He could not say if the plaintiff sent any notices of dishonour on August 20. But this must be read in conjunction with Smith's other evidence which I have already set out that the plaintiff's business is carried on by the Kenya Bank as the agent of the plaintiff from the same premises. The notices of dishonour were therefore valid by virtue of the provisions of s. 49 (*b*) of the Bills of Exchange Act.

Finally, I would clear away one other minor matter as reference was made to it during the trial. The amount claimed in the suit is Shs. 1,181,445/84 while Smith stated the balance owing was Shs. 1,194,156/34. The difference, according to Smith, is accounted for by legal expenses incurred. The sum of Shs. 1,181,445/84 is the amount owing on the note itself.

The defence fails and there will be judgment as prayed for the plaintiff.

Two counsel certified.

Judgment for the plaintiff.

For the plaintiff:
B O'Donovan and *J Couldrey*
Kaplan & Stratton, Nairobi

For the first defendant:
DN Khanna and *JK Winayak*
JK Winayak & Co, Nairobi

For the second defendant:
DN Khanna and *VH Padhiar*
Bhailal Patel, Nairobi

The Bank of India Ltd v Ambalal L Shah and others

[1965] 1 EA 18 (HCU)

Division: High Court of Uganda at Kampala

Date of judgment: 18 January 1965

Case Number: 291/1963

Before: Sheridan J

Sourced by: LawAfrica

[1] Practice – Parties – Misjoinder of defendants – Misjoinder of causes of action – Right to relief arising out of same act or transaction or series of acts or transactions – Action against guarantors on six guarantees – Guarantees in respect of monies lent to company by plaintiff on overdraft – Guarantees executed on different dates during a period of six years – Different defendants parties to different guarantees – Whether misjoinder of parties and of causes of action.

Editor's Summary

The plaintiff bank sued five defendants jointly and severally as guarantors of monies lent on an overdraft to a company. The claim was for Shs. 289,291/44 guaranteed by six guarantees of the defendants executed between March 1955 and March 1961. The first defendant was only a party to two guarantees, namely, one dated March 14, 1955 and executed by him and the second defendant for a total sum not exceeding Shs. 450,000/- and interest, and another dated May 27, 1958, executed by him with the second and third defendants for a total sum not exceeding Shs. 300,000/- and interest. The second, third, fourth and fifth

defendants submitted to judgment. A preliminary objection was taken for the first defendant, that there was a misjoinder of parties and of causes of action under O. 1 r. 3 of the Civil Procedure Rules (U), on the ground that each guarantee created a distinct cause of action.

Held –

(i) O. 1 r. 3 of the Civil Procedure Rules (U) applied because although the plaintiff had separate remedies against each guarantor, the same transaction, namely, the company's overdraft raised some common questions of law and fact as against each of them;

(ii) there was no misjoinder of the defendants or of the causes of action. *Barclays Bank v. C. B. Patel* (1959) E.A. 214 (U) not followed.

Preliminary objection overruled.

Cases referred to in judgment

(1) *Barclays Bank v. C. B. Patel*, [1959] E.A. 214U.

(2) *Umabai v. Bhau Balwant* (1910), 34 Bom. 358.

(3) *G. G. Kanani v. M. H. Desai* (1953), 7 U.L.R. 135.

(4) *Yowana Kahere v. Luneyo Estates Ltd.*, [1959] E.A. 319U.

(5) *Ramendra Nath Roy v. Brajendra Nath Dass* (1918), 45 Cal. 135.

(6) *Straoud v. Lawson*, [1898] All E.R. Rep. 469.

Judgment

Sheridan J: The plaintiff bank has sued the five defendants jointly and severally as guarantors of monies lent to a company now in liquidation. The second, third, fourth and fifth defendants have submitted to judgment. The first defendant has taken out a third party notice claiming to be indemnified by them against any losses, damages, etc. suffered by him. These proceedings are still pending.

The present claim is for Shs. 289,291/44 in respect of six guarantees into which the defendants entered between March 1955 and March 1961. The first defendant is only a party to the first two guarantees (1) dated March 14, 1955, executed by him and the second defendant for a total sum not exceeding Shs. 450,000/- and interest (Annexure 1 to the plaint), and (2) dated May 27, 1958, executed by him with the second and third defendants for a total sum not exceeding Shs. 300,000/- and interest (Annexure 2 to the plaint). The substance of the suit is contained in para. 7 of the plaint which alleges:

> "7. In consideration of the plaintiff having lent and advanced and making or continuing advances to or otherwise giving credit or financial accommodation to the aforesaid "Ambalal & Co. Ltd." prior to its liquidation, the defendants agreed in writing, from time to time, to guarantee and did thereby guarantee the due payment by them, jointly and severally, of the ultimate balance due to the plaintiff by the said "Ambalal & Co. Ltd." including the interest."

Counsel for the first defendant, has taken the preliminary objection that there is a misjoinder of parties and of causes of action under the Civil Procedure Rules, O. 1, r. 3 (U). It provides:

> "3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of

the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally, or, in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise."

He submits that each guarantee creates a distinct cause of action, and he relies on my decision in *Barclays Bank v. C. B. Patel* (1), where the facts were similar in that there the plaintiff bank sued eight defendants under two guarantees of an overdraft to a company. Different defendants were parties to the guarantees. A similar preliminary objection was taken and I upheld it on the ground that distinct causes of action accrued on different dates and against different defendants, and the circumstances in which the liability of the different guarantors arose were separate and distinct. For the plaintiffs it was argued that the overdraft was the fundamental cause of action. After hearing further argument in this case I don't think that this was right. The overdraft was the act or transaction which gave rise to the guarantees and to different causes of action. Here cannot it be said that the six guarantees arose out of the same act or transaction or series of acts and transactions? Although the word "same" must govern the words "series of acts or transactions", as they are the same here, it is not necessary that every defendant should be interested in all the reliefs claimed in the suit, but it is necessary that there must be a cause of action in which all the defendants are more or less interested although the relief asked against them may vary: see *Umabai v. Bhan Balwant* (2). Here the main question to be investigated is the state of the company's account with the plaintiffs, and it would defeat the purpose of the rule, which is to avoid multiplicity of suits and needless expense, if this had to be done in five or six separate suits against the different guarantors.

In the *Barclays Bank* case (1) I relied on the judgment of Ainley, J. (as he then was) in *G. G. Kanani v. M. H. Desai* (3). There the landlord claimed in one suit to eject two tenants from different portions of the same building. It was argued that the making of a demolition order was the comprehensive cause of action, but it was held that it was the ignoring of valid notices to quit given to each tenant under two different tenancy agreements which constituted the distinct causes of action. The only thing in common was the building of which the tenants occupied different portions. This decision was followed in *Yowana Kahere v. Luneyo Estates Ltd.* (4), in which Bennett, J. held that there was misjoinder of parties and of causes of action when eight plaintiffs, each of whom claimed to be a tenant of the defendant company in separate holdings sued for alleged interference with their right of possession. They alleged different damage, in some cases eviction, on different dates. In those cases there was no common question of law or fact affecting the defendants or plaintiffs respectively as there is here, viz. what was the state of the company's account with the bank? To quote from the judgment of Mookerjee, J. in *Ramendra Nath Roy v. Brajendra Nath Dass*, (5) ((1918), 45 Cal. at p. 135):

> "The question next arises, whether the present suit has been constituted in conformity with O. 1, r. 3. The determining factors applicable here are, first, could the right to relief against the defendants be said to be *in respect of* or *arising out of* (expressions obviously of wider import than *relating to*) the same act or transaction, and, secondly, would any common question of law or fact arise, if separate suits were brought. As regards the first test, there can in my opinion be no doubt that the right to relief against each of the defendants is based upon the same act, namely, the alleged fraud of Brajendra Nath Dass, and this is so notwithstanding the fact that there may have been subsequent acts or transactions in which the different defendants are individually concerned and which may enable them to raise distinct defences. As regards the second test, it is clear that if different suits were instituted, at least one common question of fact would arise, namely, the exact nature of the act imputed to Brajendra Nath Dass, which would have to be investigated, presumably on the same evidence separately adduced in several suits. Here, again, it is important to observe that the Code does not require that all the

> questions of law or fact which arise should be common to all the parties. The contention of the respondents was, in fact, based upon two fallacious assumptions, namely, first, that the rules require that each of the defendants should have been concerned in all the transactions, and, secondly, that, if different suits were brought, no question would arise in which all the defendants were not interested. There is clearly no foundation whatever for either of these assumptions.

In interpreting the corresponding English O. 16, r. 1, in *Straoud v. Lawson* (6), Vaughan Williams, L. J., said ([1898] All E.R. Rep. at p. 473):

> "As I pointed out in the course of the argument, the two conditions, viz., that the right to relief must arise out of the same transaction or series of transactions, and that the case must be such that a common question of law or fact would arise, are not alternative. I am dealing now with that which is undoubtedly a condition of applying the rule, that the right to relief should be alleged to be 'in respect of or arising out of the same transaction or series of transactions'. That must be a feature common to all the causes of action of the different plaintiffs in the action. I do not take those words of the rule to mean that the whole of a transaction must be involved in all the causes of action which the plaintiffs desire to join. If there were a transaction, or series of transactions, in respect of which one plaintiff was interested up to a certain point, and other plaintiffs were interested not only up to that point but in the entire transaction, or series of transactions, from beginning to end, I think that under this rule such causes of action might clearly be joined, because there would be a transaction or series of transactions, in respect of which the various plaintiffs would all be claiming a right to relief, although their remedies or damages might be different."

For these reasons I am not satisfied that there has been a misjoinder of parties and of causes of action, I think that under O. 1, r. 3 the causes of action can be joined because there was a transaction or series of transactions by way of guarantees of the plaintiff's loans to the company in respect of which the plaintiffs are claiming a right to relief, although their remedies or damages against the defendants may be different. I rule accordingly.

In conclusion I would say that this point may be somewhat academic since 1960 because if separate suits were brought the court could probably have consolidated them under the Civil Procedure Rules, O.XA, as provided for by the Civil Procedure (Amendment) Rules, 1960.

Preliminary objection overruled.

For the plaintiff:
YV Phadke
Parekhji & Co, Kampala

For the first defendant:
SH Dalal
Dalal & Singh, Kampala

William Korwarsoi A Langat v R
[1965] 1 EA 22 (SCK)

Division: Supreme Court of Kenya at Nairobi

Date of judgment: 11 September 1964

Case Number: 590/1964

Before: Sir John Ainley CJ and Chanan Singh J

Sourced by: LawAfrica

[1] Firearms – Carrying firearm while drunk – Definition of "drunk".

Editor's Summary

The appellant was convicted of carrying a firearm while drunk contrary to s. 93 of the Firearms Act. The evidence was that the appellant was one of a party of three constables, under the command of a corporal, detailed to guard an explosives magazine and that each constable had been issued with a rifle and ten rounds of ammunition; that the appellant holding one of the issued rifles threatened to shoot, and made as if to shoot, the corporal; that the appellant was staggering, smelt of drink and his speech was not that of a sober man. On appeal it was argued that there was insufficient evidence of drunkenness and that there was inadequate evidence that what the appellant carried was a firearm within the definition contained in the Firearms Act.

Held –

(i) there was enough evidence for an ordinary man to call the appellant "drunk" without medical evidence, although such evidence would have been helpful;

(ii) the rifle exhibited in the court was obviously a factory made rifle of the kind and make issued to policemen for the purpose of arming them and accordingly it was permissible for the court from observation of the weapon to infer without the necessity of expert evidence that the rifle was a firearm within the definition of the Firearms Act.

Appeal dismissed.

Cases referred to in judgment

R. v. Persdee, [1927] Cr. App. R. 95.

Judgment

Sir John Ainley CJ: read the following judgment of the court:

In this case the appellant was convicted of the unusual offence of carrying a firearm while drunk, contrary to s. 33 of the Firearms Act. He was fined Shs. 400/- and appeals from conviction and sentence.

The arguable points in the appeal are that there was insufficient evidence of drunkenness, and that there was inadequate evidence that what the appellant carried was a firearm within the definition contained in the Act. The appellant was one of a party of three police constables under the command of a corporal, detailed to guard an explosives magazine at Kibigori. Each constable had been issued with a rifle and ten rounds of ammunition. The corporal said "Those are the type of rifles usually carried by the police."

There was evidence, reasonably accepted by the learned magistrate, that the appellant holding one of

the issued rifles (produced as Ex. 2) threatened to shoot, and made as if to shoot, the corporal with that rifle. Witnesses described

the appellant's act of releasing the safety catch and working the bolt so as to load the rifle. The appellant's acts on the evidence thus far considered may of course have been the acts of a sober man. The appellant indeed asserted in an extra-judicial statement that such play as he made with his rifle was in the course of his duties as a sentry. However acting presumably on the advice of his counsel he gave no evidence and made no statement in the court below and the learned magistrate very reasonably declined to believe that such was the explanation of this affair. If the appellant was sober when he acted as the learned magistrate most reasonably believed him to have acted he was guilty of highly criminal behaviour, and a fine of Shs. 400/- would scarcely have met the case. However the charge as laid had to be proved. There was to our minds abundant evidence that the appellant was what an ordinary man would call drunk when he threatened the corporal. We are ordinary men, and so is the learned magistrate. There was evidence that the appellant was staggering, that he smelt of drink, and that his speech was not that of a sober man. His actions, as we have indicated were outrageous. There was enough there to base a finding that the appellant was drunk.

In the case of *R. v. Presdee* (1) the appellant was charged with an offence contrary to s. 40 (1) of the Criminal Justice Act, 1925. The section provided that "Any person who is drunk while in charge on any highway . . . of any mechanically propelled vehicle" may be sentenced to four months imprisonment. The verdict of the jury was "guilty of being incapable of driving a motor car brought about by alcohol, but he was not drunk – not drunk to the extent we should call a drunken man." The Court of Appeal found that this was a verdict of "not guilty", and Greer, J. remarked in the course of argument "'Drunk' is what an ordinary reasonable person would consider as such." That we think is as near as it is wise to go towards a definition of the robust English word "drunk". It is further to be noted that this case is an authority for saying that where a statute uses the plain word "drunk" without defining that word, it is wrong to apply varying standards of drunkenness depending on the occupation of the accused. This may on occasion present difficulties to the courts, but the doctrine of the reasonable doubt will generally obviate such difficulties. In many cases however it will be unnecessary for the court to explore the shadowy boundaries between drunkenness and partial sobriety. The learned magistrate here clearly felt that the case was well over these boundaries and we think that' his finding was reasonable.

It was objected at the trial that there was no medical evidence. We do not think that such evidence was necessary, though it might have been helpful. The question was not, as we have indicated, whether this man was by reason of drink incapable of performing safely some particular act or series of acts. The question was whether he was what an ordinary person would call "drunk". This the learned magistrate appreciated, and he thought that the appellant was drunk in that sense. Now was the appellant proved to have been in possession of a firearm? The learned magistrate, as we think, was entitled to hold that the rifle, Ex. 2, was the rifle which the appellant carried when drunk. It was reasonably certain that this weapon was the ordinary service rifle issued to the police, and that it was one of the weapons issued to this particular police party for the purpose of guarding the magazine. It was at least a "barrelled weapon", but then there was no expert evidence to the effect that the weapon was "lethal" or that it could discharge a shot or bullet, or that it could discharge a shot or bullet with lethal effect. We are of course aware of the numerous decisions of this court and of the Court of Appeal for Eastern Africa dealing with the necessity of proving by expert evidence that the "home made guns" so frequently exhibited to the courts during the late emergencies fell within the definition of "firearm". We think however that where an obviously factory made rifle is

before the court, and there is evidence that the rifle is of the kind and make issued to policemen for the purpose of arming them, it is permissible for the court from its own observation of the weapon and from such evidence, to infer without the necessity of expert evidence that the weapon is a firearm within the definition in the Act.

We think that the conviction in this case was proper. The sentence was not excessive.

The appeal is dismissed.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:
RS Shemi, (Crown Counsel, Kenya)
The Attorney General, Kenya

Kamau Kariuki v Republic
[1965] 1 EA 24 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	11 January 1965
Case Number:	1073/1964
Before:	Sir John Ainley CJ and Dalton J
Sourced by:	LawAfrica

[1] Street traffic – Driving tractor on road without driving licence – Using tractor on road without identification plates – Using tractor on road when unlicensed – Tractor exclusively used for farming purposes – Road passing through farm – Necessity to drive tractor along road to cross from one part of farm to another – Motor vehicle exempted from licensing if used solely on any road or other place to which public have no right of access – Tractor on road when driver charged – Meaning of word "use" in Traffic Act (*Cap.* 403), *s.* 15 (1) (*K*) *– No evidence that tractor registered.*

[2] Statute – Construction – Traffic Act (*Cap.* 403) (*K*) *– Insurance* (*Motor Vehicles Third Party Risks*) *Act* (*Cap.* 405) (*K*) *– Whether statutes in pari materia.*

Editor's Summary

The appellant was convicted on three counts, first of driving a tractor on a road when he was not the holder of a driving licence; secondly of using the tractor on a road without identification plates and thirdly of using the tractor on a road when it was unlicensed. The tractor was a motor tractor exclusively used for farming purposes and was owned by the appellant's employer. The tractor was used on farm

land through which passed a road as defined by the Traffic Act (K). The appellant was charged while using a 100 yard section of this road. Rule 9 (2) of the Traffic Rules (K) exempts from licensing vehicles which are used "solely on any road or other place to which the public have no right of access." Section 4 (3) of the Insurance (Motor Vehicles Third Party Risks) Act (K) exempts a motor tractor from insurance for the purposes of the Act if the use of such motor tractor on a road consists only of moving it by road from one part of the land of the owner thereof to another part of the land of such owner. On appeal it was submitted *inter alia* that the tractor was not used on the road; that the tractor was exempt from licensing by virtue of r. 9 (2) (*e*) of the Traffic Rules (K); that the Traffic Act and the Insurance (Motor Vehicles Third Party Risks) Act are in pari materia and should be construed together as explanatory of each other; and that the offence of using a vehicle on a road without identification plates can be committed only in respect of a vehicle which has been registered.

Held –

(i) in the context s. 15 (1) of the Traffic Act (K) the word "use" cannot be considered only to mean "frequently use", "habitually use", or "normally use"; if a man drives a vehicle he uses that vehicle and if he drives it on a road he uses it on a road;

(ii) the traversing of the public road was a necessary incident of the use to which the tractor was put and even if the appellant's crossing of the road was an isolated incident, which it clearly was not, the appellant could still be said to have used the tractor on the road;

(iii) the tractor was not used solely on any road or other place to which the public had no right of access but it was used on a road as defined by the Traffic Act and accordingly the tractor was not exempt from licensing under r. 9 (2) (*e*) of the Traffic Rules (K);

(iv) s. 17 (1) of the Traffic Act (K) should be construed as meaning that when a vehicle must be insured against third party risks under the provisions of the Insurance (Motor Vehicles Third Party Risks) Act (K) the licensing officer must be satisfied that it is so insured and where the vehicle does not require such insurance, and the licensing officer is satisfied of that, then he does not require evidence of insurance;

(v) The Traffic Act and the Insurance (Motor Vehicle Third Party Risks) Act are not in pari materia as argued for the appellant and there is nothing in the Insurance (Motor Vehicles Third Party Risks) Act adding anything to the clear words of the Traffic Act and the Traffic Rules beyond their natural meaning;

(vi) with regard to the charge of using the tractor without identification plates contrary to s. 12 (1) of the Traffic Act (K) the prosecution should have called evidence of registration and in failing to do so they failed to prove their case.

Appeal dismissed in respect of the first and the third counts. Appeal allowed in respect of the second count and conviction quashed.

No cases referred to in judgment

Judgment

Sir John Ainley CJ: read the following judgment of the court:

In this case the appellant was convicted first of driving a motor tractor on a road when he was not the holder of a driving licence, contrary to s. 30 (1) of the Traffic Act (K); second of using that tractor on a road without identification plates, contrary to s. 12 (1) of that Act; thirdly of using that tractor on a road when it was unlicensed, contrary to s. 15 (1) of the same Act.

The tractor is the property of a farming concern known as Oswald Estates Ltd. The appellant is an employee of the Estate, and presumably he is employed to drive the tractor. The tractor was used exclusively for the purposes of farming and no doubt was mainly driven about upon the farm land of the Estate. Through that farm land however runs a road which is admittedly a road within the definition contained in the Traffic Act. It is in fact the public road linking Kabati with Thika. To get the tractor from the farm land upon one side of this road to the farm land upon the other side, it is necessary to drive

the tractor on to the road, and along the road for a distance of a little over 100 yards. It was while making such a crossing in the tractor that the appellant had the misfortune to meet the police, and his prosecution for these offences followed. The appellant had no driving licence. The tractor bore no number plates, and was unlicensed. The appellant was undoubtedly driving the tractor on a road. To our minds he

was also using the tractor on a road. We concede that this tractor is normally used upon farm land belonging to the Estate for farming purposes. It is not used upon a public road in the sense that a transport vehicle is used. Nevertheless it is abundantly clear from the evidence of the general manager of the Estate that the traversing of this public road is a necessary incident of the use to which the tractor is put. The crossing of the public road is part and parcel of the user of the vehicle. It may be that the tractor crosses the road infrequently, we do not know, but there is clearly nothing adventitious in the use of that road by those who drive the tractor; the drivers of the tractor use the road for their employer's purposes, which are farming purposes, and they very clearly use the tractor on the road. Even however if the appellant's crossing of the road was an isolated incident, which it clearly was not, he would yet we think have been using the tractor on the road.

In the context of s. 15 (1) of the Act the word "use" cannot, we think, be considered only to mean "frequently use", "habitually use" or "normally use". We think that if a man drives a vehicle he uses that vehicle and that if he drives it on a road he uses it on a road.

Some reliance was placed on the provisions of r. 9 (2) (*e*) of the Traffic Rules (K). That rule exempts from licensing vehicles which are used "solely on any road or other place to which the public have no general right of access".

We are prepared to believe that the farm land of the Estate and the roads and ways thereon are places to which the public have no general right of access, but we have already answered the arguments to which these provisions have given rise. This tractor was not used solely on such places; it was used on a road as defined by the Traffic Act.

Section 15 (1) of the Act forbids any person to own or possess or to use upon a road any unlicensed vehicle. A man who can show that his vehicle falls within the exemption goes free of licensing of course. But he cannot evade the provisions of s. 15 if he uses the vehicle on a road as defined by the Act. But reference has been made to Cap. 405, the Insurance (Motor Vehicles Third Party Risks) Act (K). We will refer to this Act as "the Insurance Act". This is an Act to make provision against third party risks arising out of the use of motor vehicles.

Section 4 (1) reads:

> "Subject to the provisions of this Ordinance, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Ordinance."

Section 4 (3) reads:

> "This section shall not apply to any motor vehicle owned by the Government or by the Authority, or to a motor tractor or other motor vehicle used solely or mainly for agricultural purposes, if the use of such motor tractor or other motor vehicle on a road consists only of moving it by road from one part of the land of the owner thereof to another part of the land of such owner."

The legislature have clearly considered that the risk of death or injury or damage to travellers on the public roads of Kenya occasioned by tractors and the like moving by road from one part of a farm to another is not sufficiently great to warrant the insurance of such vehicles.

Now it is said that the Traffic Act and the Insurance Act are in pari materia and should be construed together as one system and as explanatory of each other.

The Insurance Act came into force upon October 1, 1946. There was then in

existence the Traffic Ordinance of 1929, a less elaborate statute than the Traffic Act, but which dealt with precisely the same subject matter. The modern Traffic Act replaced the Traffic Ordinance in 1954.

Section 11 of the old Traffic Ordinance made special provision touching the movement "to or from a farm" of agricultural vehicles. Whether this section was ever construed as permitting the use of unlicensed agricultural vehicles upon roads in circumstances similar to those of the present case we do not know. We can only say that the section does not appear to us to bear such a construction. However some aid was given to the owners of agricultural vehicles by that section. The section was not re-enacted in the Traffic Act. The power to exempt vehicles from licensing was placed in the hands of the Governor in Council (now presumably it is in the hands of a minister) and no exemption of agricultural vehicles eo nomine has been made.

It is now argued that the exemption from insurance given by s. 4 (3) of the Insurance Act (K) must by the rule of construction applicable to statutes in pari materia be imported in some way into the Traffic Act.

To our minds a rule of construction cannot be used to import into an Act or into subsidiary legislation provisions which are not there. In short there must be something to construe by reference to some other act, something which requires interpretation. Let it be assumed for the moment that the Traffic Act and the Insurance Act are in pari materia. Let it even be supposed that the provisions of the Insurance Act had been enacted as a part of the Traffic Act, or that it had been expressly stated that the Insurance Act was to be read as one with the Traffic Act; what then? What words are there in that part of the Traffic Act which deals with the licensing of vehicles which can be construed as granting exemption to farming vehicles which pass along a public road from one part of a farm to another? There are no such words. The matter of exemption has been left to subsidiary legislation. We have already referred to r. 9 (2) (*e*) of the Traffic Rules (K). It is perhaps to this paragraph that the rule of construction is sought to be applied. It would be, we think, to press a rule of construction to absurd lengths to hold that "vehicles which are used solely on any road or other place to which the public have no general right of access" meant "vehicles which are used solely on any road or other place to which the public have no general right of access and vehicles which though not used solely on such roads and places are used solely for agricultural purposes and public use roads only for moving from one part of a farm to another". That would be not to construe the words of the rule, it would be to make a new rule.

Yet it is said that if the rule is not amended or construed in that way absurdity will result. Section 17 (1) of the Traffic Act requires the licensing officer before he issues a vehicle licence to satisfy himself that "the vehicle is insured against third party risks in accordance with the provisions of the Insurance (Motor Vehicles Third Party Risks) Act."

How, it is asked, may a farmer who wishes to take advantage of the exemption granted by the Insurance Act, obtain a vehicle licence? Now we have been reminded that we must construe against absurdity.

With this injunction in mind we think that the subsection if it is indeed in any way ambiguous should be construed as meaning this, that where a vehicle ought to be insured against third party risks under the provisions of the Insurance Act evidence must be forthcoming that it is so insured. Where the vehicle does not require such insurance, and the licensing officer is satisfied of that, he does not require evidence of insurance.

We think that no violence is done to the wording of the subsection by this interpretation. It may be

mentioned that a similar interpretation must probably

be given to the subsection in favour of vehicles owned by the Authority. Such vehicles are exempt from insurance. They are not so far as we can ascertain exempt from licensing, or indeed from registration. We do not think however that the two Acts are in pari materia in the sense contended for by the appellant. Both Acts deal of course with motor vehicles, they have the same subject matter to that extent, but we fail to see any true connection between a statute which deals with the insurance of vehicles and a statute which deals with revenue matters such as the licensing of vehicles, and the construction, equipment, and driving of vehicles.

We see no reason at all why the legislature should not intend to exempt certain vehicles from insurance and yet intend to fix the same owners of the same vehicles with payment for a licence, and even if the Acts are in pari materia there is no contradiction in this matter.

We certainly see no reason why, having placed the public at some risk by exempting a vehicle from insurance, the legislature must be deemed to have gone further and to have declared that the vehicle may be driven on a public road not only uninsured but by an unlicensed driver, and in an unidentifiable condition.

Where the legislature has not in plain terms granted the additional exemptions mentioned it is not, as we think, open to this court to read these exemptions in to the rules in the name of a rule of construction. In short we can find in the Insurance Act no warrant for giving the clear words of the Traffic Act and the Traffic Rules any meaning which they do not naturally bear; still less do we find a warrant for adding to these words phrases culled from the Insurance Act.

We think that the appellant was properly convicted of the offence of driving without a driving licence and of using an unlicensed vehicle.

It is said however that the offence under s. 12 (1) of the Traffic Act can be committed only in respect of a vehicle which has been registered. The section begins, “No Motor vehicle or tractor registered under this Act . . . shall be used on a road unless etc. . . .”. The draftsman has no doubt used that form because he was aware that no identification plates can be issued before registration. The English draftsmen have been more cautious. In England one may not use a motor vehicle on the road unless it has identification plates affixed, though it is a defence to show that there was no reasonable opportunity of registration (and therefore of getting identification plates) and that the vehicle was being driven to be registered.

By phrasing s. 12 in this way the draftsman has created a somewhat ludicrous situation, or so we think. If the possessor or owner of a vehicle has flouted the law by failing to register his vehicle he commits an offence contrary to s. 6 of the Traffic Act. But his driver probably does not commit that offence, and can, as it seems, drive the vehicle in an unidentifiable condition with impunity. We see no escape from this somewhat absurd position. Perhaps the legislature will see fit to amend s. 12.

Counsel for the appellant has stated from the Bar that this vehicle was not registered. We know that counsel will forgive us if we say that it would be wrong for us to accept his assurance. But then there was no evidence that this vehicle was registered. Was such evidence necessary? Could not the learned magistrate assume that the vehicle was registered since the defence never suggested that the vehicle was unregistered. Somewhat reluctantly we give it as our opinion that evidence of registration should have been called, and that the prosecution (who shall blame them) did not prove their case here. We therefore quash the conviction

under s. 12 (1) of the Traffic Act and set aside the fine, which if paid must be refunded.

Appeal dismissed in respect of the first and third counts. Appeal allowed in respect of the second count and conviction quashed.

For the appellant:
DN Khanna and *TR Johar*
Johor & Co, Nairobi

For the respondent:
IE Omolo (Deputy Public Prosecutor, Kenya)
The Attorney General, Kenya

Tanganyika Electric Supply Co Ltd v Ahmed Omar
[1965] 1 EA 29 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	16 November 1964
Case Number:	22/1963
Before:	Sir Ralph Windham CJ
Sourced by:	LawAfrica

[1] Electricity – Supply – Action for charges for supply of electric current – Denial of consumption of units of electricity as claimed – Allegation of meter registering inaccurately electricity consumed – Dispute as to whether meter in proper order determinable by electric inspector – Decision of electric inspector final – No reference of dispute made to electric inspector – Powers of electric inspector – Jurisdiction of court to hear and determine suit – Electricity Ordinance (*Cap.* 131) *s.* 31 (1) (*T*).

Editor's Summary

The appellant sued for the unpaid balance of charges for the supply of electric current to the respondent and the defence of the respondent was that he had not consumed the units of electricity as claimed and that the meter had registered the electricity consumed inaccurately. Section 31 (1) of the Electricity Ordinance (T) provides that if any difference arises with a consumer as to whether any meter is or is not correctly registering the electricity consumed then that difference shall be determined upon the application of either party by an electric inspector and that the decision of the electric inspector shall be final and binding on all parties. The section further provides that the reading of the meter shall be conclusive evidence, in the absence of fraud as to the value of supply. The magistrate construed s. 31 (1)

as giving to an electric inspector exclusive jurisdiction to decide the dispute, without allowing the parties the alternative remedy of having recourse to the courts and held that, since a dispute had arisen between the parties as contemplated by the section, and further since neither party had applied to have that dispute determined by an electric inspector, the court was deprived of jurisdiction to hear and determine the suit. The magistrate further held that even if he had jurisdiction to hear the suit, he would have dismissed the appellant's claim on the ground that the claim was based on fraudulent, or at least negligent conduct on the part of the appellant's own meter reader, and that since neither fraud nor negligence had been pleaded, the claim must fail in toto. On appeal,

Held –

(i) s. 31 (1) of the Electric Ordinance (T) does not empower an electric inspector to decide upon a claim for electric charges based on a meter reading but it only gives him limited power to decide a question of fact whether the meter was correctly registering electric consumption, and if was not, then what figure it ought to have registered;

(ii) under s. 31 (1) *ibid*. the exclusive power of an electric inspector to determine one particular issue of fact when so requested is a limited one, and does not exclude the general jurisdiction of the courts to determine the suit itself in which that question is one issue, whether or not that issue has been determined by an inspector before the suit comes to court;

(iii) the magistrate erred in holding that he had no jurisdiction to decide the suit at all and that even if he had jurisdiction he would have dismissed the claim because the claim was in reality based on fraudulent or at least negligent conduct on the part of the appellant's own meter reader, and that since neither fraud nor negligence had been pleaded, the claim must fail in toto;

(iv) the claim was based on a meter reading which the court was obliged to accept as conclusive evidence of the value of electricity supplied and it was not open to the magistrate to speculate about fraudulent under readings in the past, since fraud was not relied on by the appellant nor pleaded by either party.

Appeal allowed. Judgment for the appellant.

Cases referred to in judgment

(1) *Francis v. Yiewsley and West Drayton U.D.C.*, [1957] 2 Q.B. 136.

(2) *Pyx Granite Co. v. Ministry of Housing*, [1958] 1 All E.R. 625; [1959] 3 All E.R. 1.

(3) *Hendon Electric Supply Co. v. Banks* (1918), 118 L.T. 544.

(4) *Joseph v. East Ham Corpn*., [1936] 1 K.B. 367.

Judgment

Sir Ralph Windham CJ: The plaintiff-appellant company, generally known as Tanesco, sued the defendant-respondent in the District Court of Morogoro for the sum of Shs. 1,431/44, plus an additional Shs. 23/67 by way of interest on it, as being the unpaid balance of charges for the supply of electric current to the respondent, as shown in their statement of account attached to the plaint as annexure 'A', which was based on a meter reading. In his written statement of defence the respondent denied his indebtedness and denied that he had consumed the units of electricity shown in annexure 'A', and in para. 3 of his defence he went on to allege that – "The meter seems to have registered inaccurately the electricity consumed".

The case went to trial, and the appellants called in evidence their present meter-reader, and the engineer in charge of their Morogoro branch, a Mr. Holgate; the respondent gave evidence in person. The learned trial magistrate in his judgment made findings on questions of fact and credibility, and decisions arising from what had or had not been pleaded in the plaint. But he made them only contingently, against the possibility of his being found by this court to have erred on the point of jurisdiction upon which his judgment was primarily founded. In brief, his decision on that point was that, since (as he held) a dispute had arisen between the parties as to whether the meter installed in the respondent's premises, upon which the appellants' claim was based, had been correctly registering the quantity of electricity consumed by the respondent, and since neither party had applied to have that dispute determined by an electric inspector, he the magistrate was deprived of jurisdiction to hear the suit, by virtue of the provisions of s. 31 (1) of the Electricity Ordinance (Cap. 131) (T), which section he construed as giving to an electric

inspector exclusive jurisdiction to decide the dispute, without allowing the parties the alternative remedy of having recourse to the courts. The first point for determination in this appeal is whether the learned magistrate was right in holding that he had no power to

decide, not merely the question of the correctness of the meter, but the plaintiffs' claim itself.

Section 31 (1) of the Electricity Ordinance reads as follows:

> "31(1) If any difference arises between any consumer and the licensee as to whether any meter or other apparatus, whereby the value of the supply is ascertained (whether belonging to the consumer or to the licensee), is or is not in proper order for correctly registering that value, or as to whether that value has been correctly registered in any case by any meter or other apparatus, that difference shall be determined upon the application of either party by an electric inspector, and the electric inspector shall also order by which of the parties the costs of an incidental to the proceedings before him shall be paid, and the decision of the electric inspector shall be final and binding on all parties: subject as aforesaid, the reading of the meter shall be conclusive evidence, in the absence of fraud, as to the value of the supply."

The vital words in the above subsection, as touching the question whether the court has jurisdiction, in any circumstances, to determine a suit such as the present one where the correctness of the meter is in dispute (and I will assume for the moment that it was in dispute) are the words:

> "If any difference arises . . ., that difference shall be determined upon the application of either party by an electric inspector . . ., and the decision of the electric inspector shall be final and binding on all parties: subject as aforesaid, the reading of the meter shall be conclusive evidence, in the absence of fraud, as to the value of the supply."

The learned magistrate observed of these words that "the terms of this section are mandatory and do not give either party the alternative right of pursuing his remedy in the courts". Clearly he was referring to the words – "*shall* be determined upon the application of either party by an electric inspector". In brief, he construed these words to mean that, once a dispute about the correctness of a meter has arisen, the only person or tribunal that can determine it is an electric inspector, and that even he can only do so if one of the parties asks him to; so that if neither party asks him to, there is no other way of determining, not merely the correctness of the meter, but even any claim based on a presumed correctness of the meter.

With great respect, I cannot so construe s. 31 (1). The only thing mandatory in the word "shall" in the above words is that, once a party has referred a difference to an electric inspector, then the inspector is obliged to investigate and determine it. In short, an inspector is obliged to determine a referred difference. But neither party is obliged to refer the difference to him in order to get his suit determined at all. If neither party so refers it, then the all-important last two lines of s. 31 (1) come into play, which provide that – "subject as aforesaid, the reading of the meter shall be conclusive evidence, in the absence of fraud, as to the value of the supply". Conclusive evidence where? Conclusive evidence in what tribunal? And in what tribunal is the fraud to be proved, if alleged? Clearly, in the courts of the land, should the plaintiff find it necessary to bring his claim to the courts. The section does not empower an electric inspector to decide upon a claim for electric charges based on a meter reading. It gives him limited power merely to decide whether the meter was correctly registering electric consumption, and if it was not, then what figure it ought to have registered. This in itself is simply a finding on one question of fact, albeit a vital one. The inspector does not, and is not empowered to, decide the suit itself. He is thus in no way akin to an arbitrator. Therefore, whether or not a difference regarding the correctness of a meter has been referred to, and determined by, an electric inspector, the parties are still left as it were in the air. There must be some tribunal to decide the suit itself, if the defendant still contests the plaintiff's

claim. And that tribunal, as s. 31 (1) clearly contemplates, is the court. The court, however, while having jurisdiction to decide the suit, is relieved by the section of the necessity of having to reach its own decision on that one vital question of fact regarding the correctness of the meter reading; and to that limited extent its jurisdiction might be said to be curtailed, although "jurisdiction" is in my view hardly the appropriate expression. For the section provides that, by the time the suit comes to court, the answer to that particular issue will have been already ascertained, and shall be a conclusive and ready-made one. If the issue has been referred to and determined by an electric inspector, then it will be the decision of that inspector, which may or may not confirm the meter reading; if it is not, then it will be (in the absence of fraud) the meter reading itself.

That such is the correct interpretation of s. 31 (1) appears clear from the wording of the subsection itself, whose last two lines would otherwise have no meaning. The interpretation is also supported by the general rule of interpretation expressed in the following words by McNair, J. in *Francis v. Yiewsley and West Drayton U.D.C.* (1) ([1957] 2 Q.B. at p. 148):

> "It is a fundamental rule that if a subject is to be deprived of a right of coming to these courts it must be in clear words."

This dictum was approved by Lord Denning in *Pyx Granite Co. v. Ministry of Housing* (2) [1958] 1 All E.R. at pp. 629–30), a decision upheld by the House of Lords, eo nomine, ([1959] 3 All E.R. 1.). In the present case there are certainly no clear words in s. 31 (1) depriving the courts of jurisdiction.

The interpretation of that section which I have adopted is in my view further supported by those scant reported English decisions in which the meaning was considered of s. 57 of the Schedule to the Electric Lighting (Clauses) Act, 1899, whose wording is almost identical, and in every material respect wholly identical, with s. 31 (1) of the Tanganyika Ordinance. In *Hendon Electric Supply Company v. Banks* (3), the plaintiff company had sued the defendant for electricity supplied. An electric meter had been installed on the defendant's premises, but owing to a certain screw not having been released in it, it was incapable of recording the consumption of any electricity over the relevant period and it accordingly gave a nil reading for that period, though there was nothing to prevent the actual consumption of electricity. Neither party referred the dispute regarding the correctness of the meter reading to any meter inspector, for the good reason that no meter inspector had been appointed for the locality. The plaintiffs accordingly founded their claim on a reasonable estimate based on previous consumption by the defendant. The county court judge assumed jurisdiction, but refused to consider the plaintiffs' claim, based as it was, neither upon an electric inspector's decision nor (of course) upon the nil meter reading, but upon an estimate supported by evidence. Construing the English section just as I have construed s. 31 (1), he held that since there had not been (as indeed in that case there could not have been) any reference to an electric inspector regarding the correctness of the meter reading, that reading must be taken as conclusive evidence of the value of electricity supplied; and since the reading was nil, he dismissed the plaintiffs' claim. A divisional court of the King's Bench dismissed the plaintiffs' appeal, holding that the court below had rightly construed the English s. 57, and had rightly refused to "determine the dispute and assess the amount of electricity consumed", an electric inspector being the only person empowered to determine that question. They did not hold, it is to be noted, that the county court judge had no jurisdiction to try the case at all. They upheld at the same time his assumption of jurisdiction to try the case on the one hand, and his refusal to accept anything but the meter reading as evidence of the value of the electric supply on the other. The fact that the parties could

not have applied to an electric inspector in that case even if they had wanted to. whereas in the present case they could have done, was not relevant to the ratio decidendi in that case.

The interpretation of the English s. 57 was later considered by the Court of Appeal in *Joseph v. East Ham Corp*. (4). That case was decided on another ground, namely that there was no duly certified meter in the defendant's house at all; and what was said about s. 57 was therefore obiter. But throughout the judgments in that case, if I am correct in my reading of them, the proposition was accepted that the exclusive power of an electric inspector to determine one particular issue of fact when so requested is a limited one, and does not exclude the general jurisdiction of the courts to determine the suit itself in which that question is one issue, whether or not that issue has been determined by an inspector before the suit comes to court. This right to resort to an electric inspector is described by Slesser, L.J. as, ([1936] 1 K. B. at p. 379):

> "a limited appeal to the electric inspector before the matter goes to the court at all."

Reading s. 31 (1) as I do, two things emerge clearly. First, that the learned magistrate erred in holding that he had no jurisdiction to decide the suit at all; and secondly that, no fraud having been pleaded by either party, he was bound by the last two lines of that subsection to take the meter reading as conclusive evidence of the value of the electricity supplied to the respondent, and to give judgment in the plaintiffs' favour for the amount claimed in respect of it. There has been argument before me as to whether there was at any time, or at least whether there was before the filing of the plaint, any "difference" between the parties regarding the correctness of the meter, such as s. 31 (1) makes provision for. It was assumed by the learned magistrate below that such a "difference" had arisen. I doubt whether he was strictly correct in this assumption, for there is nothing on the record to show that, before the written statement of defence was filed, the respondent was challenging the accuracy of the meter, as opposed to stating in more general terms that the plaintiffs' bill was too high; and even in the statement of defence the point was raised only in a vague and tentative way. But the point, as I see it, is immaterial. For the effect of s. 31 (1) is that, if the meter reading is not to be taken as conclusive evidence of the value of electricity supplied, not only must there have been a "difference" with regard to its accuracy but *also* that difference must have been referred by one or other of the parties to an electric inspector for determination, and determined by him. In the present case, assuming that a difference existed, this could have been done, and it was most certainly not done. Even at the outset of the hearing the learned magistrate referred the parties to s. 31, and learned counsel for the respondent stated that he did not wish to make an application under that section. Nor, naturally, did the appellants, since in the present case it was they who relied on the meter reading, just as in *Hendon Electric Supply Co. v. Banks* (3) it was the defendant who relied on it.

The learned trial magistrate, as I have earlier stated, made certain findings of fact, against the possibility of his being held, as he now has been held, wrong on his decision regarding jurisdiction. To begin with, he stated that he accepted without question the evidence of the appellants' principal witness, Mr. Holgate, who was their engineer in charge of their Morogoro branch. I would state at this point that I think that the appellants' claim to Shs. 23/67 by way of interest at 9 per cent. on the principal sum claimed was justified, as being in accordance with commercial usage, in view of Mr. Holgate's statement in evidence that: "It is the practice of Head Office in Dar-es-Salaam to charge interest on overdue accounts; it is practice throughout commercial world."

The learned magistrate went on, however, to go into certain points which

were not only not pleaded by either side, but which upon my interpretation of s. 31 (1) it was not open to him to consider. Mr. Holgate in evidence stated that, notwithstanding that there was nothing wrong with the accuracy of the meter, the number of units, namely over 6,000 which appeared, from the reading of it, to have been consumed in a month, judging by the card-reading as recorded by the meter-reader one month before, was impossibly high. He said – "It is impossible for a consumer to use 6,000 units in one month. I would suggest meter has been consistently under-read. Meter-reader has been putting down fictitious figure instead of figure given by the meter, viz. true recording of meter." He suggested that the meter-reader had been fraudulently under-reading the meter, and under-charging the respondent, for many previous months; and his suggestion implied collusion with the respondent. He went on to state that this particular meter-reader had since been discharged. He said that during all those previous months the meter had been registering correctly to within 2.1 per cent., which was in the trade considered as "accurate".

On the strength of this evidence the learned magistrate held that, even if. he considered that he had jurisdiction, he would have dismissed the appellants' claim, on the ground that the claim was in reality based on fraudulent, or at least negligent, conduct on the part of their own meter-reader, and that since neither fraud nor negligence had been pleaded, the claim must fail in toto. In so holding, the learned magistrate misconceived, with respect, both the nature of the appellants' claim and the effect of the last two lines of s. 31 (1). The claim was based on a meter-reading which the court was obliged to accept as conclusive evidence of the value of electricity supplied. The amount claimed was for units indicated on this last meter reading, less payments already made for those past months upon under-readings, if such they were. I would observe that, even if Mr. Holgate's suggestions about under-readings in those past months were correct, the respondent would be merely being charged now for consumption which he should have been charged for but was not charged for during those earlier months. But that is beside the point. The appellants were not basing their claim on any act of fraud or negligence. They were basing it on a meter reading which the learned magistrate was obliged by law to accept as conclusive evidence of the value of current supplied, their claim being for that value after deduction of current already paid for. And it was not open to the learned magistrate to speculate about fraudulent under-readings in the past, since fraud was not relied on by the appellants nor pleaded by either party.

On so much of the accepted evidence as was relevant, therefore, and on what I hold to be the proper construction of s. 31 (1) of the Electricity Ordinance, the learned magistrate ought to have entered judgment for the appellants as prayed. This appeal is accordingly allowed, and judgment is entered for the appellants as prayed, with costs here and costs below at the sum fixed by the learned magistrate.

Appeal allowed. Judgment for the appellant.

For the appellant:
Adrian Roden
Fraser, Murray, Roden & Co, Dar-es-Salaam

For the respondent:
RC Kesaria
RC Kesaria, Dar-es-Salaam

Caltex (Africa) Ltd v Esmail Kassam

[1965] 1 EA 35 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	26 March 1965
Case Number:	8/1964
Before:	Newbold Ag V-P, Sir Clement de Lestang and Spry JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Madan, J

[1] Pleading – Claim for rent or for use and occupation of land – Facts constituting claim for use and occupation of land not pleaded – Neither tenancy nor occupation established – Pleadings not amended – Claim for rent dismissed – Compensation awarded under s. 70 *of Indian Contract Act* 1872 *– Whether s.* 70 *applicable to the facts of the case.*

Editor's Summary

The respondent was the owner of certain premises in the forecourt of which three oil companies, including the appellant company, had installed petrol pumps and the respondent carried on business on these premises including the retailing of petrol from the pumps and other petroleum products on a commission basis. Competition between the oil companies being very keen the appellant was anxious to secure an exclusive out let for its products from the respondent's premises. With that end in view a tentative agreement was reached between them, the gist of which was that the respondent would require the other oil companies to remove their pumps from the premises and thenceforth only retail the appellant's products and for that purpose he would lease the premises to the appellant for 15 years at a yearly rent of Shs. 6,000/-. In contemplation of this agreement the respondent caused the other oil companies to remove their pumps and thereupon the appellants installed more pumps of its own. The pumps remained the property of the appellant but were hired to the respondent who thenceforth only retailed the appellant's products. This position continued for a period of 27 months while negotiations were taking place in respect of the agreement but which ultimately fell through failure by the respondent to show title to the premises. When this happened the respondent required the appellant to remove its equipment from the premises which the appellant did. The respondent subsequently filed an action against the appellant wherein he claimed rent for 27 months on the ground that the appellant had rented the forecourt of the premises at Shs. 6,000/- per annum or alternatively, an amount equal to the alleged rent for use and occupation of the premises. The trial judge negatived any agreement to pay rent but held that the respondent was entitled to recover reasonable compensation for use and occupation and that the basis of such a claim was s. 70 of the Indian Contract Act 1872. On appeal the two main grounds argued were that the pleadings set out a claim for use and occupation with no facts pleaded which could found a claim under s. 70, and that in any event on the facts proved s. 70 did not apply.

Held – (By De-Lestang and Spry, JJ.A.) (i) four conditions are necessary to give a right to compensation

under s. 70 of the Indian Contract Act 1872 and are: (*a*) the claimant must have done something for or delivered something to another person; (*b*) the claimant must have acted lawfully; (*c*) the claimant must not have intended to act gratuitously; and (*d*) the person for whom the act is done or to whom the thing is delivered must have enjoyed the benefit of it.

(ii) s. 70 ibid, had no application and justice did not require that the appellant should be compelled to make a payment which it had no intention of making save on the occurrence of a specific event known to the respondent which in the

result did not materialise through no fault of theirs and for the court to grant compensation to a party in these circumstances would amount to making a contract for them which was not only outside the power of the court but clearly outside the scope of the section.

(iii) (By Newbold, V.-P., dissenting as to (ii) above): as no facts were pleaded which could give rise to the operation of s. 70, and as no issues were framed or application made to amend the pleadings to include the question of compensation the judge erred in holding that s. 70 was applicable. If such facts had been pleaded, the respondent would have been entitled to compensation but the measure of damages would be the proved loss (if any) to the respondent during the period of 27 months.

Appeal allowed.

Cases referred to in judgment

(1) *Suchand v. Balaram* (1910), 38 Cal. 1.

(2) *Esso Petroleum Co. Ltd. v. Southport Corpn.*, [1956] A.C. 218; [1953] 3 All E.R. 864.

(3) *Patel v. Gajjar*, [1964] E.A. 27 (C.A.).

March 26. The following judgments were read:

Judgment

Sir Clement De Lestang JA: This appeal concerns the applicability to this case of s. 70 of the Indian Contract Act which at all material times applied to Kenya. The relevant facts are as follows. The respondent, who was plaintiff in the court below, was the owner (jointly with his brothers until July 1, 1956, and thereafter solely) of certain premises at Kisii in the forecourt of which three oil companies, namely Shell, Standard-Vacuum and the appellant had installed petrol pumps. The respondent and his brothers carried on business on these premises including the retailing of petrol from the pumps and other petroleum products on a commission basis. Competition between the oil companies being very keen the appellant was anxious to secure an exclusive outlet for its products from the respondent's premises. With that end in view it approached the respondent and at some time prior to July 1, 1956, a tentative agreement was reached between them, the gist of which was that the respondent would require the other oil companies to remove their pumps from the premises and thenceforth only retail the appellant's products and that for that purpose he would lease the premises to the appellant for 15 years with an option for a further 10 years at a yearly rent of £300 payable in arrears. In return the appellant was prepared to grant an interest-free loan of £7,500 to the respondent secured by a second mortgage on the premises, repayable over a period of 25 years by yearly instalments of £300 and to grant a sub-lease of the premises to the respondent for the whole term of the lease at a nominal rent.

In contemplation of this tentative agreement the respondent caused the other oil companies to remove their pumps and thereupon the appellant installed more pumps of its own on the premises. Thenceforth the respondent only retailed the appellant's products. Unfortunately the agreement was never concluded because, presumably, the respondent could not show a title to the premises necessary to carry out the agreement. When that happened the respondent required the appellant to remove its equipment from his premises within one month, which it apparently did. As a result the position was that the appellant, on the one hand, had incurred considerable expense which is put at over £2,000 to install its pumps and had to

incur further expense in removing

them and only had this exclusive outlet for 27 months, while the respondent, on the other hand, benefited both by the commission he obtained on the increased sales of the appellant's products and also by the work carried out by the appellant on the premises. This latter benefit arose from the fact that at the time of the tentative agreement certain works were required in connection with the level of the premises which the appellant carried out while installing its pumps, thus saving the respondent that expense.

Having got the appellant to remove its pumps the respondent brought an action against it wherein he claimed rent for 27 months on the ground that the appellant had rented the forecourt of the premises at Shs. 6,000/- per annum or, alternatively, an amount equal to the alleged rent for use and occupation of the premises with the respondent's permission. The appellant denied liability to either claim. The learned judge negatived any agreement to pay rent but found for the respondent on the alternative claim. He treated that claim as one under s. 70 of the Indian Contract Act which though not pleaded was nevertheless argued without objection at the trial. In his judgment, however, the learned judge used language which though appropriate to a claim for use and occupation at common law, was clearly inappropriate to a claim under s. 70, Indian Contract Act. He began his judgment on the alternative claim in these words:

> "The plaintiff however claims, in the alternative, the same amount as being reasonable compensation as already stated. The basis of the claim in this form is Section 70 of the Indian Contract Act."

He had already stated at the beginning of his judgment, "In the alternative, the plaintiff claims the same amount as being reasonable compensation for use and occupation of the forecourt by the defendant company". After stating the basis for the application of s. 70 he concluded "the plaintiff is therefore entitled to recover reasonable compensation for use and occupation of his forecourt by the defendant company." He seems to have confused the two claims but, be that as it may, he found that the respondent was entitled to compensation under s. 70 and awarded him compensation at the rate of Shs. 500/- per month, that is the same amount claimed as rent.

The principal question for decision is whether s. 70 has any application in the circumstances of this case. That section reads as follows:

> "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore the thing so done or delivered."

As I understand the section, four conditions are necessary to give a right to compensation thereunder: (1) the claimant must have done something for or delivered something to another person; (2) the claimant must have acted lawfully; (3) he must not have intended to act gratuitously; and (4) the person or whom the act is done or to whom the thing is delivered must have enjoyed the benefit of it.

The second and third conditions do not give rise to any difficulty as it was not and could not reasonably be contended that what the respondent did was done unlawfully or gratuitously, it is not so, however, with the first and fourth conditions.

As regards the first, according to the learned judge the respondent did two things for the appellant, namely, he caused the other two oil companies to remove their pumps and "he made available and thus 'delivered' the forecourt to the defendant company to install its pumps". It is contended by counsel for the appellant, that, except temporarily for the purpose of erecting new pumps, the respondent did not deliver possession of the forecourt to the appellant and

that whatever he did do was done not *for* the appellant but for himself in contemplation of an interest-free loan in pursuance of the wider agreement already described. Counsel for the respondent contends that the respondent, at the request of the appellant and in anticipation of a financial reward did something for it by making available to it his property to install the appellant's pumps for the exclusive sale of its products and the appellant thus acquired an equitable interest in the land or at least a commercial asset.

I have given this matter a great deal of thought and I prefer counsel for the appellant's contention to that of the respondent's. It seems to me that the appellant was never in possession of the forecourt. Once the pumps were installed the respondent, on his own admission, had full control of them and of his forecourt and carried out his business as before without any interference from the appellant. He merely paid the appellant Sh. 1/- per annum for the pumps, the same nominal amount he was paying in respect of the single pump of the appellant before the new arrangement. It is clear, therefore, that the forecourt was not delivered over to the appellant nor that the appellant required any equitable interest in the land. What the respondent did do, however, was to get rid of the other oil companies and provide the means for the exclusive retail of the appellant's products from his premises. Assuming for the moment that the appellant derived benefit from this the question is did the respondent do this for the appellant. In deciding such a question it must, in my view, be borne in mind on the one hand that the mere fact that the appellant benefited is not conclusive that the act was done for its benefit, and on the other hand that an element of self-interest on the part of the doer of the act would not necessarily deprive him of compensation under the section. 'Where a person does some act primarily for his own benefit the mere fact that another person has derived benefit from it does not necessarily entitle him to compensation from that person. Whether it does or not is a question of fact and degree to be decided, having regard to all the circumstances of the case. In my view in the present case the parties' acts and conduct were motivated primarily, if not entirely, by self-interest. Insofar as the respondent is concerned, had the transaction come to fruition it would have been highly profitable to him and I cannot accept that in those circumstances he was doing something for the appellant. Moreover, the principle seems to have been accepted by the courts in India that although the terms of the section are unquestionably wide they must be applied with discretion so as to enable the courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract (*Suchand v. Balaram* (1)). In the present case justice does not require that the defendant should be compelled to make a payment which it had no intention of making save on the occurrence of a specific event known to the plaintiff which in the result did not materialise through no fault of theirs. For the court to grant compensation to a party in these circumstances would amount to making a contract for them which is not only outside the power of the court but clearly outside the scope of the section.

As regards the fourth condition, counsel for the appellant contended that it was not proved that the appellant enjoyed any benefit. It is true that it obtained a facility for the exclusive sale of its products for 27 months but it is said that in the result, owing to the cost of installing the pumps and removing them, it derived no financial benefit. I think there is much force in this argument and that it is at least doubtful if the appellant enjoyed any benefit in the circumstances.

In my view s. 70 of the Indian Contract Act has no application in the particular circumstances of this case and I would allow the appeal.

Newbold Ag V-P: This appeal unfortunately provides one more example of a case in which the pleadings are badly drawn, the facts proved bearing

little relation to the pleadings, the advocates' submissions raising points which do not properly arise from the pleadings, and the judgment being given on a ground which does not arise from the pleadings; thereafter there is an appeal with submissions that, having regard to the pleadings, the judge had no power to give judgment on the ground on which he did and there is then argument whether, as the ground of decision was touched on during the submissions of counsel in the court below and not objected to, it was open to the judge to give judgment on the point on which he did. This distressing position arises primarily from the failure of advocates to follow the rules of procedure set out in O. VI, which requires pleadings to state facts. All too often the pleadings, so far from setting out the facts in a concise form, set out a procrustean bed of catch phrases more appropriate to the position in England one hundred years ago when the facts had to be fitted into a cause of action or a plea in defence. A part of the blame, with respect, also rests upon the shoulders of the judges of first instance who permit advocates to make submissions on points which do not arise from the pleadings without first requiring an amendment of the pleadings.

The facts in this case have been set out in the judgment of De Lestang, J.A., and I do not propose to restate them except insofar as may be necessary for the purposes of my judgment. The respondent, whom I shall call the retailer, filed a plaint against the appellant, whom I shall call the wholesaler, and in paras. 3 and 4 thereof it is averred that the retailer was the beneficial owner of certain premises and that he agreed to let and the wholesaler agreed to rent the forecourt of those premises at a specified rental. In paras. 5, 6, 7 and 8 it is averred that the wholesaler entered into possession of the demised premises, that the tenancy was subsequently terminated by a notice to quit, that the wholesaler vacated the premises after having been in possession for 27 months without having paid any rental therefore, and that as a result the retailer claimed a specific sum as rent due and owing from the wholesaler in respect of the premises. In para. 9, the retailer, in the alternative, claimed from the wholesaler the specified sum as being "the reasonable amount of compensation for the defendant's use and occupation by the plaintiff's permission, of the premises". The defence was in effect a denial of the tenancy, of entry and of any use or occupation of the premises. On those pleadings the case went to trial. In reality, the facts proved at the trial bore no relation to the averments in the plaint. In essence the facts were that the retailer had previously sold different types of petrol on his premises through pumps which were the property of the respective petrol companies. In anticipation of a vending agreement with the wholesaler, which was an oil company, under which both the wholesaler and the retailer would obtain benefits, the retailer ceased to sell the products of other oil companies and, at the request of the wholesaler, required them to remove their pumps, and permitted the wholesaler at its cost to erect pumps. These pumps remained the property of the wholesaler, but were hired to the retailer at a nominal rental and were operated under the control of the retailer who then sold on his property only the products of the wholesaler. This position continued for a period of 27 months while negotiations were taking place in respect of the agreement which both parties hoped to conclude, but which ultimately fell through. One of the terms of the proposed agreement was the payment of Shs. 500/- per month, described by the parties as "rent", by the wholesaler to the retailer in consideration of the retailer selling only the wholesaler's products.

On these facts, which of course should have been set out in the pleadings, it was manifest that no exclusive interest in land had been created and that a claim for rent based upon a tenancy could not possibly succeed; and the judge so held and that decision is not challenged. As the alternative claim was based upon the use and occupation by the wholesaler of the premises, a claim which requires the implied relationship of landlord and tenant to exist, it was equally

manifest that the alternative claim also could not possibly succeed. Where the owner of land hires an article which is then used under his control, the fact that the article rests upon or is attached to the land does not mean that the owner of the article is using and occupying the land upon which the article rests or to which it is attached. Incidentally during the opening, and at the end of the reply, the advocate for the retailer referred to s. 70 of the Indian Contract Act (which then applied). Unfortunately the trial judge did not refuse to permit any reference to s. 70 without an amendment to the pleadings. The advocate for the wholesaler did not refer to s. 70 and dealt with the case purely on the pleadings. The trial judge, having correctly set out in his judgment that the alternative claim was for compensation for the use and occupation of the forecourt by the wholesaler, then quite incorrectly stated that the basis of such a claim was s. 70. The judge then examined the facts proved and gave judgment for the retailer in accordance with s. 70, awarding to the retailer a sum arrived at on the basis that Shs. 500/- per month was reasonable compensation for each month of the alleged use and occupation of the premises by the wholesaler. From that judgment the wholesaler appealed, the three main grounds argued being that the pleadings set out a claim for use and occupation with no facts pleaded which could found a claim under s. 70, and that in any event on the facts proved s. 70 did not apply or, if it did, the amount awarded was not reasonable in the circumstances.

As I have said, on the facts proved manifestly a claim based on the use and possession of land cannot succeed. The next question is, was it open to the judge to consider the application of s. 70 having regard to the facts proved, the pleadings and the submissions. Counsel for the respondent,' for the retailer, submitted that it was as reference to the section had been made before the trial judge and no objection had been taken; if it had, he urged, an application for amendment could have been made. He also submitted that it was open to a judge to give judgment on a matter which did not arise from the pleadings.

I should like to refer yet once again to the words of Lord Radcliffe in *Esso Petroleum Co. Ltd. v. Southport Corpn.* (2) ([1956] A.C. at p. 241) where he said that if reliance upon the rules of procedure is to be treated "as pedantry or mere formalism, I do not see what part they have to play in our trial system". Judgments should be related to the pleadings. It is true that having regard to the provisions of O. XX, r. 5, where issues have been framed then judgment may be given on those issues even if they do not arise out of the pleadings. This is because the issues framed have taken the place of the issues which arise out of the pleadings, but even in such a case it is desirable that the pleadings should be amended.

In this case quite clearly no facts were pleaded which could give rise to the operation of s. 70, no issues were framed and at no stage, not even on appeal, has any application for an amendment been made. In the result the retailer asks this court to support a judgment in his favour on an issue which does not arise out of his pleadings and on which it is at least doubtful whether any submissions to the trial judge were made by the advocate for the wholesaler. I should not wish to elevate procedural law to any status higher than that of the handmaid of substantive law, but unless due (and I would emphasise that I do not mean undue) regard is paid to procedural law it is very difficult to determine the matters on which a decision on substantive rights is required and the judge will be left wandering in a maze of unsignposted alleys. It is for the plaintiff to set out in the plaint the facts upon which he seeks a decision in his favour; if he does not, he cannot ask for a decision on facts the defendant was not required to meet. In *Patel v. Gajjar* (3) ([1964] E.A. (C.A.) at pp. 30 and 39) this court refused to apply s. 70 in a case where the facts pleaded did not give rise to its application.

For these reasons I consider that the appeal should be allowed. I arrive at this conclusion with considerable regret as I am of opinion that counsel for the respondent's submissions on the facts proved are correct and that had the facts been properly pleaded the retailer would have been entitled to recover something under s. 70. This section appears in a part of the Act relating to relations resembling those created by contract. If there is an express contract it does not apply, but it does apply where a contract may be implied; and it is for this reason that it is doubtful whether the section applies where the parties are incompetent to contract. Quite clearly the retailer has done two things for the wholesaler: first he has hired the wholesaler's pumps and sells the wholesaler's products and, secondly, he does not sell the products of the wholesaler's competitors. Neither of the parties would for one moment imagine that the retailer, who was a businessman carrying on his business, intended to do this gratuitously. Nor can there be any doubt that the wholesaler enjoyed the benefit of this action. The fact that the retailer also benefits from the action does not mean that it was not done "for" the wholesaler within the meaning of the section. The word "for" is designed to exclude a case where the act is done exclusively for the benefit of the actor. In this case it would be difficult to see what benefit resulted to the retailer in selling exclusively the petrol of the wholesaler; but this "exclusivity" was the very object which the wholesaler sought to achieve by the proposed agreement. The fact that the wholesaler spent a large sum in installing the pumps is completely irrelevant – if its petrol was to be sold there, either exclusively or in conjunction with that of its competitors, the cost of installation had to be met. Having regard to my view that the appeal should be allowed, I see little point in examining the position in detail; I am, however, quite satisfied that on the facts proved s. 70 does apply, though the judge erred in the quantum awarded. The amount of compensation awarded should not be determined by what would have been obtained if an agreement had been concluded; it should be the amount the retailer had lost by what happened during the period of 27 months in which he sold exclusively the petrol of the wholesaler. No evidence of any such loss was given and thus he would only have been entitled to recover what would virtually be nominal damages.

The other members of the court also consider that the appeal should be allowed, though for different reasons. Accordingly it is ordered that the appeal be allowed with costs, with a certificate for two counsel, and that the judgment and decree of the Supreme Court be set aside and that there be substituted therefore a judgment and decree dismissing the suit with costs, with a certificate for Queen's Counsel.

Spry JA: The facts out of which this appeal arises are fully set out in the judgment of de Lestang, J.A., which I have had the advantage of reading and with which I am in agreement.

I would merely add that there is, I think, another possible approach to the problem; that is, that the act in respect of which compensation is claimed was part of the performance of an express contract and therefore not an appropriate matter for the application of s. 70 of the Indian Contract Act, 1872.

The contract, it might be argued, comprised on the one hand a promise by the respondent to cause to be removed the pumps of the other petrol companies and, on the other hand, an undertaking by the appellant company to level the forecourt of the respondent's premises and install additional pumps for the respondent's use.

It is true that both parties regarded this as a preliminary to a larger transaction, and, indeed, would not have entered into the agreement otherwise, but I do not think that prevents the agreement from constituting a separate contract. If

that is so, it was a contract that was fully performed by both parties and no question of compensation under s. 70 could therefore arise.

Appeal allowed.

For the appellant:
Clive Salter QC and *WJ Deverell*
Kaplan & Stratton, Nairobi

For the respondent:
Bryan O'Donovan QC and *Z Nimji*
Shapley, Barret, Marsh & Co, Nairobi

Karachi Gas Co Ltd v H Issaq
[1965] 1 EA 42 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	22 January 1965
Case Number:	61/1963
Before:	Newbold, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Connel, J

[1] Jurisdiction – Service of summons outside jurisdiction – Claim for damages for breach of contract – Contract for sale of goods – F.o.b. contract – Contract concluded by correspondence written both in Kenya and Pakistan – Goods in Kenya – Delivery to be made in Kenya – Plaintiff resident in Kenya – Defendant company registered in Pakistan – Payment in Pakistan currency – Refusal to accept delivery of goods – Whether breach of contract committed in Kenya – Jurisdiction of Supreme Court of Kenya to hear and determine the case.

[2] Conflict of law – Contract – Proper law of contract – Contract for sale of goods – F.o.b. Contract – Contract concluded by correspondence written both in Kenya and Pakistan – Goods in Kenya – Delivery to be made in Kenya – Plaintiff resident in Kenya – Defendant company registered in Pakistan – Payment in Pakistan currency – Whether proper if law of contract Kenya or Pakistan.

[3] Contract – Frustration – Exchange restrictions – Sale of goods – Shipment of goods from Kenya to Pakistan – Buyer's duty to obtain import licence or permit – Whether all necessary and reasonable steps taken to obtain licence or permit.

Editor's Summary

By correspondence written both in Kenya and Pakistan a contract was concluded for the sale by the respondent to the appellant of 100,000 feet of pipes which were then in Mombasa, Kenya, at a price of Pakistan rupees 3/- per foot f.o.b. Mombasa, payable in the month following that of delivery. The preliminary negotiation for the contract took place in Pakistan between the appellant company which was registered in Pakistan and a representative of the respondent who was on a visit to Pakistan. The respondent was ordinarily resident in Kenya and it was common ground that the respondent would obtain the export permit from the Kenya authorities and the appellant the import licence from the Pakistan authorities. The respondent obtained the necessary export permit and reserved shipping space for the shipment of the pipes and so informed the appellant and also requested it to make arrangements for the payment of freight and insurance charges. There then followed a series of letters and cables from the respondent to the appellant in an effort to expedite the appellant obtaining the import licence and paying the freight charges. Eventually the appellant cancelled the order for pipes on the ground that it had failed to obtain the import licence and the import of the pipes without a licence would constitute breach of the Pakistan exchange regulations. The respondent then sued the appellant

claiming damages for breach of contract and obtained an order for service outside jurisdiction. In its defence the appellant pleaded that the court had no jurisdiction; that the proper law of the contract was that of Pakistan and not Kenya and that by virtue of the Foreign Exchange Regulations Act, 1947, of Pakistan, the performance of the contract was frustrated. The trial judge decided all these issues in favour of the respondent and awarded damages claimed by him. On appeal:

Held –

(i) the trial judge was correct in finding that the proper law of the contract was that of Kenya;

(ii) the refusal to accept delivery of the goods "f.o.b. Mombasa" and further to neglect to provide a ship to carry away the goods from Mombasa, was a breach of the contract committed in Kenya and accordingly under O. VI r. 21 of the Civil Procedure (Revised) Rules (K), 1948, the Supreme Court of Kenya had jurisdiction to make the order for service outside jurisdiction and to hear and determine the case;

(iii) the appellant failed to establish that it took all reasonable and necessary steps to obtain the import licence or to obtain permission for payment to the respondent of the purchase price and accordingly the trial judge was fully justified and correct in his finding that the defence of frustration had not been established.

Appeal dismissed.

Cases referred to in judgment

(1) *Chatenay v. Brazilian Submarine Telegraph Co*., [1891] Q.B. 79; [1891] P. 82.

(2) *Debono v. Benain & Co*., [1924] A.C. 514; [1924] All E.R. Rep. 103.

(3) *Brauer & Co. v. James Clark*, [1952] 2 All E.R. 497.

(4) *Societe d'Avances Commerciales* (*London*) *Ltd. v. A Besse & Co.* (*London*) *Ltd*., [1952] 1 T.L.R. 644.

(5) *Charles H. Windschuegl Ltd. v. Alexander Pickering & Co. Ltd*. (1950), 84 Lloyd's Rep. 89.

(6) *Motibhai v. King & Co*., [1959] E.A. 270 (C.A.).

(7) *Riddlesbarger v. Robson*, [1958] E.A. 375 (C.A.).

(8) *The Assunzione*, [1954] P. 150; [1954] 1 All E.R. 278.

(9) *National Bank of Australasia Ltd. v. Scottish Union & National Insurance Company Ltd*. [1952] A.C. 493.

(10) *National Mutual Life Association v. A.-G.* (*New Zealand*), [1956] 1 All E.R. 721.

January 22. The following judgments were read:

Judgment

Duffus JA: This is an action brought by the plaintiff-respondent, H. Issaq, a merchant residing and carrying on business in Kenya, to recover damages for breach of contract from the defendant-appellant,

the Karachi Gas Company Limited, a company duly incorporated and carrying on business in Pakistan.

It is an agreed fact that a contract was duly entered into for the sale by the plaintiff to the defendant company of 100,000 ft. of four inch pipes which were then in Mombasa, Kenya at the price of Pakistani rupees 3/- per foot, f.o.b. Mombasa, payable in the month following that of delivery. It is admitted that the defendant company by their letter of May 14, 1956, (Ex. 16), addressed to

Mr. Haji Adam, the plaintiff's agent, cancelled the order for the pipes for reasons stated in the letter. The plaintiff then eventually, on September 26, 1956, had the pipes re-sold by public auction and he claims as damages the difference between the contract price and the amount realised at the auction sale together with a further amount for storage of the pipes from May 20, to October 26, 1956.

At the trial the defendant pleaded that the court had no jurisdiction and further that the proper law of the contract was that of Pakistan and that, by virtue of the provisions of the Foreign Exchange Regulations Act, 1947, of Pakistan, the performance of the contract was frustrated. Damages were also in issue.

The three issues agreed on were:

"1. Whether the contract is frustrated under the law as applicable by this court.

2. If not, what is the quantum of damages.

3. Has the court jurisdiction to hear the proceedings."

The learned trial judge decided all these issues in favour of the plaintiff and he awarded him the amount claimed in his writ, Shs. 187,010/-, as damages. The defendant company now appeals on four grounds: Grounds 1 and 2 are on the question of jurisdiction. Ground 3 complains that the trial judge erred in finding that the proper law of the contract was that of Kenya and not that of Pakistan and ground 4 states that the judge erred in holding that the contract was not frustrated. There has been no appeal against the assessment of damages.

The contract was negotiated by the plaintiff's first witness, Abdul Hamid Adam, whilst he was on a visit to Pakistan. He states he had discussions with a Mr. Garside, an engineer, and Mr. Macdonald, the manager of the defendant company. He denies, however, meeting Mr. Fancy, the director of the defendant company, who gave evidence on letters of request in Pakistan. The only other witness for the plaintiff was Abdul Hamid, the auctioneer, who re-sold the pipes on the plaintiff's instructions. As a result of the issue of the letters of request two witnesses gave evidence for the defendants in Pakistan. These were Mohammad Walimuddin Farooqui, a foreign exchange inspector in the State Bank of Pakistan and Jimmy Hussain Fancy.

Mr. Adam, who is from Nairobi, states that he was in Pakistan in 1956 and after meeting Messrs. Garside and Macdonald of the defendant company he made an offer of sale as set out in his letter of February 6, 1956, (Ex. 3). The relevant portion of this letter states:

> "I have pleasure to offer you the following piping and fittings at present lying at Mombasa, East Africa.
>
> Approximately 100,000 running feet of 4? black unused victaulic ex-disposals piping. Piping is of 4½? diameter outside and 4? inside and is seamless and of standard lengths varying from 16 to 30 feet. Price Shs. 4/50 cts. or Rs. 3/- Pakistani f.o.b. Mombasa.
>
> Purchaser has to arrange the necessary import licence. Order for the entire quantity or the part of it will be accepted against firm order and establishment of irrevocable letter of credit.
>
> Sample piece is left with you and any further particular's required will be furnished with pleasure. All the above are offered subject to being unsold."

He then states they had further discussions which resulted in the contract being arrived at as set out in the written terms of the letter and order from the defendant company dated February 14, 1956, (Ex. 4). He states he received the letter at Karachi but the order only after he returned to Nairobi. The letter (Ex. 4) reads:

"Dear Sirs,

We agree to purchase 100,000 ft. of 4" black pipe, suitable for welding, as per sample. Payment is to be made in Pakistani rupees and any pipe found unsuitable will be rejected and returned at vendor's expense.

An official order will follow in the immediate future.

Yours faithfully,

(Sgnd): R. B. Garside,

Deputy Gas Distribution Engineer."

and the order, (Ex. 31 A):

"Dear Sirs,

We have pleasure in placing with you an order for the goods noted below and shall be obliged if you will arrange supply.

Delivery – F.O.B. Mombasa.

Challan – Your challan in triplicate should accompany the goods when delivered. Two copies will be retained by us.

Invoice. Your priced bill/invoice should be sent to our Accounts Department together with challan and must state order number.

Payment will be made during the month following that in which the goods ordered have been delivered.

Goods not up to standard will not be accepted.

Item No.	*Quantity*	*Unit*	*Description*	*Index No.*	*Price*
1.	100,000	Feet	Black weld pipe size 4? inside diameter. Seamless. Payment to be made in Pakistani rupees and any pipe after examination found unsuitable to be rejected and returned at the vendor's expense		Rs. 3/- per foot. F.O.B. Mombasa

Yours faithfully,

for and on behalf of Karachi Gas Co. Ltd.

Industrial Management Ltd.

(sgnd): G. Strawbridge,

Managing Agents."

Mr. Adams further states that on his return to Kenya and in pursuance of carrying out the plaintiff's side of the contract, he obtained the export licence for the pipes and reserved shipping space for the shipment of the pipes and he wrote on March 10, 1956 and so informed the defendant. In this letter the plaintiff acknowledged the receipt of the defendant's letter and order (Exs. 4 and 31A) and he enquired whether the company had obtained an import licence and then he also cabled the defendant on March 13, to say the shipping company required payment for the freight in advance.

On March 15, the defendants cabled the plaintiff as follows:

> "H ISSACK P O BOX 10304 NAIROBI = REFERENCE YOUR 10TH MARCH NO LICENCE YET SHIP NEXT BOAT = KARGASCO"

As a result the plaintiff then made arrangements for the pipes to be sent by another ship, the s.s. "*Karanja*", and he so informed the defendant by a letter dated April 2, 1956, (Ex. 8). In this letter he said, *inter alia*:

> "I now wish to inform you that I have again secured shipping space for the piping in s.s. "*Karanja*", the first available ship sailing direct to Karachi approximately in the middle of May, 1956. In order to effect the shipment it will be essential for you to fulfill the following two obligations, viz., (1) *Import licence*, and (2) *Payment of Freight and Insurance charges*: – As the freight and insurance charges are to be paid in advance to the agents of B.I.S.N. Co., Ltd., it will be appreciated if you will kindly make necessary arrangements in this connection."

The plaintiff was again here emphasising the fact that it was the defendant's duty to obtain the import licence and also to pay the freight and insurance charges on the shipment. The defendant replied by a cable dated April 5, stating:

> "REFERENCE YOUR 2ND INSTANT FREIGHT REFERRED TO NAIROBI AGENTS BY KARACHI AGENTS CONTACT EXPEDITE YOUR AGENTS LICENCE WILL BE AVAILABLE = KARGASCO".

There then followed a series of letters and cables from the plaintiff to the defendant in an effort to expedite the defendant's obtaining the import licence and paying the freight charges. I refer to the letter of April 20, (Ex. 11); the cable of May 2, (Ex. 12); the letter of May 2, (Ex. 13); the cable of May 8, (Ex. 14); the cable of May 14, (Ex. 15); and the cable of May 17, (Ex. 17). In the letter of May 2, the plaintiff again referred to the import licence. In this respect he said:

> "I may also add to say that no mention has been made by you with regard to the Import Licence at your end. It is very essential to have the Import Licence in hand lest the Authorities in Pakistan might forfeit the cargo. I hope all the necessary arrangements in this direction will have been made by you. It will be appreciated if you will kindly inform me accordingly."

Then, on May 14 the defendant wrote the letter cancelling the contract, (Ex. 16).

I quote the letter in full:

> "Mr. Haji Adam,
>
> Room No. 42,
>
> Dilkusha Hotel,
>
> (Shafi Chambers),
>
> Nicol Road,
>
> *Karachi* 14th May, 1956.
>
> Dear Sir,
>
> *Supply of* 100,000 *ft.* 4? *Black Weld Pipes from Mombasa*
>
> Further to our recent discussions with yourself and with Mr. Jimmy Fancy regarding the supply of 100,000 ft. 4? black seamless-weld pipes from Mombasa, we wish to state that from enquiries made from the C.C.I. & E. the import of these pipes without licences virtually constitutes a breach of exchange regulations being equivalent to the transfer of capital.
>
> As already explained to you, the C.C.I. & E. and the State Bank are very particular and want to know why you are willing to accept payment in Pakistan currency in Pakistan.
>
> The supply of these 4" pipes is extremely urgent, but we are perforce to make arrangements elsewhere as the same cannot be supplied by you due to the C.C.I. & E. and State Bank rulings. Therefore please consider our local order No. 62 for the supply of these 100,000 ft. pipe as cancelled.

We trust you understand the situation and appreciate the amount of difficulties we have undergone in trying to finalise our deal with you.

Thanking you,

Yours faithfully,

for Karachi Gas Company Limited.

(Sgnd): A. R. Macdonald,

Manager.

cc. Mr. H. Issack, Importers & Exporters, P.O., Box 10304, Nairobi

cc. Amirali H. Fancy, Esq., P.I.L., Karachi, reference our D/O 05/2/363 of 9.5.56 to him.

cc. Manager

cc. Stores Officer in duplicate."

This letter was addressed to Mr. Haji Adam, the father of the first "plaintiff witness" who also acted as a representative of the plaintiff in Pakistan. The defendant then also sent the plaintiff a cable to Nairobi on May 17, as follows:

"YOUR AGENT FULLY ADVISED UNABLE TO OBTAIN IMPORT PERMIT STOP ENTIRELY YOUR AGENTS LIABILITY = KARGASCO"

Then followed correspondence between the plaintiff's solicitors and the defendant company on the matter. In the course of his evidence the first plaintiff-witness stated that he expected to be paid Pakistani rupees either in Pakistan or Kenya.

The first defendant-witness, Mr. Farooqui, produced a letter from the defendant dated July 5, 1956, (Ex. 33) to the Assistant Controller of the Exchange Control Department of the State Bank of Pakistan which referred to previous interviews and inquired if the bank had any objection to payment for the pipes being made in Pakistani rupees to the plaintiff's representative, Haji Adam. The bank's reply, dated July 6, is Ex. 34, and states:

"As explained to you during your interviews with the undersigned, we have to confirm that under our existing regulations we cannot agree to the payment in rupees to the representatives in Pakistan of the suppliers overseas."

These witnesses also produced and put in evidence the Foreign Exchange Regulation Act, 1947, of Pakistan. Section 5 of this Act prohibits the payment of any money to a person resident outside Pakistan except in accordance with the Act and s. 21 prohibits any person entering into a contract which would, directly or indirectly, evade or avoid the operation of the Act.

It is to be noted that these letters were written some time after the defendant had cancelled the contract. Learned counsel for the defendant concedes that these letters were probably written so as to obtain evidence to confirm the fact that the State Bank had refused to allow payment to be made under the Exchange Control Act.

In the course of his evidence Mr. Farooqui said in cross-examination:

"In appropriate case we may consider for payment being made in Pakistan currency to a representative of a non-resident. Permission for payment was rejected by Ex. 34. It was not possible to sanction remittance of foreign exchange to East Africa in this case and also in view of the circumstances mentioned in Ex. 33. Against an import licence remittance of foreign exchange could be made. It appears from Ex. 33 that no such import licence was produced in this case. Ex. 33 is a first formal application. Ex. 33 as well as Ex. 34 refers to

previous interviews during which this very subject was discussed."

.

> "Under s. 21 (2) any contract would become ineffective unless the State Bank has granted general or special permission. In spite of the clause in Ex. 31 that payment would be made in Pakistan rupees, had the plaintiff produced an import licence he would have got the permission to remit the foreign Exchange. The State Bank does not ask for the copy of the contract at the time of allowing remittance of foreign exchange, in such cases we only insist on production of the import licence, exchange control copy of the Bill of entry evidencing import of goods and the suppliers invoice. As such the term of payment agreed to between the parties does not come to the notice of the Bank. The import licence is issued by the Chief Controller of Import and Exports and it invariably carries the right to remittance of foreign exchange."

It is the defendant's case that this contract was in fact a local order and that payment was to be effected in Pakistani rupees in Pakistan so as to avoid the question of any foreign exchange of funds and further that delivery was to be made in Pakistan despite the provision in the contract that delivery was to be "f.o.b. Mombasa". In his evidence Mr. Fancy said that the understanding was that delivery was to be made in Pakistan and that provision was made that the goods could only be accepted in Pakistan if they corresponded with the sample and further that "f.o.b. Mombasa" was only inserted for the purpose of fixing the price. On the question of the payment he said:

> "If foreign exchange was involved we would have not bought these pipes as by paying foreign exchange we would get new pipes to our specification at more or less the same prices from overseas.
>
> Our understanding about foreign exchange in this case was very clear and that at all times only Pakistan rupees were to be paid and that we would be obtaining the necessary import permit for the clearance of the goods at the customs. However, we have used the word import licence in our correspondence rather loosely instead of the word permit.
>
> We were assured of the import permit as no foreign exchange was involved in the transaction.
>
> The difference between an import permit and import licence is that in import permit no foreign exchange payment is to be made at any stage while in the latter case it gives right to the holder to remit and make payment in foreign exchange."

On the question of the import licence he said in cross-examination:

> "No application for import permit was made in this case in as much as we were concentrating an effort in obtaining the required no objection certificate or consent of the State Bank to whom the matter would have been referred by the Chief Controller of Imports and Exports had we submitted our import permit application, which procedure would have unnecessarily caused lot of delay."

Finally he said:

> "No formal application was made to the Chief Controller of Imports and Exports as it would have served no purpose unless clearance was obtained from the State Bank of Pakistan."

It is clear that there was a definite and concluded contract between the parties, the terms of which are largely set out in formal order form (Ex. 31A). There are two main points of difference in the construction put before us, i.e., where was delivery to be effected, and secondly, where was payment in Pakistani rupees to be made. The plaintiff's case is that the delivery was to be f.o.b. Mombasa" as is clearly stated in the order and all the correspondence. The defendant's case is that this was only inserted in the order for the purpose of indicating and fixing the price and that the real place of delivery was to be in Karachi and

payment was only to be made there in the month following after delivery. Mr. Mackie-Robertson, of counsel for the defendant, stressed the fact that the defendant had a specific right of rejection in Pakistan as supporting his claim that delivery was not made until the goods were delivered to the defendant in Karachi. With respect, I cannot agree. The terms of the contract are specific and clear and delivery was to be "f.o.b. Mombasa", and in my view the fact that the defendant has reserved a subsequent right of inspection and rejection on examination of the goods in Pakistan would not alter the specific agreement that delivery was to be made on board the ship at Mombasa. The goods after delivery on the ship were to be at the buyer's risk and it would be his responsibility to unload and take delivery of the goods from the ship in Pakistan.

The question as to the place of payment is more difficult. The learned trial judge found that it was part of the contract that the defendant would open letters of credit in Kenya, and pay in Kenya. With respect, I cannot agree that the contract provided for the opening of letters of credit. The plaintiff stipulated this in his letter of February 6, but the defendant's reply and order form were not an unconditional acceptance of this offer but, in fact, set out further conditions of payment, i.e., payment was to be made in Pakistani rupees and only during the month following that in which the goods were ordered. The contract is completely vague as to where or how payment is to be effected and the plaintiff's agent, Mr. Adam, who gave evidence, is also indefinite as to where payment would be effected. Usually payment would have to be made by the purchaser to the vendor in the vendor's country and it is the purchaser's duty to effect this. In this case, though, the payment is specifically stated as being one to be made in Pakistani rupees and I agree that the inference to be drawn from this is that the payment is to be made in Pakistan, the country in which Pakistani rupees would be legal tender, and in this case there were the further facts that the plaintiff had representatives in Pakistan who could receive payment, and he appears to have been unconcerned as to where payment would be effected. I am, therefore, of the view that it was agreed that payment should be effected in Pakistan.

It was agreed that the plaintiff should obtain the necessary export permit for the goods to leave Kenya and it was also expressly agreed that the defendant would obtain the necessary import licence. This, in any event, would follow due to the fact the defendant was to accept delivery at Mombasa. It would also, in my view, be the defendant's duty, as purchaser, to pay the purchase price and accordingly to obtain any permit or consent necessary for this to be done. I will consider this aspect further.

In considering what was the proper law to be applied the question arises – where was the contract made? It is submitted that this was made in Pakistan and this was the finding of the learned trial judge, but I do not agree that this is altogether correct. I agree with the submission that the defendant's counsel made in the lower court that the order addressed to the plaintiff in Kenya (Ex. 31 A) was in effect a counter offer as it contained new terms as to payment so that this contract was only really finally concluded by the plaintiff's letter of March 10, 1956, (Ex. 5) written at Nairobi in Kenya. The position then would be that the contract was concluded by correspondence written both in Kenya and Pakistan. The goods were in Kenya, the plaintiff lived in Kenya and delivery of the goods was to be made in Kenya. On the other hand, the defendant company was registered in and operated in Pakistan and payment was to be effected in Pakistani money.

I am of the view that it is not necessary for the determination of this case to decide what is the proper law of the whole contract as it appears to me that the parties intended that, in so far as the shipment and delivery of the goods were

concerned, these were to be carried out in accordance with the law of Kenya, but, in so far as it concerned the importation into Pakistan and the payment of the purchase price, this was to be governed by the law of Pakistan. The following passage from the judgment of Lord Esher in the Court of Appeal in England in the case of *Chatenay v. Brazilian Submarine Telegraph Company* (1) is relevant and would in my view be applicable to the circumstances of this case:

> "But the business sense of all business men has come to this conclusion, that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. Otherwise a very strange state of things would arise, for it is hardly conceivable that persons should enter into a contract to be carried out in a country contrary to the laws of that country. That is not to be taken to be the meaning of the parties, unless they take very particular care to enunciate such a strange conclusion. Therefore the law has said that if the contract is to be carried out in whole in another country, it is to be carried out wholly according to the law of that country, and that must have been the meaning of the parties. But if it is to be carried out partly in another country than that in which it is made, that part of it which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country."

In this connection counsel for the plaintiff has rightly conceded that even if the proper law of the contract is Kenya, the contract would be frustrated if the defendant could not obtain an import permit or permission to pay the purchase money to a non-resident of Pakistan provided that the defendant had taken all reasonable steps to obtain the permit and permission to pay and had been unable to do so.

In any event, though, I am of the view that, subject to the limitations that I have mentioned, the learned judge was correct in finding that the proper law of the contract was that of Kenya on the principles as set out by the Privy Council in the case of *Debono v. Benain & Co*. (2).

The two main questions, then, that arise in this appeal are:

(1) Did the Supreme Court of Kenya have the jurisdiction to try this case?

(2) If so, did the defendant establish the defence that the contract was frustrated?

The Supreme Court of Kenya is a superior court of record with unlimited original jurisdiction to hear and determine any civil or criminal proceeding that is properly and legally brought before the court. The question here then would be whether this suit and the parties thereto were properly brought before the court. It is agreed that this depends on the provisions of O. V, r. 21 of the Civil Procedure (Revised) Rules (*K*), which deals with service of the writ outside the jurisdiction. The relevant portion of this rule states:

> "21. Service out of . . . Kenya of a summons or notice or a summons may be allowed by the court whenever:
>
> (*e*) the suit is one brought to enforce, rescind, dissolve, annul, or otherwise affect a contract or to recover damages, or other relief for or in respect of the breach of a contract;
>
> (1) made within the colony; or
>
> (2) made by or through an agent trading or residing within the colony on behalf of a principal trading or residing out of the colony; or

> (3) by its terms or by its implications be governed by the Kenya Law; or is brought in respect of a breach committed within the colony, of a contract, wherever made, even though such a breach was preceded or accompanied by a breach out of the colony which rendered impossible the performance of the part of the contract which ought to have been performed within the colony."

I have here correctly set out this sub-rule as some confusion occurred in the reprint of the Civil Procedure (Revised) Rules in 1959. This rule is incorrectly printed in that the words "or is brought" were left out. It was then incorrectly amended by a corrigendum put in the *Gazette* of June 16, 1959, (Notice 2391) which for some reason then substituted the words "or by its legislation" for the words "or by its implications". But the matter appears to have been now set right by a further corrigendum published in the *Gazette* of May 24, 1960. (Notice 2397).

I am of the view that the refusal to accept delivery of the goods "f.o.b. Mombasa" and further, in any event, to neglect to provide a ship to carry away these goods from Mombasa, was clearly a breach of the contract committed in Kenya and accordingly the Supreme Court of Kenya had jurisdiction. Apart from this there is the fact that the court would have jurisdiction if, as I have stated, the proper law of the contract was that of Kenya as then this would be a contract which, by its terms or by its implications, was to be governed by Kenya law.

There remains the defence that the contract was frustrated. This is covered by the fourth ground of appeal which states:

> "The learned trial judge erred in holding that the contract was not frustrated under the law applicable thereto and in failing to hold (*a*) that the proper law of the contract was the law of Pakistan and (*b*) that, having regard to the terms of the Foreign Exchange Regulation Act, 1947, of Pakistan, the contract was unenforceable."

I would refer to the Foreign Exchange Regulation Act, 1947, which is in evidence as Ex. 30. The relevant sections are 5 and 21. Section 5 is the section restricting payments and states, *inter alia*:

> "5.(1) Save as may be provided in and in accordance with any general or special exemption from the provisions of this sub-section which may be granted conditionally or unconditionally by (the State Bank), no person in, or resident in, (the Provinces and the Capital of the Federation) shall:
>
> (*a*) make any payment to or for the credit of any person resident (outside Pakistan);"

and sub-ss. (1) and (2) of s. 21 state:

> "(1) No person shall enter into any contract or agreement which would directly or indirectly evade or avoid in any way the operation of any provision of this Act or of any rule, direction or order made thereunder.
>
> (2) Any provision of, or having effect under, this Act that a thing shall not be done without the permission of the Central Government or (the State Bank), shall not render invalid any agreement by any person to do that thing, if it is a term of the agreement that that thing shall not be done unless permission is granted by the Central Government or (the State Bank), as the case may be; and it shall be an implied term of every contract governed by the law of any part of (the Provinces and the Capital of the Federation) that anything agreed to be done by any term of that contract which is prohibited to be done by or under any of the provisions of this Act except with the permission of the Central Government or (the State Bank) shall not be done unless such permission is granted."

It has not been submitted that the provisions of sub-s. (1) of s. 21 apply to this case and that this contract, directly or indirectly, evades or avoids the Act but I agree that the provisions of sub-s. (2) would apply and that it is an implied term of this contract that payment should not be made except with the permission of the Central Government or the State Bank.

The defendant, therefore, had to:

(*a*) Obtain an import permit or licence and

(*b*) Obtain permission to pay the purchase price to the plaintiff – a non-resident of Pakistan.

The first undertaking was a direct term of the contract and the second was an implied term. There is no question here of these being absolute undertakings and the question is whether the defendant has taken all reasonable and necessary steps to obtain the licence and the permit to pay.

I would refer here to the judgment of the learned judge where he states:

> "It is obvious to my mind (see Mr. Farooqui's evidence and Mr. Fancy's own admissions) that the defendants had taken no steps whatsoever to try and obtain or apply for an import licence from the Chief Controller of Imports and Exports."

Then later the judge referred to the judgments of the Court of Appeal in England in the case of *Brauer & Co. v. James Clark* (3) and in particular to the principle laid down by Lord Denning where he stated ([1952] 2 All E.R. at p. 501):

> "It is, I think, clearly the duty of the sellers to apply for an export licence and to use due diligence and take all reasonable steps to get it."

The learned judge applied this principle to the purchaser's duty here to obtain the import licence and found:

> "It is admitted, as I said, that defendants never did take the necessary step of applying to the Chief Controller of Imports and Exports a step which they were clearly bound to take under the contract.
>
> In my view, therefore, the plea of frustration is not available to the defendants."

Counsel for the appellants submitted that this question of its being the duty of the purchaser to obtain the import licence was not in the pleadings, but I agree with respondent's counsel that this was not necessary as this arose as an answer to the defence of frustration.

The respondent submitted that he had, in fact, acted with due diligence and that as the State Bank had refused to approve payment to the plaintiff, there was no necessity for him to apply for the import licence which was bound, in the circumstances, to be refused. In this respect we have been referred to the judgment of Sellers, J. in the *Societe d' Avances Commerciales* (*London*) *Ltd. v. A. Besse & Co.* (*London*) *Ltd*. (4) where he referred to the judgment of Devlin J. in *Charles H. Windschuegl Ltd. v. Alexander Pickering & Co. Ltd*. (5) and said ([1952] 1 T.L.R. at p. 646):

> "And in another passage the judge a little later said, after reviewing the evidence:
>
> > 'That is enough to destroy the defendant's case. It is not for the plaintiffs to prove that it would have been granted in sufficient time; it is for the defendants to satisfy me that it was no use their attempting really to make the application, because it was foredoomed to failure.
> >
> > That is a clear statement of the position which arises where you get a finding that sellers have not taken all reasonable and necessary steps to obtain the export licence, and the sellers must discharge that high burden

> in spite of their contention that the finding is immaterial because the oral evidence and the letters show that they would have failed to get a licence . . .' "

The onus is on the defendant to establish that the import licence would not be issued and that the payment would not be approved. In this respect I would again refer here to the evidence of his witness, Mr. Farooqui, of the State Bank of Pakistan. He says:

> ". . . Against an import licence remittance of foreign exchange could be made. It appears from Ex. 33 that no such import licence was produced in this case. . . ."

and then:

> ". . . In spite of the clause in Ex. 31 that payment would be made in Pakistan rupees, had the plaintiff produced an import licence he would have got the permission to remit the foreign Exchange."

and lastly:

> ". . . The import licence is issued by the Chief Controller of Import and Exports and it invariably carries the right to remittance of foreign exchange."

It appears, therefore, that the State Bank would have approved of the payment to a non-resident of Pakistan if the import licence had been issued. On the evidence the defendant made no attempt to apply for this licence, and he has not established that the licence would not have been granted if he did apply.

The defendant endeavoured to say that the arrangement was for a local sale in Pakistan and that the fact that payment would be made in Pakistan meant that no foreign exchange was intended or necessary. The defence is very vague in this respect and this defence has not been established or accepted by the trial judge.

In my view the defendant has not, on the evidence, established that he took all reasonable and necessary steps to obtain the import licence or permit or to obtain permission for payment to the plaintiff of the purchase price and the learned trial judge was fully justified and correct in his finding that the defence of frustration had not been established.

In my view this appeal should be dismissed with costs to the respondent.

This is a case in which I would grant a certificate for two counsel.

Newbold Ag V-P: I have had the advantage of reading in draft the judgment of Duffus, J.A. in which the facts are fully stated, and I agree with him that this appeal should be dismissed.

The two main issues which arise in this appeal are first, whether the Supreme Court had jurisdiction and, secondly, whether the contract was frustrated. As regards the first of these issues the defendant was out of the jurisdiction and was neither domiciled nor ordinarily resident in Kenya. In such a case the courts of Kenya will not assume jurisdiction in relation to any matter arising out of contract unless the circumstances fall within the provisions of O. V, r. 21 of the Civil Procedure (Revised) Rules, 1948 (*K*). This rule details the circumstances in which service of a summons or a notice of summons may be allowed out of the jurisdiction in order to give effect to a jurisdiction which the courts have assumed. In the case of a contract the courts of Kenya will assume jurisdiction, *inter alia*, if the contract is made in Kenya or if the proper law of the contract is Kenya law or if a breach is committed within Kenya. While it is not perfectly clear where this contract was made, I shall assume that it was made in Pakistan. If, therefore, the Kenya courts are to have jurisdiction in this case, either the proper law of the contract must be Kenya law or a breach of the contract must have been committed in Kenya.

The various factors in this case, as is so often the position, point in different ways for the purpose of determining what is the proper law of the contract. The test to be applied is, in my view, the system of law by reference to which the contract was made, or that with which the transaction has its closest and most real connection. Applying that test to the facts of this case, on the one hand the buyer resides in Pakistan, negotiations took place and the contract was made in Pakistan, the place of inspection would, for all practical purposes, be Pakistan, and payment was to be made in Pakistani rupees. On the other hand, the seller resided in Kenya, the goods were in Kenya, delivery was to be made in Kenya, the language of the contract was English and the terms used in the contract documents were terms which, with one irrelevant exception, were familiar terms in English contracts of sale. Weighing these two conflicting aspects I have, with some hesitation, come to the conclusion that the proper law of the contract is the law of Kenya. The two elements which have been persuasive in forming my opinion are that delivery by the seller was to be made in Kenya and the contract was not only in English but used terms which are familiar terms in English contracts. As regards the question whether a breach of the contract was committed within Kenya, I am quite satisfied that, as the seller had to give delivery in Mombasa, f.o.b., it was the duty of the buyer – a duty which, in fact, he at first accepted – to make arrangements for a ship to take the goods. As he failed to do so, he committed a breach within the jurisdiction. For these reasons I am satisfied that the Kenya court had jurisdiction.

Turning now to the second issue, that is, whether the contract was frustrated, the rights and obligations of the parties to the contract, and the determination of whether the contract has been frustrated are to be determined by the proper law of the contract. As I have already stated, I am satisfied that the proper law of the contract is that of Kenya. This means that the nature and extent of the obligations of each party to the contract, and whether these obligations have been performed, are to be determined by Kenya law. It does not mean, however, that no regard is to be paid to the law of Pakistan. If, for example, the law of Pakistan affects the mode and manner in which a party carries out his obligations in Pakistan, the Kenya law, which is the proper law of the contract, will have regard to the Pakistan law for that purpose. In other words, on the facts of this case, the nature of the obligation of the buyer to accept (subject to any right of rejection) and to pay for the goods and whether the obligation has been satisfied are matters determined by Kenya law but, as the obligation to pay is to be discharged in Pakistan, the mode in which it is to be carried out is determined by Pakistan law. The law of Pakistan requires an import licence and approval to the use of Pakistani rupees. Thus the Kenya law will acknowledge the fact that these necessary permits have to be obtained. The Kenya law will also acknowledge that the contract is frustrated if, in certain circumstances, these necessary permits have not been obtained; but the Kenya law will determine the extent of the duty on the buyer to obtain these necessary permits and whether he has fulfilled that duty. If, in the circumstances of this case, the duty on the buyer was to take all reasonable steps to obtain the necessary permits and if, according to Kenya law, he has failed to take such reasonable steps, then, according to Kenya law, the contract has not been frustrated. I am satisfied that under this contract there was a duty upon the buyer to take all reasonable steps to obtain these permits. In fact the permits were not obtained and the buyer has put forward as an excuse for the failure to obtain them the fact that if he had made the necessary applications prior to repudiating the contract he would not have obtained them. Where a person is under a duty to do something and he fails to do it and he puts forward as an excuse for such failure the fact that if he had sought to do it he would not, for reasons beyond his control, have succeeded, then a heavy onus is cast on him to explain his failure. On the facts

of this case the buyer had failed to apply for the necessary permits and the only way in which he can excuse that failure is if he can satisfy the court that any application for such permits would have been "foredoomed to failure" – to use an expression first used by Devlin, J. in *Windschuegl Ltd. v. Pickering & Co., Ltd.* (5). On the facts of this case the judge has found that the buyer did not take all reasonable steps to obtain the permits nor, as I understand the judgment, was the judge satisfied that had he done so the applications would have been foredoomed to failure. Accordingly, I am of the view that the buyer has not established that the contract was frustrated.

For these reasons I agree with Duffus, J.A. that the appeal should be dismissed with costs and that a certificate for two counsel should be granted. As the members of the court are in agreement with this, it is so ordered.

Spry JA: I have had the advantage of reading the judgments of Duffus, J.A., and of the Acting Vice-President and I agree that this appeal should be dismissed. I would, however, add some observations on the questions of jurisdiction and the proper law of the contract.

The first ground of appeal was that the learned trial judge erred in law in failing to dismiss the suit for lack of jurisdiction. Counsel for the appellant submitted that the Supreme Court had been in error in allowing service out of the jurisdiction on the appellant company, presumably under O. V, r. 21, of the Civil Procedure (Revised) Rules, 1948 (K). He argued that the contract had not been made in Kenya nor was it by its terms or by its implications to be governed by Kenya law, so that neither para. (*e*) (1) nor (*e*) (3) of r. 21 could apply and no other paragraph was appropriate. He submitted further that there had been no breach of the contract committed within Kenya. If there was no jurisdiction to order service out of Kenya, the entire proceedings were bad for lack of jurisdiction.

In *Motibhai v. King & Co.* (6) Forbes, V.-P. re-iterated the view he had expressed in *Riddlesbarger v. Robson* (7):

> ". . . that the jurisdiction over persons outside Kenya conferred upon the Supreme Court of Kenya by the Kenya Colony Order-in-Council, 1921, was, subject to any local enactment restricting such jurisdiction, a jurisdiction similar to that enjoyed by the High Court in England under the common law."

That jurisdiction is limited by O. V, r. 21, which defines the circumstances in which service outside the jurisdiction may be allowed. The first that is relevant is contained in para. (*e*) (1) and relates to proceedings on a contract made within Kenya. Counsel for the appellant submitted that in the present case the letter of February 6, 1956 (Ex. 3) constituted the offer and the letter of February 14, 1956, (Ex. 4) and the order form of the same date (Ex. 31A) the acceptance which together constituted the contract, and as these latter were posted in Karachi, the contract must be regarded as having been made in Pakistan. Alternatively, the order form might be regarded as a mere confirmation of an agreement made verbally. With respect, I cannot agree. The letter of February 6, 1956, included the sentences:

> "Order for the entire quantity or the part of it will be accepted against firm order. . . . All the above are offered subject to being unsold."

Those sentences seem to me to indicate clearly that the letter was not an offer but an invitation to treat. If that is so, then it is the letter of February 14, 1956 and the order form that constitute the offer and it is the respondent's letter of March 10, 1956, (Ex. 5) that constitutes the acceptance. Since the last-mentioned letter was posted in Nairobi, I think that technically the contract was made in Kenya.

Paragraph (*e*) (3) of r. 21 relates to proceedings on a contract which is

> ". . . by its terms or by its implications to be governed by Kenya law"

and it was on this that the main argument developed.

Counsel for the appellant relied on three propositions in arguing that the proper law of the contract was that of Kenya. First, he submitted that the contract is to be regarded as having been made in Pakistan. I have already given my reasons for rejecting that submission. Secondly, the purchase price was to be paid in Pakistani rupees, and counsel argued that this implied that the money was to be paid in Pakistan, that is to say in the country where that currency is legal tender. Thirdly, it was clear that the right of rejection was exercisable in Pakistan.

Counsel for the appellants conceded that there were two factors which pointed to Kenya as the proper law of the contract, first that the goods were at Mombasa and secondly that the contract was for delivery f.o.b. Mombasa. He argued that little weight should be given to the first. As regards the second, he submitted that this was not an ordinary f.o.b. contract, and that the reference to f.o.b. was only intended to relieve the vendor of any obligation regarding freight charges. I do not propose to deal with that argument in any detail, as I can find nothing in the evidence to support it. In my view, when parties to a contract use technical terms of commercial law, they must be presumed to use them in the usual commercial sense, unless there is very clear evidence to the contrary.

There is nothing in the evidence to suggest that the parties ever applied their minds to the question of the law to govern their contract. That being so, the proper law is, I think, that

> "with which the transaction has its closest and most real connexion"

(per Lord Simonds in *Bonython v. Commonwealth of Australia* (1951) A.C. at p. 219), and to determine that, it is necessary to take into account all relevant circumstances. In the present case, these appear to be, first, the place where the contract was made; secondly, the place where the goods were at the time of the contract; thirdly, the place where delivery was to be made; fourthly, the place where payment was to be made; and, fifthly, the currency in which payment was to be made.

As I have said, I think the contract was, technically, made in Kenya but I give little weight to that. The negotiations took place in Pakistan and the letter which I regard as constituting the offer was written from there. In such circumstances, it would be quite unrealistic to attach any great significance to the fact that a particular letter posted in Kenya, rather than some other letter in the exchange of correspondence, is taken to be that which established the contractual relationship. (See *The Assunzione* (8)).

The goods were unquestionably in Mombasa at the time when the contract was concluded, and since the contract was f.o.b., that was also the place where delivery was to be effected.

The contract was silent as to the place where the purchase price was to be paid but did stipulate that it was to be in Pakistani rupees. That the currency to be used is a relevant consideration appears from *The Assunzione* (8). On the facts of this case, it does, I think, also raise an inference that payment was to be effected in Pakistan, but in considering what weight is to be given to that inference it may be noted that the English courts are generally reluctant to draw the converse inference (see *National Bank of Australasia Ltd. v. Scottish Union and National Insurance Co. Ltd.* (9) *and National Mutual Life Association v. A.-G. for New Zealand* (10).

In this connection, it may be noted that the respondent indicated in his letter of February 6, 1956, that

he was willing to accept payment either in East African

shillings or in Pakistani rupees. The fact that the appellant company elected to use the latter may well, as one of the respondent's witnesses said, have been due to a wish to avoid possible loss through exchange fluctuations, rather than any consideration of exchange control. If that were so, the choice would have no bearing on the question of the proper law of the contract.

I do not attach any great significance to the fact that the right of rejection was exercisable in Pakistan or that payment was to be made "during the month following that in which the goods ordered have been delivered", both matters to which counsel for the appellants referred.

After weighing all these considerations, I am, on balance, of the opinion that the proper law of the contract was Kenya law.

Finally, para. (*e*) of r. 21 relates to proceedings on a contract in respect of which a breach has been committed in Kenya. Appellant's counsel sought to argue that whether or not the appellant company had been in breach of the contract in Pakistan, they had committed no breach in Kenya. With respect, I am firmly of the opinion that there was a breach in Kenya of the contract. Under the terms of the contract, delivery was to be f.o.b. Mombasa and when the appellant company repudiated the contract, its refusal to accept delivery must, in my view, be regarded as a breach in Kenya. It is immaterial that the letter of repudiation may also have constituted a breach in Pakistan.

For all these reasons, I am of the opinion that it was proper to allow service on the appellant company outside the jurisdiction.

As regards the question of frustration, I need only say that I am in full agreement with my learned brethren and have nothing to add.

Appeal dismissed.

For the appellant:
JA Mackie-Robertson, QC and *JN Desai*
Hamilton, Harrison & Matthews, Nairobi

For the respondent:
Bryan O'Donovan, QC and *SM Akram*
Akram & Esmail, Nairobi

Allanson Njugi v British India General Insurance Co Ltd
[1965] 1 EA 58 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	15 September 1964
Case Number:	66/1964
Before:	Farrell J
Sourced by:	LawAfrica

[1] Insurance – Motor insurance – Estoppel – Whether insured estopped from denying cancellation of policy having signed a new proposal form.

[2] Insurance – Motor insurance – Policy obtained through one N. – N. sub-sub-agent of insurance company – Policy issued for twelve months – Premium payable by instalments to N. – Policy and certificate of insurance kept by N. – Cover notes issued from time to time by N. – Letter from N. to insured threatening cancellation of policy if last instalment not paid within seven days – Payment not received – Instructions to insurance company to cancel policy – Policy cancelled – Prior to cancellation cheque for instalment received – Request to insurance company to reinstate policy – Request refused – Further efforts made by N. to reinstate policy – Fresh proposal form signed by insured in blank at request of N. – Insured not informed by N. of insurance company's refusal – Insured not informed for what period new insurance was to be taken out – Accident to vehicle insured before proposal form reached insurance company – Claim under policy as originally issued.

Editor's Summary

The defendant insurance company operated in Kenya through its chief agents and the chief agents had a number of sub-agents, one of which was a firm called U.M.C. U.M.C. in turn had as agent one N. and through him the plaintiff obtained a motor insurance policy with the defendant. In the chief agent's office there was a representative who was referred to in the correspondence as the "branch manager" of the defendant. The policy was issued for a period of twelve months to October 16, 1963. The premium was Shs. 2,285/75 of which Shs. 600/- was paid forthwith and the balance was to be paid by three instalments, two of Shs. 600/- and one of Shs. 485/75. The two instalments of Shs. 600/- each were paid but on April 4, 1963, N. wrote a registered letter to the plaintiff threatening to cancel the policy if the sum of Shs. 487/75 was not paid within seven days. In the meantime N. did not hand over the policy or certificate of insurance, but issued cover notes from time to time as they were requested by the plaintiff. As no payment was received within the specified time N. on April 16, 1963, returned the policy and certificate of insurance to U.M.C. with a request to cancel the policy. U.M.C. in turn passed this request to the "branch manager" and the policy was cancelled by an endorsement to the policy dated May 15, and expressed to take effect from April 15. The plaintiff had called on N. on April 23, and had given him a post-dated cheque for the balance of the premium and the cheque was duly paid on May 17. On receipt of the cheque N. requested the "branch manager" through U.M.C. not to cancel the policy and to reinstate it. On May 18 this request was refused and U.M.C. was informed that the policy had already been cancelled. Nevertheless, efforts were made by N. and U.M.C. to have the policy reinstated and on June 26 the "branch manager" suggested that a fresh proposal should be submitted. N., believing that the policy would be reinstated, issued a cover note in June and in July a further cover note was issued by U.M.C., who sent a copy to the "branch manager" and informed him that they were arranging to obtain the completed proposal form. On August 24 N. asked the plaintiff to sign a blank proposal form and he did so. The plaintiff was not informed that the

defendant had refused to reinstate the policy or for what period the new insurance was to be taken out. On August 30, the vehicle was involved in an accident and the plaintiff submitted a claim under the policy which was repudiated. The plaintiff then filed an action under the policy claiming Shs. 15,000/- in respect of damage to the vehicle and a declaration that the defendant was not entitled to repudiate liability in respect of pending claims by third parties. The defendant's defence was that the policy was cancelled with effect from April 16, under condition 7 of the policy which provided that the defendant might cancel the policy by sending seven days' notice by registered letter to the plaintiff, and that the plaintiff, having signed a fresh proposal on August 24, was estopped from denying the cancellation of the original policy.

Held –

(i) the letter of April 4, was not a notice of cancellation as contemplated by the parties when they agreed to the condition because the letter in its terms was conditional when it should have been clear and unambiguous, and because it was not within the authority of N. to cancel the policy;

(ii) the letter was in no sense a cancellation by notice in accordance with condition 7 of the policy and should be construed as a warning rather than a notice intended to have operative effect;

(iii) N. had no authority, express or implied, to procure the cancellation of the policy on behalf of the plaintiff and in purporting to cancel it the defendants did not comply with the condition by giving the requisite notice and accordingly the cancellation was ineffective;

(iv) the alleged estoppel had not been pleaded with sufficient particularity to entitle the defendants to rely on it, and in any case no valid estoppel had been established by the evidence.

Judgment for the plaintiff as prayed.

Cases referred to in judgment

(1) *Ruby Steamship Corporation v. Commercial Union Assurance Co*. (1933), 46 Lloyd's Rep. 265.

(2) *Etchells, Congdon and Muir Ltd. v. Eagle Star and British Dominions Insurance Co. Ltd.* (1928), 72 Sol. Jo. 243.

Judgment

Farrell J: This suit arises out of an accident to a vehicle owned by the plaintiff and insured by him with the defendant company. It is not disputed that the accident took place within the period for which the policy was originally issued; but the defendants claim that the policy was validly cancelled before the accident took place. The plaintiff now claims under the policy a sum of Shs. 15,000/- in respect of damage to his vehicle and a declaration that the defendants are not entitled to repudiate liability in respect of pending claims by third parties.

The facts are somewhat complex. The defendants operate in this country through East African Underwriters Ltd., as their chief agents. In that organisation they have a representative who is referred to in the correspondence as the branch manager of the defendant company. The chief agents have a number of sub-agents, one of which was a firm called the United Marketing Company, to which I shall refer as U.M.C. U.M.C. in turn had as agent one Nehra, trading under the name of Phakey & Co. Nehra was thus

a sub-sub-agent of the defendant company.

The plaintiff is an African who has for many years been engaged in a transport business, in which he employed two or more vehicles, one of which was the

passenger omnibus, registration number KGM. 66, with which the suit is concerned. In October, 1962, he approached Nehra with a view to insuring this vehicle and signed a proposal form for a policy with the defendant company for the period of 12 months from October 17, 1962, to October 16, 1963. The premium was Shs. 2,285/75 of which Shs. 600/- was paid forthwith and the balance was to be paid by three instalments, two of Shs. 600/- and one of Shs. 485/75. A policy was issued five days later, on October 22, 1962. There is nothing unusual in the terms of the policy, and it is only necessary to mention one condition, No. 7, which reads as follows:

> "The company may cancel this policy by sending seven days' notice by registered letter to the Insured at his last known address and in such event will return to the Insured the premium paid less the pro rata portion thereof for the period the policy has been in force or the policy may be cancelled at any time by the Insured on seven day's notice and (provided no claim has arisen during the then current Period of Insurance) the Insured shall be entitled to a return of premium less premium at the company's short period rates for the period the policy has been in force."

It is not clear on what date the instalments of premium were due, but two instalments each of Shs. 600/- were paid by cheque, one on November 19, and the second on December 17, 1962. The final instalment then remained unpaid for some months. In the meantime Nehra did not hand over the policy or certificate of insurance, but issued cover notes from time to time as they were requested by the plaintiff.

On April 4, 1963, when the policy had been in force for nearly 6 months, Nehra sent a notice to the plaintiff in the following terms:

> "Dear Sir,
>
> *Motor Policy No*. 720851/*OC*.
>
> We very much regret to have to inform you that a sum of Shs. 486/75 being the premium due on 17.10.62 in respect of the above-named policy still remains unpaid despite previous reminders.
>
> We are, therefore, compelled to notify you that if your cheque for the said amount is not received within the course of the next seven days from the date hereof, the said policy will be cancelled.
>
> Yours faithfully,
>
> for Phakey & Co."

This notice is on a printed form and was sent by registered post.

No payment was forthcoming within the specified time, and on April 16, 1963, Nehra returned the policy and certificate of insurance to his immediate principals, U.M.C., with a request to cancel the policy.

U.M.C. in turn passed this request with the certificate of insurance to the branch manager of the defendant company on April 18.

On April 23, the plaintiff called on Nehra, and gave him a cheque to cover the balance of the premium due on the policy. The cheque was post-dated to May 10, 1963, and in fact, owing to a further request for time by the plaintiff, was not presented until May 17. On presentation the cheque was duly paid.

On receipt of this cheque Nehra immediately informed U.M.C., that if the policy had not been already cancelled, it should not be cancelled. There appears to have been some delay in dealing with the matter, but on May 6, U.M.C., wrote to the defendants' branch manager, requesting him to reinstate the policy and return the certificate of insurance. There is some reason to doubt whether this letter was despatched on the date shown, as it appears not to have been received until about May 18, when the policy had

already been cancelled.

The cancellation was effected by an endorsement to the policy dated May 15, 1963, and expressed to take effect from April 15, 1963.

In answer to the request for reinstatement of the policy, the branch manager replied to U.M.C., on May 18, informing them that the policy had already been cancelled and regretting that it could not now be reinstated. Nevertheless, efforts were made by Nehra and U.M.C., to have the policy reinstated, and according to Dave, a clerk employed by U.M.C., Durgesh the branch manager agreed that it should be reinstated. This is denied by Durgesh, who in a letter to U.M.C., dated June 26, suggested that a fresh proposal should be submitted. It seems clear, however, that Nehra believed that the policy would be reinstated, and on June 6, 1963, he issued a cover note to the plaintiff (Ex. 6) in which reference is made to the number of the policy. On July 16, a further cover note was issued, this time by U.M.C., who sent a copy to the branch manager and informed him that they were arranging to obtain the completed proposal form. The defendants through their branch manager protested against the issue of this cover note before the proposal form had been completed and threatened to cancel it if the proposal was not received within seven days.

On August 24, the plaintiff called on Nehra in response to repeated requests, and Nehra asked him to sign a fresh proposal. The plaintiff says that he signed the form in blank, and Nehra does not deny that he may have done so. The plaintiff also says that he was never informed of the defendants' refusal to reinstate the policy or of the reason why he was being asked to make a fresh proposal. He thought that there might have been a mistake in the first proposal he had completed. Nehra agrees that through a "mistake" he did not inform the plaintiff of the period for which the new insurance was to be taken out, and explains that he was still fighting to have the policy reinstated. I accept the evidence of the plaintiff as to his actual state of mind at the time when he signed the fresh proposal form.

On August 30, 1963, before the defendants had received the fresh proposal, the accident happened which gave rise to these proceedings. The plaintiff immediately submitted a claim through Nehra, which was passed to U.M.C., and forwarded by them to the branch manager of the defendant company who repudiated the claim.

To complete the narrative of facts, the agency of U.M.C., was terminated on August 31, 1963, but notwithstanding this the managing director of U.M.C., in response to a telephoned request issued a certificate on September 2, 1963, confirming that the vehicle was insured with the defendant company from October 17, 1962, to October 16, 1963.

On these facts the plaintiff claims under the policy as originally issued. The defendant pleads that the policy was cancelled with effect from April 16, 1963, and that the plaintiff having signed a fresh proposal on August 24, 1963, is estopped from denying the cancellation of the original policy. The plaintiff in his reply alleges in turn that the defendant is estopped from denying that the policy continued in force by virtue of having issued cover notes and accepted the balance of the premium after the date of the alleged cancellation. The first issue is whether the policy was ever validly cancelled. If it was, the only issue remaining is whether the defendants are estopped from relying on the cancellation by their subsequent conduct. If it was not validly cancelled, the remaining issue is whether the plaintiff is estopped from denying its cancellation by having signed a fresh proposal form.

It is, perhaps, worth pointing that, while it was the plaintiff's delay in paying the last instalment of his premium that led up to the purported cancellation of the policy, the defendants do not claim to have cancelled the policy by reason

of non-payment of the premium. In this connection the following passage from Shawcross on Motor Insurance (2nd Edn.) p. 472 is apposite:

> "The mere non-payment of premium, unless amounting by the express provisions of the policy to the breach of a condition precedent, does not affect the validity of the policy. Although the policy as a rule expressly provides that pre-payment of premium is a condition of the insurers' liability, or an event without which the policy is inoperative, yet if they issue a policy under seal reciting payment of the premium, or if by their conduct they relieve the assured from the necessity of compliance with such term, liability may, nevertheless, accrue to the insurers without the premium having been paid. The premium must, save in these exceptional cases, be paid to the insurers or their authorised agent and in the proper form."

There is no condition in the policy itself requiring full payment of the premium as a condition precedent. There is, however, on the proposal form, a note to the effect that "no insurance is in force until the premium or a deposit has been paid", and as the proposal is deemed to be incorporated in the contract of insurance, this term becomes a condition of the policy. But the defendants do not deny that the policy ever became operative, nor do they seek to rely on this condition as a ground for cancellation. In any case the payment by the plaintiff of Shs. 600/- on the date of the original proposal would presumably amount to a deposit.

In view of this, it is immaterial whether the final instalment of the premium was received before or after the date of cancellation. In fact it appears to have been received the day after the cancellation, as the receipt is dated May 16, 1963, and the endorsement of cancellation is dated May 15, 1963; but nothing turns on this.

The defendants rely on condition 7 of the policy as giving them a right to cancel the policy at any time without any reason being assigned. The condition has already been set out, and is in common form. Where cancellation is by the insurers, Shawcross (loc. cit.) at p. 602 remarks:

> "The mode of cancellation provided for is simple and needs little comment. Notice must be in writing, sent by registered letter to the assured's last known address, and must be given seven days before the cancellation is to become effective."

The only notice given to the plaintiff, which could in any way be construed as falling within the terms of the condition was the letter of Nehra dated April 4, 1963, which has already been set out. This was sent by registered post and purported to give seven days notice of cancellation, and it is reasonable to suppose that it was intended by Nehra to be sent in compliance with the condition. But it does not appear to me that this is in any way the sort of notice of cancellation which was contemplated by the parties when they agreed to the condition. In the first place it is in its terms conditional and in my view a notice of cancellation, like a notice to quit, must be clear and unambiguous. Nor is it within the ordinary authority of an agent or sub-agent to cancel a policy. If in purporting to cancel the policy Nehra was acting as agent for the defendant company he was acting in excess of his authority, as he evidently realised when he later requested the defendant company to cancel the policy. If the notice of April 4 was effective to cancel the policy, such a request was unnecessary. Nor can it be said that the defendant company ratified his unauthorised act, since they have purported to cancel the policy with effect from April 16, 1963, whereas the notice if it was to be effective as a cancellation, must have taken effect from April 11, 1963. The condition provides that the defendant company may cancel the policy "by sending seven days' notice", and it must be strictly construed. I hold that the letter dated April 4 was in no sense a cancellation by

notice in accordance with the condition, and must be construed as a warning rather than a notice intended to have operative effect.

Faced by this difficulty, the defendants are driven to argue that in requesting cancellation of the policy, Nehra was acting as agent for the plaintiff. This was the assumption of the branch manager, Durgesh (D.W. 1), who said that if a request for cancellation came from an agent, the defendants would assume it came from the insured. Where cancellation is requested by the insured, seven days' notice is equally stipulated by the condition, but in that case it is open to the company to waive compliance with the requirement, and according to Durgesh this is frequently done. But whatever Durgesh may have assumed, it appears to me far-fetched to suggest that Nehra in requesting cancellation was in any sense acting as agent for the plaintiff. In the first place, the plaintiff did not want the policy cancelled; he had asked not for it to be cancelled; and if Nehra had written "I am authorised by the insured to ask for the cancellation of the policy" it would have been manifestly untrue. In the second place, it is clear that Nehra was seeking to protect his own interests. Under the system of accounting adopted by the defendants in relation to their agents and sub-agents, it was the sub-agent (or sub-sub-agent) dealing directly with the client who was accountable for any amount of premium not recovered. It was accordingly to the interest of Nehra to secure full payment of the premium, or in default to procure cancellation of the policy so that a refund of premium might be credited to him and he should not become liable for payment of an amount which he had never received.

A parallel situation was considered by the English Court of Appeal in *Ruby Steamship Corporation v. Commercial Union Assurance Company* (1). The facts of that case were complex, involving the relations between American brokers, English brokers and an English insurance company. It is sufficient to cite the following passage from the judgment of Scrutton, L.J., ((1933) 46 Lloyd's Rep. at p. 275):

> "The defendants' chief defence is that under the circumstances, by the law of New York (the American brokers) had power to relieve themselves from further personal liability for premiums which (the assured) would not pay, by cancelling the policy with the assent of the underwriters, but without the consent of (the assured), who had not paid the premiums. This is a question of New York law."

The learned Lord Justice, then went on to decide, as a result of certain decisions of the American courts and expert evidence on American law, that the American brokers were justified in cancelling the policies. But it is clear from his judgment that, if English law had applied, the decision on this point would have been different; and in an earlier passage (ibid at p. 272) he referred to *Xenos v. Wickham* (2) in which it was held by Lord Cranworth that "it is no part of the ordinary duty or power of a broker to cancel agreements once validly and completely entered into".

It must, of course, not be overlooked that both the cases cited were concerned with marine insurance brokers, whose position vis-a-vis the assured is not in all respects the same as that of an insurance agent. But as the broker is *prima facie* the agent of the assured, whereas the agent is, except in special circumstances (e.g. when he fills up the proposal form for the insured), the agent of the insurer, it might be expected that authority to cancel the policy would be more readily implied in the case of the broker than of the agent. The cases establish that the broker has no such implied authority, and it would appear *a fortiori* that neither has the agent.

For the reasons given I find that Nehra had no authority, express or implied to procure the cancellation of the policy on behalf of the plaintiff, and that in

purporting to cancel it the defendant company did not comply with the condition by giving the requisite notice. The cancellation was accordingly ineffective.

The next question for consideration is whether, notwithstanding that the cancellation was ineffective, the plaintiff is, as the defendants allege, estopped from denying its cancellation. The plea of estoppel is raised in para. 3 of the defence, which reads as follows:

> "Well-knowing that the said policy was cancelled the plaintiff on 24.8.1963 signed a proposal form in respect of his vehicle KOM. 66 requesting a comprehensive insurance from the defendant in respect of the above vehicle for a period of twelve months from 16.7.1963. The defendant did not agree to the said proposal and has not issued to the defendant a policy of insurance in respect of the said vehicle as requested by the plaintiff in the said proposal form or at all. At all material times the Certificate of Insurance as defined by s. 7 of the Insurance (Motor Vehicle Third Party Risks) Act (Cap. 405) Laws of Kenya issued by the defendant to the plaintiff in respect of the said policy has been to the knowledge of the plaintiff in possession of the defendant due to the cancellation of the said policy. In the premises the defendant will urge that the plaintiff is estopped from denying the cancellation of the said policy."

It is by no means clear what exactly is meant by this plea of estoppel. It appears to be based on two separate averments:

(1) that the plaintiff made a fresh proposal in July:

(2) that the certificate of insurance to be knowledge of the plaintiff remained in the possession of the insurer "due to the cancellation of the said policy".

It is difficult to see how the second point could in any way amount to an estoppel, nor was it pressed in argument before me, presumably because the evidence showed that the certificate of insurance remained in the hands of the defendants' agents throughout and long before any question of cancellation arose, and that the plaintiff had not in any way acquiesced in its so remaining.

In what sense is it alleged that the making of a fresh proposal by the plaintiff amounted to an estoppel? The most concise (though not, perhaps, the most authoritative) statement of the requirements of estoppel is found in Shawcross (*loc. cit.*) at p. 691:

> "It (i.e. estoppel) arises where:
>
> (1) The party against whom it is set up has by statement or conduct made a representation as to a matter of fact with the actual or apparent intention that the party to whom it is made shall act upon it;
>
> (2) The party to whom the representation is made is induced to act, and does act upon it;
>
> (3) The party so induced and acting acts to his detriment."

The pleading does not indicate what representation the plaintiff is alleged to have made by completing a fresh proposal. If it was a representation that the policy had been cancelled, that was a fact already asserted by the defendants without relying in any way on any representation by the plaintiff. If it was a representation that the plaintiff accepted the cancellation as valid, the defendants must go on to plead and prove that the defendants acted upon it to their detriment. There is nothing in the pleading to this effect, nor is there any evidence that the defendants in reliance on the supposed representation in any way altered their position for the worse. The pleading, in fact, appears to emphasise that the defendants took no action at all on the second proposal, except to reject it.

Finally, two principles may be mentioned which would appear to deprive the alleged estoppel of any effect. The first is stated in Halsbury's Laws (3rd Edn.) Vol. 15 at p. 227:

> "A representation will be deprived of any effect as an estoppel if the making of it has been contributed to by some breach of duty on the part of the person seeking to take advantage of it."

Here if the plaintiff by his conduct represented that he accepted the cancellation, he was induced to make such representation solely by the defendants' misconduct in requiring him to make a fresh proposal on the erroneous basis that they had validly cancelled the policy.

The second principle is found in the ruling of Mackinnon, J., in *Etchells, Congdon and Muir, Ltd. v. Eagle Star and British Dominions Insurance Co., Ltd.* (2), cited in Shawcross (*loc. cit.*) at p. 695 (the full report is not available) that there can be no estoppel unless the party to be estopped has acted with full knowledge of the facts. Here, the plaintiff is an illiterate African, and I accept his evidence that he did not know why he was being asked to make a fresh proposal. Nor had he ever been given an opportunity of seeing the policy, so as to make himself aware (if he was capable of understanding them) of its terms and conditions.

I find that the alleged estoppel has not been pleaded with sufficient particularity to entitle the defendants to rely on it, and that in any case no valid estoppel has been established by the evidence.

No doubt conscious of the difficulties inherent in the plea of estoppel, counsel for the defendant in his closing arguments based his case not so much on estoppel as on election. If the policy was wrongly cancelled, so he argues, the plaintiff was put on an election either to accept the wrongful cancellation or to treat the policy as continuing in force. By signing a proposal form only explicable on the footing that the policy had come to an end, he unequivocally accepted the cancellation as a fact.

It is very doubtful whether the defendants on the pleadings are entitled to rely on such an election. Election is not the same as estoppel, and the pleadings are silent as to any election. Whether that is so or not, I do not think the principle of election has any application to this case. Election arises where a contract has been wrongfully repudiated, as is clear from the passage from Shawcross (*loc. cit.*) at p. 673 to which counsel referred. The reason why election is necessary is that wrongful repudiation does not of itself put an end to the contract.

> "The repudiation of a contract by one party or a breach by one party going to the root of the contract does not of itself discharge the contract, but the other party has the option of treating the contract as at an end, or of treating it as still in being." (Shawcross, *loc. cit.* p. 692).

But in this case the defendants do not purport to have repudiated or to have been guilty of any breach of the policy: they seek rather to rely on a condition of the policy which entitles them to put an end to it at their own will. If they had complied with the condition, that alone would have brought the contract to an end without the exercise of any option by the plaintiff. If they did not comply with the condition their purported cancellation was of no effect. Admittedly, the plaintiff might by his conduct have accepted an invalid cancellation in much the same way as he might have accepted a wrongful repudiation. But that (if the other requirements were fulfilled) could only have amounted to an estoppel: it could not amount to an election, since the issue whether the policy continued in force or not after the purported cancellation was determined by the failure or otherwise of the defendants to comply with the condition, and not by any subsequent action on the part of the plaintiff.

In case I should be wrong on this point, I should in any case have thought that the principle laid down by Mackinnon, J., in the case already cited, would apply with as much force to an election as to an estoppel, as it would be inequitable to hold that a party had made an unequivocal election without being fully aware of his rights. But as I have not been referred to or discovered any authority on this point, I do not propose to say any more about it.

For the above reasons I find that the policy has not been validly cancelled and that nothing which the plaintiff has subsequently done has estopped him or precluded him in any way from asserting that it remained in force for the full period for which it was issued. In view of these findings it becomes unnecessary to discuss the difficult question which would arise on a consideration of the plaintiff's plea of estoppel raised in his reply. There will be a declaration as prayed, and as the amount of the claim has not been seriously disputed judgment for the plaintiff for the sum of Shs. 15,000/- with interest and costs.

Judgment for the plaintiff as prayed.

For the plaintiff:
YP Vohra
Vohra & Vohra, Nairobi

For the defendants:
H Shroff
H Shroff, Nairobi

Abdul Aziz Suleman v South British Insurance Co Ltd
[1965] 1 EA 66 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	4 February 1965
Case Number:	779/1964
Before:	Chanan Singh J
Sourced by:	LawAfrica

[1] Practice – Summary judgment – Application to enter judgment – Claim under insurance policy for liquidated amount – Affidavit in reply defective – Supplementary affidavits filed by defendant and plaintiff without leave – Defence that arbitration was condition precedent to any right of action – Alternative defence that plaintiff had agreed to settle claim for specified amount – No evidence before court as to terms of arbitration clause – Whether defendant entitled leave to defend – Leave of court necessary to file supplementary affidavit.

Editor's Summary

The plaintiff sued the defendant claiming Shs. 9,486/30 under an insurance policy and applied under O. 35 r. 2 and r. 3 (1) of the Civil Procedure (Revised) Rules, 1948 (K), for summary judgment. The defendant company filed an affidavit in reply which was defective and later filed a second affidavit without leave of the court, and also filed a defence. The affidavits stated that under the policy an arbitration award was a condition precedent to any right of action and also raised an alternative defence that the plaintiff had agreed to settle his claim for Shs. 2,365/-. The plaintiff also filed a second affidavit without leave of the court and it was submitted that judgment should be entered for Shs. 9,486/30 or alternatively for Shs. 2,365/-. The insurance policy was not produced and there was no evidence as to the precise terms of the arbitration clause.

Held –

(i) O. 35 of the Civil Procedure (Revised) Rules, 1948 (K) envisages not more than one affidavit by the plaintiff in support of his application and an

affidavit by the defendant or sworn oral evidence by the defendant, or by somebody on his behalf, supported if necessary by documents. If any further affidavits are necessary, the leave of the court must be obtained to file them;

(ii) as no objection was taken by either side to the filing of the supplementary affidavits the court would accept both affidavits;

(iii) the complicated nature of a case is no excuse for refusing an application under O. 35 so long as it is clear that the defendant has no real defence;

(iv) this application for summary judgment should be dismissed because the court could not decide without further evidence whether the condition precedent of arbitration could operate and whether Shs. 9,486/30 was the "loss or damage" suffered by the plaintiff;

(v) the plaintiff was also not entitled to judgment for Shs. 2,365/- because if the defence that an arbitration award was a condition precedent succeeded then there would be nothing payable to the plaintiff.

Application dismissed.

Cases referred to in judgment

(1) *Standard Goods Corporation Ltd. v. Harakchand Nathu* (1950), 17 E.A.C.A. 99.

(2) *Les Fils Dreyfus v. Clarke*, [1958] 1 All E.R. 459.

(3) *Cow v. Casey*, [1949] 1 K.B. 474; [1949] 1 All E.R. 197.

(4) *Heyman v. Darwins Ltd.*, [1942] A.C. 356.

(5) *Nemchand Premchand Shah v. The South British Insurance Co. Ltd.*, [1962] E.A. 131 (C.A.).

(6) *Shah v. Hercules Insurance Co. Ltd.*, [1963] E.A. 114 (C.A.).

(7) *Udham Singh v. Ambalal & Co. Ltd.*, [1959] E.A. 67 (U.).

Judgment

Chanan Singh J: This is an application under O. XXXV, rr. 2 and 3, asking that judgment be entered for the plaintiff as prayed for in the plaint. The notice of motion is supported by the usual affidavit showing that the defendants "are justly and truly indebted" to the plaintiff.

The defendant company filed an affidavit in reply on October 19, 1964 that is 6 days after the filing of the application. This affidavit in reply is sworn by Derek Thomas Maling, an employee of the defendant company. It says that the company has a good defence because under condition (9) of the Insurance policy, which is the basis of the suit, an arbitration award is a condition precedent to any right of action. Alternatively, it says that the plaintiff had agreed to settle his claim for a sum of Shs. 2,365/- before the filing of the suit. Alternatively, to these two defences, the affidavit in reply states that the claim of the plaintiff is inflated. The affidavit contains 9 paragraphs, the last of which reads "that the contents of this affidavit are true to the best of my knowledge, information and belief."

Counsel for the plaintiffs objects to this affidavit in reply on the grounds that it does not disclose

which of the facts stated are true to the “knowledge” of the deponent and which ones are true to his “information and belief”. In the case of the latter set of facts he was bound to state the source of his information.

Under O. XVIII r. 3 (1) affidavits are to be

> “confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, provided that the grounds thereof are stated.”

In support of his contention plaintiff's counsel quotes the well known case of *Standard Goods Corpn. Ltd. v. Harakhchand Nathu* (1) which concerned an affidavit. There, the facts of one paragraph were stated to be within the "knowledge" of the deponent whilst the facts of another paragraph were stated to be true "to the best of my knowledge and information". It was held that an affidavit of that kind ought never to be accepted by the court as justifying an order based on the so called facts.

I think counsel for the plaintiff's objection to the affidavit is well founded. I hold that this affidavit cannot be accepted as showing cause against the application of the plaintiff.

On December 1, 1964, another employee of the defendant company, David Francis Hicks, swore an affidavit and filed it in court. That affidavit is to the same effect as the affidavit of Derek Thomas Maling with the difference that the facts are now stated to be "true and within my knowledge".

I must here remark on the practice which is growing of filing several affidavits in support of, or in opposition to, an application under O. XXXV. The position as I see it is this. Under r. 2 of this Order the plaintiff is entitled to apply by motion for judgment where the suit seeks "to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising" in the various ways mentioned.

Under r. 4, the defendant has the right to "show cause against such an application by affidavit". He can also be allowed by court to "be examined upon oath." The court is empowered to "order the defendant, or in the case of corporation any officer thereof, to attend and be examined upon oath, or to produce any leases, deeds, book or documents, or copies of or extracts therefrom." The object of r. 4 is clearly to stop the defendant from vaguely denying a claim. If the plaintiff knows of the existence of any document in the hands of the defendant which supports his claim, he can invoke the aid of the court to call upon the defendant to produce it. The court may also on its own initiative order the defendant to produce any documents.

There is no provision enabling either party to put in supplementary affidavits. In my opinion, O. XXXV envisages no more than an affidavit by the plaintiff in support of his application and an affidavit by the defendant or sworn oral evidence by the defendant or by somebody on his behalf supported, if necessary, by documents.

If any further affidavits are necessary, the leave of the court must be sought to file them. There is a tendency to make applications under this Order a substitute for the hearing of contentious suits. In the present case a supplementary affidavit filed by the plaintiff runs to two foolscap pages, and is supported by copies of seventeen letters that passed before action. These letters are not the type of evidence that can help at this stage.

I am not saying that no supplementary affidavit can ever be put in. What I do say is that leave of the court is necessary to put it in. That would also appear to be in accord with the English practice. The leading judgment of the Court of Appeal, *Les Fils Dreyfus v. Clarke* (2) ([1958] 1 All E.R. says at p. 463):

> "To say now that an affidavit filed by the plaintiff in proceedings under R.S.C., O. 14, cannot be, as it were, supplemented by a further affidavit by the plaintiff, with the leave of the court, is something which startles one, and, as far as I know, no case has ever heretofore suggested that with the leave of the court the plaintiff's affidavit cannot be supplemented."

In the present case, each side has put in an additional affidavit, without leave and without objection from

the other side. Neither party can, therefore, object if I accept both affidavits. I do accept them.

It is quite obvious that the claim by the plaintiff is not as straightforward as counsel for plaintiff has tried to make it. I do, however, accept the argument of the following passage from the judgment of Lord Greene, M.R., in *Cow v. Casey* (3) to which my attention has been drawn by counsel for the plaintiff ([1949] 1 K.B. at p. 481):

> "The jurisdiction ought only to be exercised in proper cases. If the Rent Restriction Acts dome into an Or. 14 case, no greater attention in principle is to be given by the court to that class of action than to any other class of action. The only point is, that, as everybody knows, the Rent Restriction Acts are complicated Acts. They contain a number of difficult matters and there are a number of authorities decided upon them. But it is not sufficient under an Or. 14 case to flourish the title of the Increase of Rent Restriction Acts in the face of the court and say that is enough to give leave to defend. If a point taken under the Rent Restriction Acts is quite obviously an unarguable point, the court has precisely the same duty under O. 14 as it has in any other case. It may take a little longer to understand the point and to be quite sure that one has seen all round it in a case under the Rent Restriction Acts than in other cases, but when the point is understood and the court is satisfied that it is really unarguable, the court has the duty to apply the rule . . ."

The complicated nature of a case is no excuse for refusing an application under O. XXXV so long as it is clear that the defendant has no real defence to the action.

Quite apart from the affidavits, however, the defendant has filed a written statement of defence. The original written statement was filed on October 14, 1964, and an amended one on January 12, 1965. Again, counsel for the plaintiff request for particulars runs to three foolscap pages and the particulars themselves to another three. Now that all these documents are before me, I hold that I am entitled, for the purpose of deciding this application, to look at them. Paragraph 3(*b*) of written statement reads as follows:

> "The defendant will aver that the plaintiff has not complied with condition 9 of the said policy which said condition made the making of an award thereunder a condition precedent to any right of action against the defendant. The defendant will crave leave to refer to condition 9 at the hearing of this suit and will allege that this suit concerns a difference arising out of the said policy and the said difference has not been the subject of an Award under condition 9."

In considering the effect of an arbitration clause one has naturally to examine the wording of such a clause. Viscount Simon, L.C., said in *Heyman v. Darwins Ltd.* (4)

> "The governing consideration in every case must be the precise terms of the language in which the arbitration clause is framed."

The arbitration clauses in an Insurance policy are generally of three types, see *Nemchand Premchand Shah v. The South British Insurance Co. Ltd.* (5) (per Newbold, J.A., [1962] E.A. at p. 136). I do not even know precisely enough to which of the three clauses the arbitration clause in this case belonged. The insurance policy has not been produced by either side. I was told by counsel for the defendant company, that the arbitration clause in question is an "all differences" type so that the differences of all types arising from the policy are subject to arbitration before a right of action accrues. The arbitration clause in the *Nemchand Premchand Shah's* case (5) was a "quantum only" clause. A denial of liability would, therefore, entitle the insured to take the matter to court; and an arbitration award would not be a condition precedent to the accruing of cause of action.

The decision in that case, therefore, is not of any direct help to me here, assuming that the clause in the present case is in fact an "all differences" clause. For the same reason, the case of *Shah v. Hercules Insurance Co. Ltd.* (6) also quoted by counsel for the plaintiff in his support is not relevant to the issue before me.

I am not therefore in a position to say definitely whether or not the arbitration clause in this case is a condition precedent; and, in any case, there is a dispute on this issue. Plaintiff's counsel also says that the arbitration clause was waived by the defendant company by its conduct. Let us look at that allegation.

The alternative defence set up by the defendant is that there was a settlement between the parties for a sum of Shs. 2,365/-. If in fact there was a settlement, then it is clear I think that the arbitration clause was waived by consent of both parties. Counsel for the plaintiff, however, contends that there was no such settlement. He says that at one time the defendant company mentioned the figure of Shs. 2,365/- and then arbitrarily reduced it by the sum of Shs. 480/-, thus showing that the figure of Shs. 2,365/- had not in fact been agreed by the two parties. Here, again, there is a dispute: was there or was there not a settlement between the parties? This is hardly a matter that can be decided without evidence. I do not accept counsel's argument that the mere fact of the defendant company's starting negotiations for a settlement amounted to a waiver of the arbitration clause.

If there was no settlement between the parties, then the question remains: assuming that the arbitration clause is out of the way, what sum is payable to the plaintiff? He has been claiming Shs. 9,486/30. The defendant company has not been prepared to pay more than Shs. 2,365/-. How can the big difference between these two figures be covered without evidence?

Plaintiff's counsel, I quite understand his point of view, tries to get a judgment for his client for the figure claimed in the plaint without going to trial even on the issue of quantum. The defendant company says that the sum claimed is excessive. Quite clearly, the plaintiff is not entitled to more than what the insurance policy gives him, and I cannot in the fact of the points raised by the defendant say without further evidence whether or not Shs. 9,486/30 is the "loss or damage" suffered by the plaintiff.

There is another point also that arises on the correspondence. On August 13, 1964, the defendant company wrote to Messrs. Khanna & Co., advocates for the plaintiff:

> "I thank you for your letter of the 10th instant and would advise that any dispute that may exist between our Insured and ourselves can be resolved in accordance with condition 9 of the policy and perhaps you would be good enough to signify your agreement to Mr. J. D. M. Silvester as Arbitrator . . ."

On August 20, 1964, they wrote again:

> "I thank you for your letter of the 17th instant in connection with the above and would advise that your client agreed to accept the sum of Shs. 1,885/- in respect of the cost of repairs . . . and in view of the fact that he has withdrawn his acceptance of this offer and has submitted an estimate for an enhanced claim then there must be a dispute and he will appear to have raised it. Therefore, I consider that a dispute within the terms of the policy does exist . . . Needless to say I shall be quite prepared to defend this issue and our Advocate shall submit that the court is not competent to try the case in view of non-compliance with policy conditions, i.e. submission to arbitration."

The last letter dated September 10, 1964 from the defendant company to the plaintiff's said advocates reads as follow:

> "I thank you for your letter of the 8th instant and note your comments.

Would you please note that any action will be defended by our advocates, Messrs. Macdougall & Wollen."

This series of letters placed before me by the plaintiff makes it clear that the defendant company intended to raise the issue of the arbitration clause. The defendant company also said that there was a settlement between the parties before action and that, later, the plaintiff submitted "an enhanced claim".

These are exactly the issues which the defendant company now raises. Was the plaintiff entitled to say in his affidavit of October 7, 1964: "I verily believe that there is no defence to the suit". He knew or ought to have known, through his advocates, that the defendant company did have defences to the action and did intend to raise them. The plaintiff had no reasonable grounds for believing in terms of r. 2 of O. XXXV that the defendant company had no defence. See *Udham Singh v. Ambalal & Co. Ltd*. (7) ([1959] E.A. 67 (U) at p. 68).

For these reasons, I must reject counsel for the plaintiff's request that judgment be entered for the plaintiff for the whole sum claimed.

He asks, in the alternative, that judgment for the sum of Shs. 2,365/- be entered for the plaintiff because the defendant company admits at least that much. The difficulty in adopting such a course is this.

The defendant company says that the arbitration award in this case is a condition precedent. If this defence prevails nothing will be payable to the plaintiff. The defendant company pleads a settlement at Shs. 2,365/- only as an alternative to their main defence. It would not, therefore, be proper for me at this stage to enter judgment for the plaintiff even for Shs. 2,365/-.

In the result I dismiss the application of the plaintiff and reserve the question of costs for consideration at the time the case is finally disposed of.

Application dismissed.

For the plaintiff/applicant:
DN Khanna
Khanna & Co, Nairobi

For the defendant/respondent:
RN Sampson
Macdougall & Wollen, Nairobi

Migezo Mibinga v Uganda
[1965] 1 EA 71 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	25 March 1965
Case Number:	184/1964
Before:	Sir Samuel Quashie-Idun P, Newbold and Sir Clement De Lestang JJA

Sourced by: LawAfrica

Appeal from: High Court of Buganda, Sir Udo Udoma, C.J

[1] Criminal law – Evidence – Manslaughter – Dying declaration – Corroboration – Declaration in presence of accused – Deceased's statements only evidence implicating accused – Weight to be attached.

Editor's Summary

The appellant was convicted of manslaughter and the only evidence implicating the appellant consisted of repeated statements made by the deceased to several persons soon after he was discovered lying injured that it was the appellant who had beaten him. The Chief Justice considered with care the circumstances under which the statements were made and looked for corroboration which he found in the conduct of the appellant when accused by the deceased in the presence of other persons of having beaten him. What happened was

that the appellant was brought to where the deceased was lying, the deceased pointing at the appellant had said ". . . You are the person who had beaten me" and the appellant made no reply. On appeal,

Held –

(i) although there is no rule of law that to support a conviction there must be corroboration of the statements made by the deceased person as to the cause of his death, it is unsafe to base a conviction solely on them;

(ii) the probative force of a statement as to the cause of his death by a person since deceased is not enhanced by its being made in the presence of the accused unless by his conduct, demeanour, etc., the accused has acknowledged its truth and consequently the trial judge should expressly state whether he is satisfied or not that there was such acknowledgement;

(iii) although the Chief Justice had not said that he was satisfied that the appellant had acknowledged truth of the deceased's statement, in effect he did find that by his conduct the appellant accepted the statement made by the deceased, a conclusion which was open to the Chief Justice in the particular circumstances of the case.

Appeal dismissed.

Cases referred to in judgment

(1) *Pius Jasunga Akumu v. R.*, [1954] E.A.C.A. 331.

(2) *Director of Public Prosecutions v. Christie* (1914), 10 Cr. App. R. 144; [1914] A.C. 545.

Judgment

Sir Clement De Lestang JA: read the following judgment of the Court:

The appellant was convicted of manslaughter by the High Court of Buganda. The deceased, who was a very old man, died of shock as a result of a beating and the sole question before the trial court was who had beaten him. The only evidence implicating the appellant consisted of repeated statements made by the deceased to several persons soon after he was discovered lying down injured that it was the appellant who had beaten him because he had accused him of not paying his poll tax. The appellant was apparently well known to the deceased, who not only named him but also identified him subsequently. It appears also that the deceased, at the time he made the statements, was fully conscious and talked sensibly. Statements as to the cause of his death by a person since deceased are admissible in evidence under s. 30, Evidence Ordinance (U). Although there is no rule of law that to support a conviction there must be corroboration of such statements, it is generally recognised that it is very unsafe to base a conviction solely on them (*Pius Jasunga Akumu v. R.* (1). In the present case the learned Chief Justice was fully alive to this danger as will appear from the following passage from his judgment:

> "The only question before the court for serious and careful consideration is as to the weight to be attached to such statements, especially as they were not made under the solemn sanction of oath and the deceased was not cross examined. These statements must be received by the court with great caution, although the attack on the deceased was not made in the night and in darkness and there is no evidence before the court that the incident took place in circumstances of confusion."

He consequently considered with care the circumstances under which the statements were made and looked for corroboration which he found in the

conduct of the appellant when accused by the deceased in the presence of other persons of having beaten him. What happened was that as a result of previous allegations by the deceased that it was the appellant who had assaulted him, the appellant was arrested and brought to where the deceased was lying. As the appellant arrived the deceased, pointing to him, said "You Migezo, you are the person who had beaten me" and the appellant made no reply. It was only when in answer to a question by the Mulongoli Chief, who had brought the appellant, the deceased for the second time said that it was the appellant who had beaten him that the appellant said "I did not beat him".

> "The rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated, save so far as he accepts the statement, so as to make it, in effect, his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct or demeanour at the time when a statement is made amounts to an acceptance of it in whole or in part."

per Lord Atkinson in *Director of Public Prosecutions v. Christie* (2) ((1914) 10 Cr. App. R. at p. 155).

The learned Chief Justice dealt with the incident mentioned above in these words:

> "In this respect, I think the conduct of the accused on meeting the deceased for the first time after the alleged beating and in the presence of others is relevant. The evidence which I accept on the point is that to which I have already referred, namely that on arrival at the house of Mawera (P.W. 1) the deceased, pointing to the accused, had said 'You Migezo, you are the person who had beaten me', and that to that direct confrontation the accused had said nothing. It seems to me that the conduct of the accused in these circumstances was not consistent with innocence, but was capable of amounting to corroboration. In my view it was not the conduct of an innocent person. An innocent person would have reacted differently and would have been expected to protest vigorously."

It is not always appreciated that the probative force of a statement as to the cause of his death by a person since deceased is not enhanced by its being made in the presence of the accused *unless* by his conduct, demeanour, etc., the accused has acknowledged its truth. Consequently it is advisable that a trial judge should expressly state whether he is satisfied or not that there was such acknowledgment.

Although the learned Chief Justice has not said so in so many words, we understand him in the paragraph which we have quoted from his judgment to find, in effect, that by his conduct the appellant accepted the statement made by the deceased, a conclusion which in our view was open to him in the particular circumstances of this case. The learned Chief Justice went further to consider the possibility of the deceased being mistaken as to the identity of his assailant, or of his not being in a fit condition to make a reliable statement and concluded against such possibilities. With respect, we think he was justified in so doing. We accordingly dismiss this appeal.

Appeal dismissed.

The appellant in person.

For the respondent:
TS Cotran (State Attorney, Uganda)
The Director of Public Prosecutions, Uganda

William Mulwa Muasya v R

[1965] 1 EA 74 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	24 August 1964
Case Number:	523/1964
Before:	Sir John Ainley CJ and Chanan Singh J
Sourced by:	LawAfrica

[1] Road traffic – Unlicensed public service vehicle – Meaning of "carrying passengers for hire or reward" – Traffic Act, s. 2 (*K*).

Editor's Summary

The appellant was convicted of three offences, namely, driving a public service vehicle without being licensed for such purpose contrary to s. 98 (1) of the Traffic Act (K), driving a public service vehicle in relation to which no public service vehicle licence had been issued contrary to s. 95 ibid. and making a statement which was to his knowledge false contrary to s. 113 ibid. The appellant thereupon appealed and this case is reported on the first two offences only. The prosecution case was that the appellant drove a Landrover from Mutomo Market to Kibwezi and during that journey carried passengers for hire or reward, thereby bringing the vehicle, which was designed to carry more than seven persons, within the definition of a public service vehicle contained in s. 2 ibid, which defines a public service vehicle, *inter alia*, as any motor vehicle which carries passengers for hire or reward. It was admitted that the appellant was not licensed to drive a public service vehicle and that the vehicle had not been licensed as a public service vehicle. From the evidence it appeared that at the market passengers approached the appellant and said "Will you take us to Kibwezi" and the appellant replied "Yes, get aboard". He also agreed that he carried passengers and that he "asked for petrol from them and four men paid 9/- each total 36/-" and that three men did not pay. The substantial issue at the hearing was whether the appellant carried passengers for hire or reward within the meaning of s. 2 ibid.

Held –

(i) the expression "carrying passengers for hire or reward" is limited to vehicles in which passengers are carried for a monetary consideration legally recoverable by the carrier: *Coward v. Motor Insurance Bureau* applied;

(ii) the expression "legally recoverable" did not mean that the illegality of carrying passengers for hire or reward in an unlicensed vehicle was to be taken into consideration; it meant that, illegality aside, there must be an establishment of contractual relations, express or implied, between the passenger and the carrier;

(iii) in the present case there was a carrying "for hire or reward" in the limited sense of this expression.

Per Ceuriam – "It is no doubt true that with Coward's case in mind and a little ingenuity, the owners

of vehicles such as the vehicles in this case can make a handsome profit from carrying the public on gentlemen's understandings."

Appeal dismissed.

Cases referred to in judgment

(1) *Coward v. Motor Insurance Bureau,* [1962] 1 All E.R. 531.

Judgment

Sir John Ainley CJ: read the following judgment of the court:

In this case the appellant was convicted of three offences, namely driving a public service vehicle without being licensed for such purpose contrary to s. 98(1) of the Traffic Act, driving a public service vehicle in relation to which no public service vehicle licence had been issued contrary to s. 95 of that Act, and making a statement which was to his knowledge false, contrary to s. 113 of that Act.

The case for the prosecution was that the appellant drove a Land Rover from Mutomo Market to Kibwezi, and during that journey carried passengers for hire or reward, thereby bringing the vehicle, which was designed to carry more than seven persons, within the definition of a public service vehicle contained in s. 2 of the Act. It was admitted that the appellant was not licensed to drive a public service vehicle, and that the vehicle had not been licensed as a public service vehicle. It was also alleged that shortly after his arrival in Kibwezi the appellant was arrested and taken to the police station there. It was said that when asked for his name at the police station, the appellant, whose name is Willy Mulwa Muasya, gave his name as Jeremiah Kyeva Muasya. That name is the name of the appellant's brother. The appellant was bonded to appear before the court in that name, it was sworn, and on the due day his brother appeared before the court to answer charges relative to the driving of the vehicle. The imposture was detected, and the appellant was eventually brought to justice.

It has not been argued that if the appellant gave a false name as alleged he was not guilty of an offence contrary to s. 113 of the Act. The defence was that even if the appellant was driving the vehicle he was not, in law driving a public service vehicle. But, it was said, the appellant was not driving the vehicle. His brother, Jeremiah, was the driver. It was Jeremiah who was arrested. It was Jeremiah who gave his name, his true name, to the police, and was bonded to appear before the court. We will consider the last mentioned question first, that is to say the question whether it was the appellant or Jeremiah who was brought to the police station. This question is to a large extent bound up with the question whether the appellant was driving the vehicle from Mutomo to Kibwezi and we will consider that question also at this stage.

There was the evidence of the first prosecution witness, a police constable, and of the fifth prosecution witness, a young man named Gideon that the appellant was driving the vehicle. Gideon and this constable, Johnson, were emphatic that Jeremiah was not even travelling on the vehicle during its journey. Cpl. Onyango, the third prosecution witness arrested the man sitting behind the wheel of the vehicle shortly after the arrival of the vehicle in Kibwezi. He swore that the man he arrested, and brought to the police station, was the appellant. Johnson swore that the man brought in was the appellant. The second prosecution witness, P.C. Tanayo, swore that the man brought in was the appellant. Undoubtedly the man brought in gave his name as Jeremiah Kyera Muasya, and the learned magistrate believed that the man brought in was the appellant. Against this evidence was set the evidence of the appellant and that of Jeremiah himself who, strangely, was called by the prosecution. Prosecutors do on occasion embarrass the courts by calling witnesses who give evidence diametrically opposed to the prosecution case, thus leaving the courts to decide not between the prosecution's case and that of the defence, but between the veracity of the prosecution's own witnesses. In some cases the practise will be fatal to the prosecution case. The court may reasonably say "Precisely what are we asked to believe. The scales sway even on the prosecution's own case". But a trial is not a game of chess as this court has more than once remarked. It

is the duty of the court to seek out the truth despite the technical errors of the parties. Reviewing the evidence which concerned events from Mutomo Market to the police station, the learned magistrate took the view that Jeremiah was a liar,

seeking to shield his brother. He concluded that not only was the appellant the driver of the vehicle, but that he was the man arrested, and was the man who was present at the police station. In so deciding he did not ignore the evidence of the defence witness. The case no doubt presented genuine factual problems. Most cases do so. But we think that the learned magistrate reached the correct conclusion here. It is said that he made some false points against the appellant and that he erroneously turned himself into a handwriting expert. We do not think that the magistrate erred in giving some weight to the failure of Jeremiah to recognise P.C. Tanoyo in court, or to the appearance of the name "Willy" (erased) in the Occurrence Book. Those matters may have been straws, but they indicated the direction of the wind. It is perfectly true that the magistrate compared the signature on the bond with the known signature of Jeremiah and found differences, upon which differences he relied. It has been said more than once by the Court of Criminal Appeal in England that juries should not as a rule be left unaided upon questions of disputed handwriting. We are, however, unaware of any ruling which forbids a magistrate or judge to look at disputed signatures or to make observations upon what they see. However undesirable it is to leave juries unguided in matters of handwriting, however helpful and desirable it is to have the assistance of experts on such questions, the courts cannot, in the absence of expert testimony, shut their eyes to what appear to them to be facts. Among other facts in this case the magistrate noted dissimilarity between the two signatures. Had he based his entire judgment on that matter we should have been inclined to say that some possibility of error was present. But upon all that was before him we think that the magistrate reached a safe and just conclusion.

We think in the first place that he was justified in saying that the appellant was driving this vehicle and in the second place that he was correct in saying that the appellant gave false information to the Police at Kibwezi.

The appellant was then properly convicted of an offence contrary to s. 113 of the Traffic Act. We dismiss his appeal from conviction upon the third count in the charge sheet.

Now for this stupid, and very wrongful act, the appellant was sentenced to nine months imprisonment. It is said that this sentence is excessive. Here we agree, though we appreciate the learned magistrate's attitude. This man trifled with the court, and with the authorities, to whom he gave a great deal of trouble. He showed no repentance. His original act of wrong doing was well nigh idiotic. His imposture could not, and did not succeed. It was the appellant's pertinacity in supporting the imposture which scandalised the magistrate, and indeed it was scandalous. With hesitation we yet think that for the actual offence committed that of giving a wrong name to the police to evade a traffic charge was, in view of the appellant's previous good character, over severe. We think that a substantial fine will meet this case. We set aside the sentence of imprisonment and substitute a fine of Shs. 500/-. In default the appellant will go to prison for one month.

We now turn to the first and second counts upon the charge sheet. What are the facts? We have stated that we agree with the learned magistrate that the appellant was driving this vehicle. It is apparent that the appellant carried passengers. He took on board a considerable number of passengers at Mutomo Market. After the vehicle had proceeded some way towards Kibwezi a woman was picked up. Another woman was picked up later. Thus far the appellant seems to have been willing to serve the public, but of course he may have been serving the public in an altruistic manner. From the record of the evidence it would appear that at the market passengers approached the appellant and said "Will you take us to Kibwezi". The answer of the appellant was merely

"Yes; get aboard". So far as we are aware this was the case of the two women who joined the vehicle later on. However Johnson, a constable was welcomed aboard with his luggage. Gideon and his party were welcomed aboard, though he was in no way connected with Johnson. Two women, unconnected with one another were taken on board. There may, though this is not certain, have been others, unconnected with Gideon, the women, or Johnson who were aboard. That is of little moment. It is sufficiently clear that the appellant was not carrying a single party of friends as passengers. He was ready to carry those persons who asked him to carry them. This we consider to be a fair inference from the recorded evidence. Now did anyone pay for the privilege of travelling on the appellant's vehicle? There can be no doubt whatsoever that four, at least, of the passengers did so. There is very strong evidence that all the passengers paid Shs. 9/- each for the trip, but there is no question whatever that four passengers each paid that sum for the trip, to the appellant. This is how the appellant himself put the matter, having stated that he was not the driver "I agree I carried passengers on this vehicle. I asked for petrol from them and four men paid Shs. 9/- each – total of Shs. 36/-. Three men did not pay. The turn-boy Singe collected this money – they paid to him – and I knew about it. I wanted a travel warrant from PW1 (Johnson) as he (and ?) PW5 (Gideon) did not pay me . . . they paid this of their own wish". What the appellant was saying here was, in effect, that "he sent the hat round" asking for voluntary contributions, contributions which he could not enforce and which he never intended to enforce. He would cheerfully have carried these fellow citizens some fifty miles for nothing. Simply it was "up to them" to give some return if they chose.

The learned magistrate did not take this view of the evidence. He believed and as we think quite reasonably believed, that the appellant asked Shs. 9/- of each passenger as a fare. It is clear that he accepted the evidence of Johnson (PW1) and Gideon (PW5) as to the circumstances. Both these witnesses swore that the appellant stopped the vehicle at the Athi River crossing, before arrival at Kibwezi and "asked" in Gideon's phrase ("told" in Johnson's phrase), each person to pay Shs. 9/- as fare from Mutomo to Kibwezi. Some at any rate of the passengers agreed to pay that fare and some at any rate did pay it. The trip it may be noted was not over. Let it be assumed, as it is somewhat unrealistic to assume that these passengers originally supposed that they were to have a free ride, but were disillusioned at the crossing. Then at the Athi River crossing they are asked to pay a fare. It is open to them to refuse and to walk the rest of the way. It is open to them to pay up and to continue the journey. Those who agreed to pay did, as it seems to us, enter into contractual relations with the appellant. If having paid or having agreed to pay Shs. 9/- they had not been carried from the crossing to Kibwezi, surely they could rightly have complained of a breach of a clear cut agreement. If having been carried from the crossing to Kibwezi after promising to pay Shs. 9/- they had failed to do so, then subject to defences of illegality and the like, surely the appellant had the right to say that there had been a breach of contract.

We now turn to the definition of a public service vehicle. Such a vehicle is defined *inter alia* as any motor vehicle which "is carrying passengers for hire or reward". Were the questions untouched by authority one member at least of this court would have said that the "or" in the definition was disjunctive, and that it separated two words of dissimilar meaning; that the word "hire" let in the conception of a contract, and that the word "reward" was there to cover where there was recompense but no contract. We think, however, that we should follow the reasoning in *Coward v. Motor Insurers Bureau* (1), in which case the English Court of Appeal held that the expression "vehicles carrying passengers for hire or reward" as used in the English Road Traffic Act, 1930,

is limited to vehicles in which passengers are carried for a monetary consideration legally recoverable by the carrier. The expression "legally recoverable" does not we think mean that the illegality of carrying passengers for hire or reward in an unlicensed vehicle is to be taken into consideration. We understand the decision to mean that, illegality aside, there must be an establishment of contractual relations express or implied between the passenger and the carrier. It was with this decision in mind that we went into some detail when reviewing the facts. It is no doubt true that with Coward's case (1) in mind, and a little ingenuity, the owners of vehicles such as the vehicle in this case can make a handsome profit from carrying the public on gentlemen's understandings. We yet think that in this case there was a carrying "for hire or reward" in the limited sense of this expression, and that the appellant was properly convicted upon the first two counts of the charge sheet.

The sentence upon the second count was heavy, but we are not prepared to say that it was manifestly excessive. Subject to the variation of the sentence on the third count we dismiss this appeal. There will be 14 days to pay the fine.

Appeal dismissed.

For the plaintiff:
EP Nowrojee
EP Nowrojee, Nairobi

For the respondent:
IE Omolo, Deputy Public Prosecutor
The Attorney General, Nairobi

Ranchhod Sunderji and another v BM Majithia
[1965] 1 EA 78 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	25 March 1965
Case Number:	29/1964
Before:	Sir Samuel Quashie-Idun P, Crabbe and Duffus JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanganyika, Spry, J

[1] Rent restriction – Possession – Application by landlord for possession for redevelopment otherwise than as dwelling house – Minister's certificate that development in public interest – Whether prior permission of Rent Restriction Board required to bring proceedings.

Editor's Summary

The respondent, a co-owner of certain premises, applied to the Rent Restriction Board in Dar-es-Salaam for orders for recovery of possession of the premises rented to the appellants on the ground that he required possession of the premises for purposes of development otherwise than as a dwelling house. Before making the applications the respondent had obtained a certificate from the Minister that such development was in the public interest under s. 19 (1) (*n*) of the Rent Restriction Act, 1962. The Board dismissed the applications on the grounds that they were premature as the respondent had not sought or obtained permission of the Board to bring the proceedings and that the Minister had issued the certificate without any enquiry and therefore it was invalid. From this decision the respondent appealed to the High Court who allowed the appeal, set aside the decision of the Board, remitted the proceedings to the Board, and directed the Board to decide "whether in all the circumstances of the case the making of orders for possession would be reasonable". On further appeal it was argued *inter alia* that a landlord seeking recovery of possession of the premises for the purpose of redevelopment must obtain

permission from the Board before instituting proceedings for that purpose; and that the applications were not maintainable without joining the co-owner as applicant.

Held –

(i) the phrase "and no permission to bring proceedings therefore shall be granted by any Board" contained in s. 19 (1) of the Rent Restriction Act, 1962 refers only to power of the Board under s. 7 (1) (*s*) of the Act and therefore it was not necessary for the respondent to obtain permission from the Board before instituting proceedings;

(ii) the appellants were not entitled to raise the point that the applications were not maintainable without joining the co-owner because this point was not taken before the High Court nor did the appellants make it an issue in their defence and accordingly they must be deemed to have acknowledged the respondent as their landlord with authority to institute the proceedings;

(iii) the action of the Minister was purely executive and there was no need to hold an enquiry before issuing the certificate.

Appeal dismissed.

Cases referred to in judgment

(1) *Qureshi v. Patel* (1951), 18 E.A. 1.

March 25. The following judgments were read:

Judgment

Sir Samuel Quashie-Idun P: The respondent applied to the Rent Restriction Board for Dar-es-Salaam for orders for recovery of possession of premises rented to the appellants on the ground that the respondent as landlord required possession of the premises for purposes of development, the landlord having obtained a certificate from the Minister that such development was in the public interest under s. 19 (1) (*n*) of the Rent Restriction Act (Cap. 42), 1962. The applications filed against the two tenants were consolidated. The Rent Restriction Board dismissed the applications on the grounds (1) that the applications were premature as the landlord had not sought or obtained permission to bring the proceedings and (2) that the Minister had issued the certificate authorising the redevelopment without any enquiry and therefore the certificate was invalid.

From the decision of the Board, the landlord appealed to the High Court and on April 9 Spry, J., as he then was, allowed the appeal, set aside the decision of the Board, remitted the proceedings to the Board, and directed the Board to decide the single issue as to "whether in all the circumstances of the case the making of orders for possession would be reasonable".

Against this judgment of the learned judge the appellants have appealed to this court on a number of grounds. The first ground argued was:

> "1. The first Appellate Court erred in holding that the Board misdirected itself in construing sub-s. 19 (1) of the Rent Restriction Ordinance."

In support of this ground counsel for the appellants referred to s. 19 (1) of the Rent Restriction Act (Cap. 42) 1962 and also to s. 8 (1) of the Land (Rent and Mortgage Interest Restriction) Ordinance (Cap. 115)

which has been repealed.

Section 19 (1) (Cap. 42) of 1962 makes provision whereby a landlord may recover possession of premises to which the Act applies, and where certain events enumerated in the sub-ss. (*a*) to (*n*) have occurred. The sub-ss. (*a*) to (*n*)

are too numerous to be quoted in this judgment. The relevant subsection to this appeal is contained in sub-s. (1) (*n*) which reads:

> "No order for the recovery of possession of any premises to which this Act applies, or for the ejectment of a tenant therefrom shall be made by the court or any Board, and no permission to bring proceedings therefore shall be granted by any Board unless the landlord requires possession of the premises for purposes of re-development otherwise than as a dwelling house and the Minister has certified that such redevelopment is in the public interest."

The relevant provision of Cap. 115 (repealed) to which the court's attention was drawn is s. 8 (1) (*b*) which states:

> "No order for the recovery of possession of any premises to which this Ordinance applies, or for the ejectment of the tenant therefrom, shall be made unless the landlord has obtained from the Board permission to take such proceedings."

Although counsel for the appellants' agreed that the relevant wordings in the repealed Ordinance and Act (Cap. 42), 1962 are different, he submitted that a landlord seeking recovery of possession of premises for the purpose of redevelopment must obtain permission from the Board before instituting proceedings for that purpose.

It is clear from the reading of s. 8 (1) (*b*) of the repealed Ordinance (Cap. 115) and s. 19 (1) of Cap. 42, 1962 that it was not the intention of the legislature to retain for the Board the power to grant permission to a landlord to institute proceedings for recovery of premises in any case under the Rent Restriction Act.

The powers of the Board are contained in s. 7 of Act (Cap. 42), 1962 and the only subsection which contains a provision entitling the Board to grant leave is s. 7 (1) (*s*) which says:

> "A Board shall, in relation to the area for which it is established, have power to do all things which it is required or empowered to do by or under the provisions of this Act, and without prejudice to the generality of the foregoing shall have power in any case where difficult questions of law or fact are likely to arise, as to which the decision of the Board shall be final, to grant leave to a landlord to bring proceedings in the court for the recovery of possession of premises, the payment of arrears of rent or permission to levy distress."

It is my view that the phrase "and no permission to bring proceedings therefore shall be granted by any Board" contained in s. 19 (1) of the Act refers and can only refer to power of the Board under s. 7 (1) (*s*) of the Act. It was therefore unnecessary for the landlord to obtain permission from the Board before instituting the present proceedings and that ground of appeal must fail.

The second ground of appeal argued was as follows:

> "2. That on the admission of the respondent that he is co-owner of the property the subject-matter of the application of the Rent Restriction Board, the application was not maintainable without joining the co-owner as applicant and should have been dismissed by the Rent Restriction Board on that ground also and/or by the first appellate court."

Although this ground was not argued before the learned trial judge, counsel for the appellants submitted that in law, the respondent being a co-owner, could not institute the proceedings by himself without joining his co-owners. He referred to *Qureshi v. Patel* (1) p. 1.

In that case the plaintiff, who was a tenant in common with his brother of a plot of land, sued alone for recovery of rent without pleading co-ownership. The question of ownership was raised in the defence and the plaintiff admitted

that he was a co-owner. The defendant called no evidence and submitted that the action was bad for nonjoinder. The plaintiff's counsel then applied for leave to amend the plaint by joining the plaintiff's brother. This was refused and the action dismissed. On appeal, this court held that in refusing leave to amend the judge had exercised his discretion judicially, that the appellant was not aggrieved by the judge's order and therefore dismissed the appeal. Apart from the fact that this point was not taken before the learned trial judge who sat as the first appellate court nor did the appellants make it an issue in their defence they must be deemed to have acknowledged the respondent as their landlord with authority to institute the proceedings. It is my view that the authority cited is distinguishable from the circumstances in the present case.

Counsel for the appellants also referred to s. 45 of the Law of Contract Ordinance No. 1 of 1961 which reads:

> "45. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and after the death of the last survivor, with the representatives of all jointly."

The short answer to this submission is that if the point had been raised at the proper time, it would have been dealt with judicial discretion and the necessary order made under O. 1, r. 10 of the Indian Code of Civil Procedure to which counsel for the appellants also referred the court.

I hold the view that having regard to the defence filed and the issues involved in this case the question as to whether the respondent's action was maintainable or not, cannot now be gone into by this court. This ground therefore fails.

The last ground of appeal argued was:

> "6. The first appellate court should have held that the Minister did not act in accordance with the principles of natural justice in giving a certificate required by the said section 19 (1) (*n*) without giving the appellant an opportunity for opposing the grant of such a certificate."

The arguments submitted in support of this ground were similar to those submitted before Spry, J. namely that no opportunity was given to the appellants to oppose the application by the landlord for recovery of possession of the premises. It is sufficient to say that the action of the Minister is purely an executive one and that nowhere is it laid down in the Act that the Minister should hold an enquiry before issuing a certificate.

The learned trial judge stated in his judgment:

> "The Board had evidence before it that the Minister had certified that the re-development of the property otherwise than as a dwelling-house was in the public interest. It was not for the Board to consider the propriety of the certificate or of the procedure which led up to it and in any case, as I have said, the Board had no sufficient evidence before it on which it could make a judicial finding. The Board's duty, once it was satisfied that the Minister had given his certificate, was to consider, under s. 19 (2), whether in all the circumstances it was reasonable to make the order sought. This the Board failed to do."

I agree with the learned trial judge. As he pointed out in his judgment, it

is for the Board to act under s. 19 (2) of the Act. This ground also fails and in the result, I would dismiss the appeal with costs for the respondent.

Crabbe JA: I agree.

Duffus JA: I also agree.

Appeal dismissed.

For the appellants:
KC Kesaria and *VC Kesaria*
RC Kesaria, Dar-es-Salaam

For the respondent:
PR Dastur
PR Dastur, Dar-es-Salaam

Thakers Ltd v Bernard G Chipunguhelo (*alias*) Chips
[1965] 1 EA 82 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	30 October 1964
Case Number:	10/1964
Before:	Sir Ralph Windham CJ
Sourced by:	LawAfrica

[1] Libel – Newspaper report – Report about motor car accident – Death reported of B. and K. occupants of car – B. and K. were prisoners serving sentence – Report stated discovery of bottle of brandy in car and photographs of women in trousers pocket of K. – Action for libel by B. – Innuendo that B. was habitual drunkard, profligate, of immoral character and had committed offence under Prisons Ordinance (*Cap.* 58) (*T*) *– Whether report defamatory – Damages.*

Editor's Summary

The appellant company published a report about a motor car accident in its daily newspaper stating that the respondent and one K., who were prisoners of the first grade, were the occupants of the car and that they had died as a result of the accident. It was also stated in the report that a bottle of brandy was found in the car and that in the trouser pocket of K. there were found three photographs of women and two letters "bearing the address of K. Street, Dar-es-Salaam". The respondent brought an action for libel alleging that the report was defamatory of him by innuendo and the innuendo pleaded was that he was an habitual drunkard, profligate, of immoral character, a person of no substance, unworthy of trust or

confidence and that he had committed an offence under the Prisons Ordinance. At the hearing it was conceded that the whole report was untrue and there was evidence that K. Street was known to be associated with prostitutes. At the trial it was argued that as the photographs were not alleged to have been found on the respondent, there could be no reputation of immorality on his part but the magistrate rejected this argument on the ground that it was very difficult to detach the respondent from whatever imputations the publication created as the respondent and K. were associates. The magistrate found that the words did bear the meaning so placed upon them by the respondent and awarded damages in the sum of Shs. 4,000/-. On appeal:

Held –

(i) the report about the discovery of a bottle of brandy not only conveyed to one or more other persons the meaning, but were reasonably capable of conveying the meaning, that the respondent, if not an habitual drunkard, was at least a man who was given to drink, and that he was on that occasion in possession of the bottle of brandy in dishonest and untrustworthy breach of prison regulations; and accordingly the report was defamatory of

the respondent in respect of the imputation of bibulousness and breach of prison discipline;

(ii) on the evidence the imputation of profligacy and immoral character against the respondent could not be sustained because the photographs and the letters were not found on the respondent and as such the innuendo of profligacy would not naturally occur to a responsible and fair-minded third person;

(iii) the damages awarded were high and bearing in mind that the respondent's admitted conviction for the offence of theft by a servant was relevant to his reputation for honesty and trustworthiness the damages should be reduced to Shs. 100/-.

Order accordingly.

Cases referred to in judgment

(1) *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 741.

(2) *Nevill v. Fine Arts Co.*, [1897] A.C. 68.

(3) *Hawkins v. Express Dairy Co. Ltd.* (1940), 163 L.T. 147.

(4) *Hobbs v. Tinling*, [1929] 2 K.B. 1.

Judgement

Sir Ralph Windham CJ: The appellant company publish a daily newspaper in Dar-es-Salaam in Swahili. They appeal against a judgment of the District Court, Dar-es-Salaam awarding to the plaintiff-respondent Shs. 4,000/- damages in respect of an article published about him in their newspaper on August 28, 1961, which was alleged and held to be libellous by innuendo. The following facts were and are conceded by the appellants: first, that the article in question was published by them on the date and in the words alleged. Secondly, that the allegedly libellous words were neither true nor privileged. Thirdly that the person described as "Chips" in the article was the respondent Chipunguhelo, that being his nick-name.

The following is an English translation of the article:

> "Two prisoners of first grade at Kingolwira in Morogoro, Chips and Kingue died recently in an accident of motor car collided against a motor trolly along the road leading to Kingolwire. In that motor car there was found one bottle of brandy and in the trousers pocket of Kingue there were found three photographs of women and two letters bearing the address of Kirk Street and Nyamwezi Street, Dar-es-Salaam.
>
> Ramadhani Abdallah Kingue and Chips died recently here in Morogoro in an accident of motor car collided against a motor trolly, a motor vehicle that moves on railway to carry sisal to the factory, when it collided against a motor car.
>
> It appears that Kingue is the one who was driving because when people arrived at the scene of accident at the road leading to Kingolwira, Kingue was pressed by the steering. Glasses, some penetrated into his stomach and some have cut him much in the head. He died there, but Chips died in hospital.
>
> Chips and Kingue, prisoners of first grade in Kingolwira prison, were given a job of selling milk in Morogoro township and were also given a motor car for that job. Chips was a D.O. in Tabora and Kingue is said to have had a responsible job in Dar-es-Salaam."

It was conceded, either on pleadings or at the trial, that the whole of the above report of a motor-car accident, and of the deaths of Kingue and the respondent Chips in it, was false, the appellants having printed in their newspaper, without inquiry, a report of this fictitious incident which had been telephoned to their office by a mischief-maker from Morogoro. The respondent on his part conceded the truth of the allegation that he was a first-grade prisoner in Kingolwira prison at the time of the publication, serving a sentence of three years imprisonment there for theft by a servant, a term which (with remission) has since expired in October, 1962. He did not concede, nor was it proved, that while in prison he or Kingue were given the job of selling milk in Morogoro township and given a car for that job.

The passage in the offending article which was alleged to be, in its context, libellous against the respondent, was the statement that after the supposed fatal accident in which the supposed occupants of that car, Kingue and the respondent, were said to have been killed:

> "In that motor car there was found one bottle of brandy and in the trousers pocket of Kingue there were found three photographs of women and two letters bearing the address of Kirk Street and Nyamwezi Street, Dar-es-Salaam."

It is claimed that these words, while not defamatory of the respondent in their natural meaning, were defamatory of him by innuendo, the innuendo being pleaded in para. 9 of the plaint as follows:

> "9. The said words mean and were understood by those who read them to mean that the plaintiff is a habitual drunkard, profligate, of immoral character and was a person of no substance and unworthy of trust or confidence. They were also meant or understood to mean that the plaintiff has committed an offence under the Prisons Ordinance (Cap. 58) of the Laws of Tanganyika, in that he the plaintiff and Kingue his fellow prisoner were found with a prohibited article namely brandy and also that they had consumed brandy which they are not permitted to do."

The learned trial magistrate found that the words did bear the meaning so placed upon them by the respondent, and he entered judgment in his favour accordingly. The relevant passage in the judgment reads as follows:

> "When one reads the article concerned on the whole one would not fail to get the impression that the accident was the result of drunkenness on the part of the driver. I am unable to find any news value in the publication that a bottle of brandy was found in the car which was involved in an accident. This is no doubt intended to associate the accident with some alcoholism. It is noted that the alleged collision was with a trolly which had its own track. Similarly there can be no news value in the publication of the fact that three photographs of women were found in the pocket of the other prisoner, except to show that the man was of low morals. It was argued that as the photographs were not alleged found on the plaintiff, there could be no reputation of immorality on his part. The point remains, however, that the plaintiff and the other man were associates. In my view it is very difficult to detach the plaintiff from whatever imputations the publication created. The question of a bottle of brandy being found in the car no doubt was an imputation of the commission of a prison offence by plaintiff and his associate. It is common ground that both prisoners were first grade prisoners and as a result occupied some place of trust. It was therefore possible to allow them to go into Morogoro town to sell milk – a privilege not normally extended to the ordinary prisoner.
>
> If such trusted prisoners had in fact done what the publication had alleged, they would have exhibited unfitness in the office of trust placed on them by the Prison authorities.

> In my view the general impression one gets, after reading the article, would be that the plaintiff was a drunkard, morally low and unreliable and that he also committed a prison offence."

The appellants appeal against the conclusions of the learned magistrate with regard to the innuendoes against the respondent imported by the reference to the presence (*a*) of a bottle of brandy in the car in which he was being driven by Kingue, and (*b*) of letters and photographs of women in Kingue's pocket. In the alternative they appeal against the quantum of damages awarded. Kingue, it is to be noted, did not sue the appellants for libel.

In deciding upon these matters as an appeal court, after a perusal of the evidence, I bear in mind that my prime business is to decide whether the words, or any of them, were reasonably capable of being understood to convey the imputations attributed to them. For if they were, then it is only on very strong grounds that this court would interfere with the decision of the court below that they were so understood by one or more persons and were accordingly libellous. In short, I am concerned primarily with the question whether the learned magistrate, in his capacity as judge, was right in ever leaving to himself, in his capacity as jury, the question whether these words conveyed the defamatory meaning alleged. The position is laid down clearly in *Capital and Counties Bank v. Henty* (1).

With these things in mind I turn to the two allegations of fact which the learned magistrate found to be defamatory of the respondent by innuendo, first the presence of the bottle of brandy in the car, and secondly the presence of the three photographs of women and the two letters in the trouser pocket of his companion Kingue.

With regard to the bottle of brandy, I am of the opinion, reached after some hesitation, that the words not only conveyed to one or more other persons the meaning, but were reasonably capable of conveying the meaning, that the respondent, if not a habitual drunkard, was at least a man who was given to drink, and that he was on that occasion in possession of the bottle of brandy in dishonest and untrustworthy breach of prison regulations; an imputation which would of course be in some degree defamatory. As the learned magistrate rightly observed in his judgement, a report that a bottle of brandy was found in a car that had just been involved in a road accident has no intrinsic news value, and an ordinary person reading it would immediately and not unreasonably read it in a sense derogatory towards the occupants of the car.

With regard to the report about three photographs of women and two letters bearing the address of Kirk Street and Nyamwezi Street, however the position is different. There was evidence, it is true, that Kirk Street is known to be associated with prostitutes; and the coupling of letters bearing the name of that street with the mention of three photographs of women would certainly carry the innuendo that the man on whose person they were found was an immoral character. But that man was Kingue and not the respondent, and the things were found (it was said) in his trouser pocket. The report nowhere suggested that the respondent even knew they were there. In dealing with this point and in finding that the statement about the photographs and addresses libelled not only Kingue but also the plaintiff-respondent, the learned magistrate said:

> "The point remains, however, that the plaintiff and the other man were associates. In my view it is very difficult to detach the plaintiff from whatever imputations the publication created."

With the greatest respect, I think this conclusion of the learned magistrate was unjustified. If a man and his companion drive out in a car together, a report that the car then met with an accident and that a bottle of brandy was found

in it may well suggest to a reasonable third person that both occupants of the car had been drinking or conveying the brandy. But what a man keeps in his trouser pocket is ordinarily known only to himself; and I do not think that a report of the contents of his pocket is reasonably capable of suggesting that his companion shared in the little secrets, dirty or otherwise, which he kept there, or in the immoral mode of life that they evidenced, even if that companion was his associate in some enterprise of a quite different nature, such as smuggling brandy into a prison or unlawfully drinking it. To extend the innuendo of profligacy to the companion, in the present case the respondent, is in my view one of those far-fetched and "sinister" inferences which *might* be drawn from the report but which would not naturally occur to a reasonable and fair-minded third person, and which ought accordingly not to be left to a jury or, in the present case, ought not to have been left by the learned magistrate to himself in his capacity as jury: vide *Capital and Counties Bank v. Henty* (1) ((1882), 7 App. Cas. at p. 788) and *Nevill v. Fine Arts Co.* (2) ([1897] A.C. 68, at p. 73).

In brief, I find that the article printed by the appellants was rightly held to be defamatory of the respondent in respect of the imputation of bibulousness and breach of prison discipline, but wrongly in respect of profligacy. And it now remains for me to decide whether the figure of general damages awarded, namely Shs. 4,000/-, ought for this or any other reason to be reduced. A court of appeal will rarely interfere with the quantum of general damages awarded in an action for defamation, unless the court in assessing them, or in directing a jury as to the factors to be considered in assessing them, has taken into account a factor that ought not to have been considered, or has failed to take into account one which ought to have been considered. Now in the present case, in assessing damages at Shs. 4,000/- on the face of it a decidedly high figure, the learned magistrate must be assumed to have attributed some part of this amount to damages for the imputation of profligacy, an imputation against the respondent which I have found could not be sustained. Conversely, it would seem that the learned trial magistrate failed to take into account a factor that was relevant to the assessment of general damages, namely the fact that the respondent was at the time serving a sentence for the crime of theft by a servant, and that accordingly he must be presumed to have had less reputation to lose from the defamatory article, in respect of his trustworthiness and honesty, than if his record had been blameless. My presumption that the learned magistrate did not take this factor into account is based on his failure to mention it in his judgment when assessing damages and on the largeness of the sum that he awarded. That such a fact of admitted dishonesty is relevant when it forms part of the plaintiff's own case, as it did here, was laid down clearly in *Hawkins v. Express Dairy Co. Ltd.* (3) where Stable, J., in substituting contemptuous damages for the £750 awarded by the court below, distinguished such a case from the general rule as to the exclusion of evidence of a plaintiff's particular acts of misconduct in actions for defamation, as laid down by the Court of Appeal in *Hobbs v. Tinling* (4).

Bearing the foregoing factors in mind, and bearing in mind also that the respondent's admitted conviction for the offence of theft by a servant was relevant to his reputation for honesty and trustworthiness but not to his (presumed) reputation for sobriety, I reduce the Shs. 4,000/- awarded by the learned magistrate to the respondent to the sum of Shs. 100/-. In the circumstances there will be no order for the costs of this appeal, while the respondent's costs in the court below will be payable on the sum now awarded as damages only.

Order accordingly.

For the appellant:
BN Patel

Baloo Patel & Co, Dar-es-Salaam

For the respondent:
MN Rattansey
Mohmuel N Rattansey & Co, Dar-es-Salaam

George Bernard Gordon v Martha Nyamate Gordon
[1965] 1 EA 87 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	7 November 1964
Case Number:	4/1964
Before:	Reide J
Sourced by:	LawAfrica

[1] Divorce – Domicil – Domicil of choice – Animus manendi – Petitioner born in England – Petitioner employed by Government of Tanganyika on pensionable terms – Possibility of employment being terminated – Petitioner ordinarily resident in Tanganyika for 18 *years – Petitioner's assets in Tanganyika including a building – Petitioner married to an African lady – Intention to stay in Tanganyika so long as employment available – Intention to return to England ultimately – Whether petitioner had acquired domicil of choice.*

Editor's Summary

The petitioner in a divorce suit was born in England and in 1946 at the age of 22 came to Tanganyika as an Assistant District Officer appointed by the British Colonial Office on permanent and pensionable terms. In 1952 the petitioner married the respondent, an African, and had most of his assets in Tanganyika including a building. The petitioner averred that he had retained his domicil of origin and the respondent averred that the petitioner had acquired a domicil of choice in Tanganyika. At the hearing the petitioner stated that if his employment was terminated he would try to find other employment in Tanganyika or failing that, in East Africa, and that when he could not any longer find employment he would return to England. The petitioner also stated that he had never at any time formed an intention of remaining in Tanganyika for the rest of his life, but had always meant to return ultimately to England to end his days there.

Held – although the petitioner had been resident in Tanganyika for 18 years and had most of his interests and ties in Tanganyika and could be said to have "joined a new society" this fell far short of establishing or even of raising a presumption that he had abandoned his domicil of origin, and that he was domiciled in England.

Order accordingly.

No cases referred to in judgment

Judgment

Reide J: The preliminary point before me for decision is whether the petitioner had retained his domicil of origin in England, as he avers, at the time of filing his petition on June 1, 1964, or whether, as the respondent avers in her answer, he had acquired a domicil of choice in Tanganyika. If his domicil was then England, then this suit will fall to be heard under the provisions of the Tanganyika (Non-Domiciled Parties) Divorce Rules 1963. There are now only three judges (of whom I am not one) in Tanganyika who have been approved to hear divorce suits under these Rules. If the domicil was then in Tanganyika, then the petition, as it appears to me, cannot be heard without amendment.

There is really no dispute about the facts of the question now before me. The petitioner, now aged 40, was born in England of British parents, and England was his home until he came to Tanganyika in 1946, when he was 22, as an Assistant District Officer appointed by the British Colonial Office on

permanent and pensionable terms. Shortly after his arrival he formed an alliance with an African lady and lived with her until March 1952, when they were married. At this time she had borne him two children, and has borne him four more since marriage, the youngest in 1957. In 1952 the petitioner went to England on leave. He was concerned about the question of the legitimacy of his two eldest children and had some correspondence on this subject with the Home Office in London. He also obtained British passports for his wife and the two children. He has said that he learnt at the Colonial Office that his marriage was disapproved of officially, and there was some talk of his being transferred either to the west coast of Africa or to the West Indies. Feeling that this approach was unjust he saw the then Governor of Tanganyika, Sir Edward Twining (as he then was), and as a result was permitted to return for service in Tanganyika, though not as an administrative officer. On his return he was given Government quarters in Oyster Bay, Dar-es-Salaam. He encountered a measure of hostility from some of his neighbours because of his marriage, and for this reason in 1954 he bought a house for about Shs. 30,000/- in Changombe, Dar-es-Salaam, where he and his family have lived until the marriage broke up. I am not sure when that latter event occurred, but I assume it was not before 1960, in which year he bought a plot of land which he has said was used as a "beach bungalow" (sic), at Kawe, Dar-es-Salaam. Since 1952 he has paid two other visits to the United Kingdom, and on one of them was accompanied by the respondent. He has said nothing about his plans for his children's education and future.

The petitioner, who was examined and cross-examined at some length, impressed me as completely truthful and frank, and I accept his evidence without hesitation. He says he likes life in Tanganyika and would like to stay here for the present. He realises that because of what he calls "localisation" (by which I take him to mean the Government's policy of replacing European officials by Africans) his present employment as Principal of the Civil Service Training Centre (a post which he holds on pensionable terms) may not last much longer. He says that when it terminates he will try to find other congenial employment in Tanganyika, or failing that, in East Africa, and that when he cannot any longer find such employment he will return to England. He went on to say more than once and categorically that he has never at any time formed an intention of remaining in Tanganyika for the rest of his life, but has always meant to return ultimately to England to end his days there. As I have intimated. I accept the truth of that statement of his intentions. He agrees that most of his assets are in Tanganyika, although he still has in England a Post Office savings bank account, a small current bank account, two life policies and a third share in a house. He says that when he filed his petition he had not considered what disposition he would make ultimately of his property here. He was frank enough to say that he contemplates a proposal of marriage to another African lady supposing that this petition is successful, though he has not yet made up his mind about this. The respondent's advocate submits that these matters and the petitioner's already long stay in this country point to his having "elected to join a new society" and to adopt East Africa as his permanent home, though I would point out in passing that to displace the presumption that a person has retained his domicil of origin it is necessary to show that he has adopted (not merely a region embracing several countries but) a particular country as his permanent home.

"Domicil" has never been exhaustively defined, and it has indeed been said that an absolute definition is impossible. Cheshire's Private International Law (5th Edn.), p. 160, has this to say:

> " . . . More recent decisions (i.e. more recent than 1859), while repeating that a permanent home constitutes domicil, have insisted that the word

> 'permanent' must be given its literal meaning. A present intention to remain indefinitely in an existing home does not per se satisfy the test of permanence. What must be shown is an intention never to leave. Accordingly, it has several times been affirmed, and more than once by the House of Lords, that the present home of a man is not to be equated with domicil if he contemplates some event, however remote or uncertain, which may cause him at some indeterminate time in the future to change his country of residence. If this possibility is present to his mind, even an intention to reside indefinitely in a place is ineffective. Lord Cranworth . . . offered his own solution of the riddle.
>
> > 'The present intention of making a place a person's permanent home can exist only where he has no other idea than to continue there, without looking forward to any event certain or uncertain, which might induce him to change his residence. If he has in his contemplation some event upon the happening of which his residence will cease, it is not correct to call this even a present intention of making it a permanent home. It is rather a present intention of making it a temporary home, though for a period indefinite and contingent (*Moorhouse v. Lord* (1863), 10 H.L.C. 272, 285–6)'."

That dictum, although 100 years old, remains a correct statement of law and one never departed from in the numerous leading cases on domicil which have since made their appearance, and I shall follow it here. I will say at once that I am in no doubt that when the petitioner filed his petition he had never abandoned his domicil of origin. It is true that Cheshire (*op. cit.* p. 173) has said:

> "All that can be gathered from the authorities . . . is that very little reliance can be placed upon declarations of intention especially if they are oral",

though it appears that the learned author was referring to cases where the person concerned was not himself before the court. Even where he has testified, his testimony of his intentions "is accepted with considerable reserve, even if the truthfulness of the witness be admitted". (*Hodgson v. Beauchesne* [1858] 12 MOO P.C. 285 at p. 325). I am aware too, that it has been held that a mere intention to retain a former domicil or acquire another one has no legal effect when the balance of evidence shows that a new domicil animo et facto has been adopted. I bear in mind that the English courts have consistently taken the view that it requires far stronger evidence to establish the abandonment of a domicil of origin in favour of a fresh one than to establish a change from one domicil of choice to another. Another important consideration which operates in my mind is that in this country jurisdiction in divorce extends to both domiciled and non-domiciled parties. If it were indeed the fact that the petitioner really had at the material time an intention of making Tanganyika his permanent home there seems to me no reason in the world why he should not have said so, have brought his petition under the Divorce Ordinance as a domiciled person and so avoided the trouble and worry involved in the determination of this preliminary point. The only reason that I can imagine why he should have petitioned as a non-domiciled person is that that is what he knows himself to be and that he is a truthful man. I have not heard that he has at any time sought to obtain Tanganyika citizenship, though I should have thought it might well have been to his advantage to do so if he wished to make this country his permanent home, or even if he was anxious to retain employment here as long as possible. It is true that he has been in Tanganyika a long time – eighteen years – and that most of his interests and perhaps ties are at this moment to be found here, and that in that sense he may be said to have "joined a new society". But that falls far short of establishing or even of raising a presumption that he has abandoned his domicil of origin. It must be remembered that he came here when a young man as what was called a "colonial civil servant", and that he

is now only 40. It is a matter of the widest common knowledge that both colonial civil servants who retired from their service in this country before its independence, and those who elected to remain in the service of independent Tanganyika and have since retired, have for the most part returned to their country of origin, whether they had worked here for a short time only or for many years – perhaps for the best part of a lifetime. Nor is there anything surprising or unnatural in that. Many men of course either come to this country with an intention already formed, or they acquire an intention after arrival, of making it their permanent home. On the other hand, many may, and do, come to an East African country in their youth intending to make their home and their career here, perhaps over many years, but without ever forming such intention to remain permanently. They may stay for 30 or 40 years, and while they are here give of their best and largely identify themselves with the life and interests of the country in which they are living. Nevertheless, their expectation and intention of returning to their country of origin when their youth is spent, or when they feel that their career in Africa has come to a close, is never abandoned. The petitioner is, as I have said, still a young man, and even supposing that he contemplates the possibility of remaining here for as long as another 20 years that would not of itself discredit the existence of a perfectly natural intention, such as he says he has always had, of ultimately returning to England to end his days there.

It has been submitted that the petitioner's having married an African wife who has given him a family, and his contemplating marriage to another African lady, are indications of an intention to remain permanently, if not in Tanganyika, then at any rate in East Africa. I have already pointed out that so far as East Africa is concerned, such an intention, even if established would not displace the presumption that the petitioner's domicil was that of his country of origin. Such a submission, however, would appear to assume that the petitioner might be unwilling, or would at any rate be reluctant, to remove his African wife or his children with him to England. I have not, however, heard anything to lead me to think that that would be so assuming, of course, as regards his wife, that he was on good terms with her.

Accordingly, I find that the petitioner is a non-domiciled person.

Order accordingly.

For the petitioner:
RS Grimble
Fraser, Murray, Roden & Co, Dar-es-Salaam

For the respondent:
RC Kesaria and *VC Kesaria*
RC Kesaria, Dar-es-Salaam

Bharmal Kanji Shah and another v Shah Depar Devji
[1965] 1 EA 91 (SCK)

Division: Supreme Court of Kenya at Nairobi

Date of judgment: 12 August 1964

Case Number: 1098/1963

Before: Rudd J

Sourced by: LawAfrica

[1] Mortgage – Statutory power of sale – Action for declaration that no amount due under mortgage – Alternatively suit for redemption – Interlocutory injunction restraining sale – Undertaking in damages – Imposition of additional terms.

Editor's Summary

The plaintiffs as personal representatives of a deceased charger brought a suit for a declaration that there was nothing due or secured by or advanced under the charge and alternatively for an account and redemption, and applied for an interlocutory injunction pending the decision of the suit to restrain the defendant charged from exercising a statutory power of sale under s. 69 of the Indian Transfer of Property Act, 1882 as amended. The defendant resisted the application for the interlocutory injunction on the ground that there was not enough substance shown by the plaintiffs to justify it, but was prepared to submit to an injunction on terms.

Held –

(i) the court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage;

(ii) an interlocutory injunction restraining the defendant from exercising the power of sale should be granted on the usual undertaking as to damages and on imposition of additional terms.

Interlocutory injunction granted on an undertaking to pay damages and on additional terms.

Cases referred to in judgment

(1) *Gill v. Newton* (1866), 14 L.T. 240.

(2) *Pike v. Cave* (1893), 62 L.J. (N.S.) 937.

Judgment

Rudd J: This is an application by the plaintiffs as personal representatives of a deceased charger for an interlocutory injunction restraining the defendant chargee from exercising a power of sale under a charge which was registered under the Registration of Titles Act (K) whereby the deceased charger charged certain lands and buildings to be erected thereon to secure advances which the defendant was to make in order to enable the charger to complete a building on the said lands. The instrument of charge was executed on December 30, 1959 and recited *inter alia* that the chargee had agreed at the request of the charger to advance to the charger a sum of Shs. 60,000/- in manner thereinafter referred to enable the charger to complete business-cum-residential premises on the land in compliance with certain building plans which had been approved on July 29, 1958, and upon the repayment of the said principal sum together with interest and other charges secured in manner therein-after appearing.

The instrument therein witnessed *inter alia* as follows; [*The judge here set out a portion of the instrument and continued*: –]

The other provisions need not be set out at present except to state there was a power of sale in accordance with s. 69 of The Indian Transfer of Property Act was provided in case of default.

The defendant claims that Shs. 50,000/- in all, not Shs. 60,000/- was advanced under the agreement recited in the instrument, that Shs. 1,200/- only has been paid as interest and that the charger and his estate is in default of payment of principal to the extent of Shs. 50,000/- as well as upwards of Shs. 27,200/- on foot of interest. The defendant threatens to exercise his power of sale.

The plaintiffs on the other hand claim that nothing was advanced in terms of the charge, that any advances that were made were not in terms of the charge and they have brought the suit for a declaration that there is nothing due or secured by or advanced under the charge and alternatively for an account and redemption. Pending the decision of the suit the plaintiffs claim an interlocutory injunction restraining sale under the power provided in the instrument of charge or under the statutory power of sale provided by s. 69 of the Indian Transfer of Property Act as amended.

The charge provided for the advance to be made by instalments depending on the progress of the building. We do not know on what dates the specified stages of progress of the building were attained. There are affidavits showing advances in all amounting to Shs. 50,000/- most of which were made according to the deponents after July 15, 1959 and before the date of the execution of the instrument of charge.

The delay in execution of that instrument is sought to be explained on the ground that there was considerable delay between the time the document was engrossed and the time it was executed. This is not the time when all the rights of the parties under the charge should be finally determined but one can say that the instrument contains intrinsic evidence that interest was to be paid as from July 15, 1959 which I think tends to show that the agreement was made on or before that date and that some advances were to be made before December 30, 1959. There is also a document said to be in the charger's writing authorising certain payments from the advances as and when they are made and some of the payments claimed to have been made by the defendant and an advocate, who received instructions from the charger and from the chargee are consistent with that document. It seems unlikely that the charger would have executed the instrument of charge and allowed it to be registered against his title if he thought that no advances had been made under it.

The defendant resists the application for interlocutory injunction on the ground that there is not enough substance shown by the plaintiffs to justify it. But he would be prepared to submit to an injunction or he would undertake not to sell if the current rents and profits from the property were paid to his advocate to be held in trust as security pending the decision of the suit. This appears to me to be a very fair offer but counsel for the plaintiff was unable to accept it without instruction from his clients.

I have been referred to the cases of *Gill v. Newton* (1) and *Pike v. Cave* (2) to show that if an interlocutory injunction is granted the applicant should be required to give an undertaking in damages and more particularly that such an undertaking can be taken notwithstanding that the undertaker may not be entitled to property of any value.

In this case I would feel much happier about granting the injunction if I could feel reasonably sure that in the event of a substantial amount being found due on the charge the plaintiffs would proceed to pay it and redeem in accordance with the alternative prayer of the plaint. I am told that the property if sold is not likely to realise the amount claimed to be due by the defendant.

The injunction was granted in *Gill v. Newton* (1) because there was a deed of arrangement subsequent to the mortgage and this deed of arrangement was in unusual terms which might have the effect of depriving the mortgagor of his power of sale. That too was a case in which the plaintiff alleged her surprise that so large a sum was due to the defendant and she charged that such a sum was not in fact due and that the defendant who had been allowed into possession ought to furnish accounts of his receipts and payments.

Turner, L.J. held the opinion that the injunction was due because of the terms of the deed of arrangement but not upon the allegation that the amount owing upon the mortgage was in dispute for the consequence of that would be that in every case a mortgagor would only have to raise a question as to the amount due upon the security to enable him to come to court for an injunction which would deprive the mortgagee of his remedies under the deed. I respectfully agree that that is not a practice which should be allowed to develop especially as the Indian Transfer of Property Act contains specific provisions in s. 69 (B) whereby on an improper exercise of the power any person damnified thereby shall have a remedy in damages.

In *Pike v. Cave* (2) it was decided that a personal undertaking was sufficient terms to impose as a condition of the interlocutory injunction where there was a real issue to be tried and not a "shadowy" one. Kekewich. J. there stated that the position would be different if the issue were "shadowy" and suggested that in such case the injunction should be refused. I do not think that practice is commonly followed in Kenya where I think an injunction has been allowed in some quite shadowy cases on terms giving greater security to the defendant.

In this case the defendant while not admitting that it is a fit case for an interlocutory injunction is not averse to such an injunction being granted on terms of more effective security. He wants his money back or as much as he can realise on the security. I suspect that he might be prepared to settle at a figure much lower than the amount he claims is due under the mortgage. I think that this is a case which could and should be settled and so I will not absolutely refuse the interlocutory injunction but I would impose additional terms as well as a mere undertaking in damages. As regards to the additional terms I put the plaintiffs to their election as follows:

either (1) the plaintiffs to undertake to collect the current rents and profits of the premises vigilantly and to pay the same to the plaintiffs advocates or into court where they will be held in trust pending the decision of the suit.

or (2) the plaintiffs within a reasonable time to give satisfactory security to the extent of Shs. 40,000/- towards the redemption of such sum as may be found due on the charge and costs. Any balance to be ultimately refunded to the plaintiffs.

(3) I order the costs of the application, costs in the cause.

(4) Liberty to apply.

I have assessed the sum of Shs. 40,000/- as the amount of the security because I think it a reasonable amount in the circumstances since it is as much or more than the defendant expects to recover on a sale, it is only about half the amount claimed to be due on the charge and less than the figure which plaintiffs' advocate suggested the premises are worth today. There will also be the usual undertaking as to damages.

I see I have not fully explained the basis of the decisions in *Gill v. Newton* (1) and *Pike v. Cave* (2) which in my view was this:

Lack of substance is not a good ground for refusing the injunction or adding terms in addition to the usual undertaking as to damages where there is a real issue to be tried. In Kenya at any rate I do not think the rule applies with full effect where the court thinks the claim is to use Kekewich, J's expression shadowy.

Interlocutory injunction granted on an undertaking to pay damages and on additional terms.

For the plaintiffs:
DN Khanna
DN & RN Khanna, Nairobi

For the defendant:
Satish Gautama and Bhailal Patel
Bhailal Patel, Nairobi

Bhag Bhari v Mehdi Khan
[1965] 1 EA 94 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	22 January 1965
Case Number:	17/1963
Before:	Newbold Ag V-P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Miles, J

[1] Practice – Originating summons – Prayer for accounts – Issues relating to wilful default raised at hearing – Adjudication of such issues by court – Also payment into court ordered – Whether judge exceeded jurisdiction – Civil Procedure (Revised) Rules, 1948, *O.* 36, *r.* 1 (*c*) *and* (*d*) (*K*).

Editor's Summary

The appellant, the heir of a deceased person, had taken out an originating summons under O. 36 of the Civil Procedure (Revised) Rules, 1948 (K), against the respondent, asking for an order that the respondent "do supply . . . particulars of true and fair accounts of the assets and liabilities of the estate". At the hearing of the summons in chambers the advocate for the respondent took a preliminary objection and raised the following points, namely, that the only relief asked for in the originating summons was the supply of accounts, that the final accounts of the administrator had been supplied subsequent to the issue of the originating summons, that the court could not examine the accounts on the originating summons, and that in any event, an originating summons was not the proper procedure for the investigation of the

matters which the appellant was proposing to ask the court to investigate. The trial judge overruled the preliminary objection, held that the issues were neither obscure nor complex, that it was unnecessary to raise these matters by way of suit and adjourned the proceedings into court and heard evidence on the following issues, namely, (1) whether the respondent had repaid to the deceased during his lifetime a sum of Shs. 6428/16 which had been loaned to him (2) whether the respondent or his son had stolen jewellery belonging to the appellant, (3) whether the respondent or his son had fraudulently misappropriated the sum of Shs. 1200/- which sum was the salary payable to the deceased, (4) whether the respondent had received a loan of Shs. 15,000/- from the deceased during his life time, (5) whether sums expended on the maintenance of the appellant subsequent to the death of the deceased was a proper charge against the estate and (6) whether the sum of Shs. 1,805/- was to be reimbursed to the respondent out of the estate. The trial judge found for the appellant on issues (1) and (6) and

ordered the respondent to pay into court the total sum of Shs. 9,038/16 and stated that, though this was not expressly asked for in the originating summons he had the power to make such an order under O. 36, r. 1 (*c*). Thereupon, the appellant appealed on the issues that the trial judge had found against him, whilst the respondent cross-appealed, *inter alia*, against the ruling on the preliminary objection. It was contended on behalf of the respondent (*a*) that the procedure by way of originating summons should never have been adopted since the matters to be decided were not simple, (*b*) that r. 1 (*c*) ibid. only empowered the court to order the furnishing of particular accounts and that what was asked for was a general account, (*c*) that r. 1 (*c)* ibid. was concerned with the ordering, not the examination, of accounts and that since at the time of the hearing final accounts had been rendered, no action was called for on the summons and (*d*) that it was not competent for the court on an originating summons to order the payment into court of any money, except where there had been an express admission that the party concerned had the money in hand.

Held –

(i) the scope of an inquiry which could be made on an originating summons and the ability to deal with a contested case was very limited; on these grounds the trial judge should have refused to deal with issues raised at the hearing apart from the question of furnishing accounts;

(ii) an inquiry should not be ordered under O. 36 where wilful default was alleged on the part of the administrator;

(iii) the object of r. 1 (*d*) ibid. was simply to enable the court to order the payment into court of money clearly or admittedly in the hands of an administrator pending the determination of the entitlement to that money; in the present case, not only was it not admitted or proved that the money was in the hands of the administrator, but there was no issue as to entitlement and therefore no occasion for the money to be paid into court; consequently, para. (*d*) was inappropriate.

Appeal dismissed. Cross-appeal allowed.

Cases referred to in judgment

(1) *Kulsumbai v. Abdulhussein*, [1957] E.A. 699 (Z).

(2) *Re Skinner, Cooper v. Skinner*, [1904] 1 Ch. 289.

(3) *Re Carlyon, Carlyon v. Carlyon* (1887), 56 L.J. Ch. 219.

(4) *Dowse v. Gorton*, [1891] A.C. 190.

(5) *Re Hengler, Frowde v. Hengler*, [1893] W.N. 37.

(6) *Re Stuart, Smith v. Stuart* (1886), 74 L.T. 546.

(7) *Re Newland, Bush v. Summers*, [1904] W.N. 181.

(8) *Nutter v. Holland*, [1894] 3 Ch. 408.

(9) *Strafford v. Sutcliffe*, [1942] W.N. 80.

(10) *Neville v. Mathewman*, [1894] 3 Ch. 345.

(11) *Gurdial Singh Dhillon v. Sham Kaur*, [1960] E.A. 795 (C.A.).

(12) *Ilanga v. Manyoka*, [1961] E.A. 705 (C.A.).

(13) *Gandy v. Casper Air Charters Ltd*. (1956), 23 E.A. C.A. 139.

(14) *Hemraj Bharmal Shah v. Santosh Kumari*, [1961] E.A. 679 (C.A.).

(15) *Pushpa Patel v. Fleet Transport Co. Ltd*., [1960] E.A. 1025 (C.A.).

(16) *Easter Bakery Ltd. v. Castelino*, [1958] E.A. 461 (C.A.).

(17) *Simonian v. Johar*, [1962] E.A. 336 (C.A.).

(18) *Ayoub v. Standard Bank Ltd*., [1961] E.A. 743 (C.A.).

(19) *A.-G. v. Corpn. of Birmingham* (1880), 15 Ch.D. 423.

(20) *Esso Petroleum Co. Ltd. v. Southport Corpn*., [1956] A.C. 218; [1955] 3 All E.R. 864.

January 22. The following judgments were read:

Judgment

Spry JA: On January 26, 1960, the appellant filed an originating summons under O. 36 of the Civil Procedure (Revised) Rules, 1948 (K), in which, claiming to be an heir of one Khuda Dad Khan, deceased, she sought an order against the respondent, as the administrator of the estate of the deceased, that he "do supply . . . particulars of true and fair accounts of the assets and liabilities of the Estate" and also asked for costs. The summons was supported by an affidavit made by the appellant, to which were annexed copies of accounts dated August 29, 1958, and copies of correspondence.

On March 10, 1960, the respondent filed an affidavit in reply, in which he averred that the accounts as rendered were true and complete and he asked that the summons be dismissed with costs. He said that the administration was not yet complete, but he annexed certain additional accounts.

There was considerable delay in fixing a date for hearing, partly, at least, because some efforts were made to achieve a settlement, In the meanwhile, on July 13, 1961, a final account was rendered by the respondent to the appellant.

On April 3, 1962, the hearing of the summons began in chambers, when counsel for the respondent, submitted a preliminary objection. He began by criticising the form of the summons, in that it did not specify the rule under which it was issued and he criticised also the use in the summons of the word "supply", referring the court to para. (*c*) of O. 36, r. 1. He then drew attention to the fact that the summons was headed by references to the Trustee Ordinance (now Cap. 167) (K) and the Mohammedan Marriage, Divorce and Succession Ordinance (now Cap. 156) (K) neither of which, in his submission, was relevant. Finally, he submitted that the procedure by originating summons was inappropriate, as the issues were complex, and he cited the judgment of Sir Ralph Windham in *Kulsumbai v. Abdulhussein* (1) as authority for asking that the summons should be dismissed.

Counsel, who appeared for the appellant in the superior court and before us, argued that the issues were not complex, since he was merely asking for particulars. He did, however, apparently argue that the procedure under O. 36 covered the checking as well as the furnishing of accounts. He was not at this stage apparently alleging any wilful default. There had apparently been some reference to "bad faith" and appellant's counsel expressly said "I do not suggest defendant has pocketed money".

Respondents' counsel, in reply, submitted that the prayer in the summons was "Simply to supply accounts. Plaintiff must show account not complete. Cannot challenge accounts filed . . . if accounts challenged this court cannot go into them . . . Plaintiff has only asked for supply of accounts." He went on to argue that some at least of the issues were complicated.

The learned judge did not consider it necessary to consider the references to the Trustee Ordinance (K) and the Mohammedan Marriage, Divorce and Succession Ordinance (K), as he was satisfied "that the summons is technically competent under O. 36 r. (1) (*c*)." He considered the issues in some detail and held that they were neither obscure nor complex, although some at least called for evidence. He distinguished the case from *Kulsumbai v. Abdulhussein* (1) and held that the preliminary objection failed. He did not refer, in his ruling, to the suggestion that had been made that the court was not entitled to examine the accounts.

The proceedings were then adjourned into court and a protracted hearing followed. A letter dated

April 15, 1959, from the advocates for the appellant

to the respondent, a copy of which was annexed to the summons, was adopted as a statement of the issues. This raised ten matters, but of these four were abandoned at the beginning of the hearing. The six issues which were fought out were:

(i) an allegation that a loan of Shs. 6,428/16 made by the deceased to the respondent was not shown in the accounts;

(ii) an allegation that certain jewellery belonging to the appellant had been handed by the deceased to the respondent for safe custody and had not been returned or accounted for;

(iii) an allegation that the deceased had requested the respondent's son to collect a sum of Shs. 1,200/-, due to the deceased as salary, and that this had not been accounted for;

(iv) an allegation that a loan of Shs. 15,000/-, made by the deceased to the respondent was not shown in the accounts;

(v) an allegation that certain payments totalling Shs. 2,305/-, debited to the appellant on a distribution account should have been charged against the estate; and

(vi) a request for particulars of a sum of Shs. 1,802/85 which the respondent claimed to have paid on behalf of the deceased for medicines, rent and funeral expenses and for which he had reimbursed himself out of the estate.

The learned judge gave judgment, finding for the appellant on issues (i) and (vi) and for the respondent on the remaining issues. He concluded his judgment as follows:

> "There will be an order as prayed in the originating summons. There will also be an order that the defendant do pay into court to the credit of this eastate in Probate and Administration Cause No. 56/1958 the sum of Shs. 9,038/16, i.e. Shs. 7,233/16 and Shs. 1,805/-. This is not expressly asked for in the originating summons but O. 36, r. 1 (*c*) gives power to make such an order. If an amendment is necessary, I will grant leave. I will hear argument on the question of costs and any other matter which may arise out of this judgment, such as the time within which the money is to be paid into court."

After delivering his judgment, the learned judge heard argument on costs and a formal application for leave to amend the summons and then made the following order:

> "ORDER (1) Leave to amend Originating Summons claiming payment.
>
> (2) Payment of Shs. 9,038/16 into Court within 28 days.
>
> (3) Defendant to pay costs personally in view of my finding on item 2.
>
> (4) Costs to be taxed on scale applicable to suits.
>
> I do not consider this to be a case for taxation on the higher scale. I do not regard this as a case for severing the costs of the various items. In two of them at least there was a case for investigation."

Notice of appeal was given on December 31, 1962, an amended originating summons was filed on January 17, 1963, and a decree was extracted on February 21, 1963. The amended originating summons included an application for an order that:–

> "The defendant do pay into court to the credit of the Estate in Probate and Administration Cause No. 56 of 1958 what may be found due and owing thereto."

This appeal is against the findings of the trial judge on issues (ii), (iii) and (v) and the respondent has cross-appealed against the preliminary ruling on the objection in limine, against the order for costs and against the finding on issue (i). One other ground appearing in the cross-appeal was not pursued but in the course of the hearing, Counsel who appeared for the respondent, was permitted to amend his notice of cross-appeal by the addition of an extra ground relating to jurisdiction.

It will, I think, be convenient to deal first with the cross-appeal, so far as it relates to matters of jurisdiction. On the first ground, that is in relation to the preliminary ruling, respondent's counsel made two submissions. He began by submitting that the procedure by way of originating summons should never have been adopted, since the matters to be decided were not simple and he commented on the fact that the hearing had lasted ten days. If the matter were one that could properly be dealt with under O. 36, the question whether the complexity of the issues made that procedure inappropriate would have been in the discretion of the trial judge and this court would be reluctant to interfere. In the present case, however, I think the summons should have been dealt with on grounds other than the question of complexity.

Counsel's second submission was that para. (*c*) only empowers the court to order the furnishing of particular accounts and that what was asked was for a general account. He was not able to cite any authority for his submission but he referred to Form 159 at p. 692 of Vol. 12 of the Encyclopaedia of Court Forms and Precedents in Civil Proceedings as lending some support to it. Appellant's counsel, on the other hand, contended that the word "particular" in para. (*c*) means no more than particularised or identified. In my opinion, respondents' counsel's interpretation is too narrow. In the case of a small estate only a single account may be necessary and it would seem unreasonable that a beneficiary interested in the whole estate should be deprived of the benefit of invoking O. 36, r. 1 in such a case, merely because he cannot relate his interest to some particular fund. The fact that a person is only interested in a particular fund would, no doubt, be a good reason for dismissing a summons asking for a general account. I find some authority for this interpretation in *Re Skinner, Cooper v. Skinner* (2). That report deals only with a question of costs, but in the preamble it is recited that a beneficiary who had repeatedly but unsuccessfully asked executors for an account "took out a summons, asking for an account of testator's estate under O. 55, r. 3 (*c*), and that if and so far as might be necessary the testator's real and personal estate might be administered by the court" and it appears to have been accepted that this was a proper procedure for getting an account. O. 36, r. 1 of the Civil Procedure (Revised) Rules, 1948 (K), is similar to the English O. 55, r. 3, from which it was derived, and English cases must have a high persuasive value, since the Kenya legislature, in adopting this Order, must be deemed to have intended to adopt it as then interpreted.

The additional ground of appeal which counsel for the respondents was permitted to add to his notice of cross-appeal was as follows:

> "1A. That the learned judge erred on an originating summons merely asking for supply of true and fair accounts of the assets and liabilities of the estate in embarking upon a full-scale investigation and examination of the accounts already rendered and proceeding to pass a monetary decree in the sum of Shs. 9,038/16, which was in excess of jurisdiction."

On this, counsel for the respondent's arguments fall under two heads: first, that para. (*c*) is concerned with the ordering, not the examination, of accounts and that since at the time of hearing final accounts had been rendered, no action was called for on the summons: and, secondly, that it is not competent for

the court on an originating summons to order the payment into court of any money, except where there has been an express admission that the party concerned has the money in hand.

As regards the first of the submissions, I would begin by observing that in my opinion many of the difficulties that have appeared in these proceedings are the result of incompetent drafting of the originating summons. It referred merely to O. 36, without specifying any rule or paragraph, and the expression "particulars of true and fair accounts" is in my opinion most ambiguous. The learned judge assumed that what was being asked for was an order for the furnishing of accounts, under para. (*c*), but I think that when the summons is read with its supporting documents, the better opinion would be that it was also an application under para. (*g*) for an inquiry into certain items of the accounts already rendered.

The extent to which such an inquiry may be made on an originating summons is, I think, very limited.

In the first place, it is clear that the scope of such an inquiry is limited to matters relating to the administration of the estate. If any authority is needed for that proposition, it may be found in *Re Carlyon, Carlyon v. Carlyon* (3).

On this ground, I consider that the learned judge should have refused to deal with issues (ii) and (iii). As regards issue (ii), it was not suggested that the jewellery claimed was the property of the deceased at the time of his death or fell into his estate, nor was it suggested that it was in the hands of the respondent as administrator. Similarly, as regards issue (iii), it was not alleged that the sum of Shs. 1,200/-, salary due to the deceased for the month prior to that in which he died, had ever come into the hands of the respondent or that it was an outstanding debt due to the estate.

Secondly, an inquiry should not be ordered under O. 36, where wilful default is alleged on the part of the administrator. In *Dowse v. Gorton* (4) Lord Macnaghten remarked ([1891] A.C. at p. 202):

> "And, indeed, I apprehend it would not be competent for an applicant on an originating summons to ask for or obtain otherwise than by consent an order founded on breach of trust or inquiries pointing to wilful default".

Again, in *Re Hengler, Frowde v. Hengler* (5) Kekewich, J., said that:

> ". . . accounts and inquiries on the footing of wilful default could not be directed in proceedings by originating summons . . ."

Those observations need some qualification. In *Re Stuart, Smith v. Stuart* (6) Stirling, J., said ([1896] 74 L.T. 546):

> "It is contended that there can be no further relief in this action because it is said that the relief is in respect of a breach of trust, and cannot be given on originating summons. To that general proposition I entirely assent; but if it is sought to be laid down that in no case can relief be given on originating summons in respect of breach of trust, I think it goes too far. The exception which I take to it is with respect to those cases in which an executor or trustee would be found liable simply on the common account for moneys come to his hands as such executor or trustee."

He went on to instance examples where relief would be granted. In the particular case before him, he ordered that accounts and inquiries be proceeded with, but he added:

> "At the same time I should be extremely sorry to get rid of the rule of the court by a side wind, namely, the rule that *in any contested case* an originating summons is not the proper mode of deciding the question".

This judgment was cited with approval by Kekewich, J., in *Re Newland, Bush v. Summers* (7).

It is true that wilful default was neither alleged in the letter which was treated as setting out the issues nor in argument on the preliminary objection but I think it was implicit in the correspondence as a whole and certainly the cross-examination of the respondent left no doubt that fraud was being alleged. This applies not only to issues (ii) and (iii) but also to issues (i) and (iv), when the allegation was that the deceased had made loans to the respondent, which had neither been repaid nor accounted for.

Counsel for the respondent submitted that these loans were outside the scope of the originating summons because they were alleged to have been made to the respondent personally but, with respect, I do not think there is any merit in that argument. Debts due by a personal representative to the deceased are deemed, at least in equity, to be assets of the estate and the personal representative is therefore accountable for them. I think, however, that when the appellant persisted in her claims after the respondent had asserted that the debt of Shs. 6,428/16 had been settled in account and that there had never been a loan of Shs. 15,000/-, she can only be regarded as asserting a wilful default or breach of trust and therefore that these matters were not appropriate to an originating summons.

The remaining two issues, (v) and (vi), might, I think, have been appropriate to an originating summons. The first involved only a simple question of law whether certain items treated in the distribution account as advances to the appellant should have been debited to the estate. The second was apparently only a request for an order for particulars or vouching, but was argued on the footing of issues of fact whether items of expenditure had in fact been incurred. The difficulty here is that the court considered and adjudicated on questions that had not been put to it in the originating summons. This might have been in order had it been by consent, but since the respondent had at an early stage challenged the procedure, the subsequent course of the proceedings cannot be regarded as based on consent.

I am therefore of the opinion that the court lacked jurisdiction to decide any of the issues.

On the second leg of his argument on jurisdiction, respondent's counsel argued, relying on *Nutter v. Holland* (8) that it is not competent for the court on an originating summons to order the payment of money into court by an administrator, unless it has been shown that the money is actually in his hands. Appellant's counsel, relying on *Strafford v. Sutcliffe* (9) submitted that the rule in *Nutter v. Holland* (8) only applied to orders made before judgment and he submitted that in the present case the order must be regarded as having been made after judgment. I agree with counsel for the appellants' to this extent, that I do not think *Nutter v. Holland* (8) is relevant to these proceedings, but I think it is clear from the study of that case and even more clearly *from Neville v. Mathewman* (10) that the object of para. (*d*) of O. 36 r. 1, is simply to enable the court to order the payment into court of money clearly or admittedly in the hands of an administrator pending the determination of the entitlement to that money. In the present case, not only was it not admitted or proved that the money was in the hands of the administrator, but there was no issue as to entitlement and therefore no occasion for the money to be paid into court and para. (*d*) was inappropriate. In my opinion, the order should be set aside.

I may mention here that respondent's counsel also criticised the passing of a judgment and the subsequent issue of a decree. I think the point was well taken. In England, a judgment is sometimes delivered on an originating summons but the position in Kenya was summed up by Sir Alastair Forbes, V.-P., in

Gurdial Singh Dhillon v. Sham Kaur (11) (C.A.) when he said ([1960] E.A. at p. 796):

> "It may be noted that the description of the grounds for the learned judge's decision as a "judgment" is incorrect. It is common ground that the formal adjudication upon an originating summons under O. 36 of the Civil Procedure Rules is an "order" and not a "decree" (*Violet O'Dell v. A. W. Thompson* (1955), 22 E.A.C.A. at p. 179). Owing to the structure of the legislation in Kenya relating to appeals on civil matters a judgment can only be delivered if it will result in a decree. The grounds for making an order cannot be treated as a judgment and are normally referred to as a ruling (*Bhagat Singh v. Ramanlal P. Chauhan* (1956), 23 E.A.C.A. at p. 185)."

Counsel for the appellant's submitted that the proceedings were not irregular because they constituted a suit within the meaning of s. 2 of the Civil Procedure Ordinance (Cap. 5). I think the simple answer to this is that the definitions in s. 2 apply only "unless there is anything repugnant in the subject or context." The word "suit" may, and I think does, in certain contexts in the Ordinance include proceedings begun by originating summons but it is, to my mind, quite clear that the whole object of O. 36 is to provide a simple procedure by which certain minor matters can be disposed of without the formality or expense of an ordinary suit. I think, with respect, that it was in looking on these proceedings as a suit that the learned judge fell into error.

If the cross-appeal succeeds on the ground that the proceedings were wholly irregular, it is unnecessary to consider the merits of the appeal but I may say that in my view there was no merit in any of the grounds of appeal.

I would therefore dismiss the appeal, with costs, and allow the cross-appeal, also with costs, except for the costs of appearances on November 18, 1964, already awarded to the appellant when an adjournment was granted on that day. I would set aside the judgment and decree of the Supreme Court and substitute an order dismissing the summons, and awarding the respondent three-quarters of his costs in that court.

Newbold Ag V-P: This is an appeal and cross-appeal against what purports to be a judgment and a decree of the Supreme Court on an originating summons. I cannot recall a case in which the procedure adopted had less regard to the rules of procedure of the court nor the matters investigated and relief given less connection with the relief sought. An originating summons is a form of legal proceeding designed to give, in certain specified circumstances, a quick, summary and inexpensive remedy. In the case of this originating summons a period of nearly three years elapsed between the date it was filed and the date of the decision; the hearing time took ten days; and the appellant's advocates presented for taxation a bill of costs of almost £1,250. It would seem that this is an apt case for adapting Voltaire's comment on the Holy Roman Empire – that it was neither holy, nor Roman, nor an empire.

This originating summons was taken out by the appellant, (whom I shall refer to as the plaintiff), the heir of a deceased person, against the respondent (whom I shall refer to as the defendant), the administrator of the estate, asking for an order "that the defendant do supply to the plaintiff particulars of true and fair accounts of the assets and liabilities of the estate" and also for an order for costs. An affidavit of the plaintiff was filed which set out that interim accounts had been supplied about eighteen months before, that the plaintiff was dissatisfied with the accounts and with various matters set out in attached correspondence, that there was property yielding income, and in para. 5 it was stated that the affidavit was in support of the application "that the defendant do supply true and fair accounts of the assets and liabilities of the estate". At the hearing of the appeal the only authority for the issue of this originating

summons was stated to be O. 36 and in this respect it would seem that only r. 1 is relevant. This rule, so far as it is relevant, provides that:

> ". . . any person claiming to be interested in the relief sought as . . . heir . . . of a deceased person . . . may take out . . . an originating summons . . . for such relief of the nature or kind following as may by the summons be specified and the circumstances of the case may require, that is to say, the determination . . . of any of the following questions:
>
> (*a*) Any question affecting the rights or interest of the person claiming to be . . . heir . . .;
>
> (*b*) The ascertainment of any class of creditors . . . heirs . . .
>
> (*c*) The furnishing of any particular accounts by the . . . administrators . . . and the vouching, where necessary, of such accounts.
>
> (*d*) The payment into court of any money in the hands of the . . . administrators . . .
>
> (*g*) The determination of any question arising directly out of the administration of the estate . . ."

It would seem clear beyond peradventure that the plaintiff, as an heir, was entitled to take out this originating summons asking for the defendant, as administrator, to supply accounts. It would seem equally clear that the only relief specified in the summons which the plaintiff sought, and thus the only matter for the decision of the judge, was the supply of such accounts. The fact that the originating summons used the words "particulars of true and fair accounts" can, in the light of the affidavit in support, mean nothing more than accounts with detailed particulars. As I listened to counsel for the plaintiff submitting on appeal that these words enabled the judge to do what he did I was reminded irresistibly of the passage where Alice objects that "glory" did not mean "a nice knock-down argument" and Humpty Dumpty scornfully replied: "When I use a word it means just what I choose it to mean – neither more nor less". When the originating summons eventually came before the judge in chambers, counsel for the defendant, who had apparently received a few days earlier a letter from counsel for the plaintiff stating that an application would be made for evidence to be taken in court, submitted that it was for the plaintiff to show cause why the matter should be heard in court; and with this the judge agreed. The defendant's counsel, apparently being aware that the plaintiff would seek to have investigated a number of matters wholly unrelated to the relief sought, then took a preliminary objection specifically raising the points that the only relief asked for in the originating summons was the supply of accounts, that the final accounts of the administrator had been supplied subsequent to the issue of the originating summons, that the court could not examine the accounts on the originating summons, and that, in any event, an originating summons was not the proper procedure for the investigation of the matters which the plaintiff was proposing to ask the court to investigate. I consider that this objection was premature and should have been made at the stage when the plaintiff's counsel sought to introduce matter unconnected with the relief specified in the originating summons. However, apparently with the consent of the judge, the question whether the plaintiff could, on this originating summons asking solely for the supply of accounts, ask the court to investigate a number of completely unconnected matters was argued and it appeared that counsel for the plaintiff proposed to ask for a decision on the following matters:

1) Whether the defendant had repaid to the deceased during his lifetime a sum of Shs. 6,428/16 which had been loaned to the defendant.

2) Whether the defendant or his son had stolen jewellery belonging to the plaintiff.

3) Whether the defendant or his son had fraudulently misappropriated the sum of Shs. 1,200/-, which sum was the salary payable to the deceased for the month prior to his death.

4) Whether the defendant had received a loan of Shs. 15,000/- from the deceased during his lifetime.

5) Whether sums expended on the maintenance of the plaintiff subsequent to the death was a proper charge against the estate.

6) Whether the sum of Shs. 1,805/- was to be reimbursed to the defendant out of the estate.

Having heard argument the judge over-ruled the preliminary objection, held that the issues were neither obscure nor complex and that it was unnecessary to raise these matters by way of suit, adjourned the originating summons into court and then, without any pleadings or particulars, and with complete disregard of the principles behind O. 6 r. 1 and 2, proceeded to hear evidence for eight days and thereafter submissions of counsel. For some unknown reason and in disregard of O. 17, r. 1, 2 and 3, the defendant gave evidence first, with the result that he did not even know what the evidence, relating to most serious charges of fraud and criminal offences, against him would be. The judge, in a reserved decision which purports to be a judgment, dismissed the claims in respect of the matters set out as items (2), (3), (4) and (5) above but upheld the claims set out as items (1) and (6) above. As regards item (1), the judge, although the plaintiff had claimed only Shs. 6,428/16, held that the defendant owed the estate Shs. 7,233/16. The last paragraph of the judgment was as follows:

> "There will be an order as prayed in the originating summons. There will also be an order that the defendant do pay into court to the credit of this estate in Probate and Administration Cause No. 56/1959 the sum of Shs. 9,038/16 i.e., Shs. 7,223/16 and Shs. 1,805/-. This is not expressly asked for in the originating summons but O. XXXVI, r. 1 (*c*) gives power to make such an order. If an amendment is necessary, I will grant leave. I will hear argument on the question of costs and any other matter which may arise out of this judgment, such as the time within which the money is to be paid into court."

After delivery of the judgment, leave to amend the originating summons "claiming payment" was given and on January 17, 1963, an amendment was filed which added a paragraph asking for an order that: "The defendant do pay into court to the credit of the estate in Probate and Administration Cause No. 56 of 1958 what may be found due and owing thereto". Also, following upon delivery of judgment and upon an application by counsel for the plaintiff, the judge ordered that the defendant do pay personally the costs on the scale applicable to suits. Subsequently what purports to be a decree was extracted, it being ordered therein as follows:

"(1) That the defendant do supply to the plaintiff particulars of true and fair accounts of the assets and liabilities of the estate.

(2) That the defendant, Medhi Khan, do within twenty eight days, pay into court the sum of Shillings Nine Thousand Thirty Eight and Sixteen Cents (Shs. 9038/16) found to be due from the said defendant to the estate of Khuda Dad Khan, Deceased.

(3) That the defendant do personally pay to the plaintiff whole of her costs to be taxed and certified by the Taxing Master of this court on scale applicable to suits."

From that decision the plaintiff appealed in respect of the ruling on items (2), (3) and (5) and the defendant cross-appealed against the ruling of the judge

on the preliminary objection and also against the decision in relation to item (1) and the order for costs.

As far as the appeal is concerned, at the conclusion of the address of counsel for the plaintiff we stated that we did not wish to hear counsel for the defendant. For the plaintiff to succeed on items (2) and (3), which related to allegations that the defendant or his son had stolen jewellery belonging to the plaintiff and had fraudulently misappropriated a sum of money which was due to the deceased, there had to be evidence to support the allegations sufficient to satisfy the high standard of proof requisite in an allegation of fraud (see *Ilanga v. Manyoka* (12). The judge held that the evidence before him did not discharge that burden in either case and, in common with the other members of the court, I saw absolutely no reason to disagree with that view. This is quite apart from any question which would arise of the liability of the defendant for any act of his son. As regards item (5), the ground of appeal related to the details of the amount involved, a matter which could not arise unless there was an appeal against the decision of the judge that, whatever the amount may have been, it was not a proper charge against the estate. An application for leave to appeal against the decision of the judge on that point was refused at the hearing of the appeal, thus the appeal against item (5) automatically falls away. For those reasons I am and I was of the opinion that the appeal should be dismissed.

Turning now to the cross-appeal, the quite extraordinary nature of the proceedings which took place is at once apparent. On this originating summons, which sought only an order that accounts be supplied by an administrator, the judge, in spite of objection, entered into a detailed examination of certain items of receipts and expenditure of the defendant as administrator; entered into an investigation of allegations of fraud and larceny against the defendant, both as administrator and in a personal capacity; entered into an investigation of alleged loans to the defendant before he became administrator; entered into an examination of the question whether in Mohamedan law a widow was entitled to maintenance during the period of iddat consequent upon the death of her husband; and entered into an examination of whether certain items of expenditure were reimbursable to the defendant out of the estate. All of this was done by first taking the evidence of the defendant without any statement of the material facts upon which the plaintiff relied or particulars of the allegations of fraud and without any regard to the fact that no relief was asked for in the originating summons in relation to any of these matters. Having done all this, the judge then delivered what purports to be a judgment, but is a ruling, the terms of which are formally embodied in what purports to be a decree, but is an order (see *Dhillon v. Shan Kaur* (11), as a result of which the defendant is required to “supply to the plaintiff particulars of true and fair accounts” and to pay into court a sum of money “found to be due to from the said defendant to the estate”.

The rules of procedure are designed to formulate the issues which the court has to determine and to give fair notice thereof to the parties. Were it not that the judge has seen fit to determine a number of issues which were never raised in the originating summons I should not have thought it necessary to state that a judge has no power to determine an issue which is not before him. If authority were needed for that proposition I would refer to *Gandy v. Casper Air Charters Ltd.* (13), *Bharmal v. Kumari* (14) and *Pushpa Patel v. Fleet Transport Co. Ltd.* (15). It is for this reason that the court will freely grant applications for amendment if they are made at the proper time, do not create injustice and do not change the suit into one of a substantially different character (see *Eastern Bakery Ltd. v. Castelino* (16) and *Simonian v. Johar* (17). Where leave to amend is granted the amendment must be made in accordance with O. 6, r. 24 (and see the observations of Gould, J.A. in *Ayoub v. Standard Bank Ltd.* (18) and

especially when the amendment seeks a quite separate relief from that previously sought it would seem necessary that it be made before the decision is given as the decision must be related to the suit (see *A.-G. v. Corpn. of Birmingham* (19)). A judge has, of course, in accordance with the principle of O. 7, r. 6, power to grant relief in addition to that specifically claimed if justice so requires, but such other relief must be ancillary to and not inconsistent with the relief claimed and must arise from the issues in the suit. If a judge were free to determine issues not before him then it would result in the injustice of condemning a party upon a ground of which no fair notice had been given. As Lord Radcliffe put it in *Esso Petroleum Co., Ltd. v. Southport Corpn.* (20) ([1956], A.C., at p. 241), if reliance upon the rules of procedure is to be treated "as pedantry or mere formalism I do not see what part they have to play in our trial system."

What the judge seems to have done in this case was to take the accounts, though which accounts were taken is not quite clear, and to enter into issues wholly unrelated to the single issue raised in the originating summons. An originating summons was the perfectly proper procedure for asking an administrator to supply accounts, and if the relief was granted the order would be that the accounts be supplied within a specified period. It may have been possible under O. 36 also to have applied for the determination of the issue referred to above in item (5) and for an order that after the accounts were supplied they be taken in accordance with O. 37, r. 11 and 12 or O. XX, r. 15. The other items were, however, certainly not matters which could be agitated on an originating summons under O. 36, and while rr. 9 and 10 of that Order permit of evidence being taken, this is only so if the matters in respect of which relief is sought can be disposed of in a summary manner. Another extraordinary aspect of this case is that the judge, having in effect taken the accounts and arrived at a figure owed by the defendant, then ordered that the defendant do supply particulars of true and fair accounts.

With the leave of the court, and subject to conditions as to costs, the defendant was allowed to add a ground to his cross-appeal, which ground, in conjunction with the other grounds, raised, *inter alia*, the question of the power of the judge to do what he did and to make the order that he did. I am satisfied that the procedure adopted by the judge and the order made by him were completely incorrect and that he exceeded his jurisdiction both by reason of deciding issues not before him and by reason of deciding on an originating summons taken out under O. 36, matters which could not be decided by that procedure. I am satisfied, therefore, that the order cannot stand and that the cross-appeal should be allowed. The only matter which gives me concern is the fact that the relief asked for in the originating summons could properly have been asked for therein. As, however, the final accounts of the administration of the estate were filed about eighteen months after the summons was taken out, the normal procedure would have been to withdraw the summons upon payment by the administrator out of the estate of the costs of the originating summons up to the date of withdrawal.

For these reasons I consider that the appeal should be dismissed with costs; and as the other members of the court agree, it is so ordered. I also consider that the cross-appeal should be allowed with costs, subject to a set off of the order for costs made during the hearing of the appeal, and the order of the judge set aside and that there be substituted therefore an order dismissing the originating summons with three-quarters of his costs thereof to be paid by the plaintiff to the defendant; and as the other members of the court agree, it is so ordered.

Duffus JA: I have had the considerable advantage of reading the judgments of Newbold, Ag. V.-P. and Spry, J.A.

This is an appeal from a decision of a judge of the Supreme Court of Kenya on an originating summons on matters arising out of the administration of the estate of Khuda Dad Khan, deceased.

The facts are fully set out in the judgment of Spry, J.A. Shortly though, the plaintiff/appellant, Bhag Bhari, to whom I will hereafter refer as "the plaintiff", brought this originating summons against the defendant/respondent, Medhi Khan, as the Administrator of the estate under the provisions of O. 36 of the civil Procedure (Revised) Rules, and sought an order that:

> "The defendant do supply to the plaintiff particulars of true and fair accounts of the assets and liabilities of the estate".

The originating summons was supported by an affidavit and copies of an account supplied by the administrator and of correspondence between their respective solicitors. The Administrator filed a counter-affidavit. It appears from the correspondence that the plaintiff challenged the account rendered on some ten various items. The respondent at the start of the hearing raised various preliminary objections but, in so far as this appeal is concerned, the ones that mattered were that he submitted that all that the summons asked for was the supply of accounts which he had already rendered, and further that all items objected to, except item 7, were complex and not proper matters for decision on an originating summons. The plaintiff withdrew his objection to four items so that there then appeared to be six items in dispute between them and shortly these were that the plaintiff alleged in items 2 and 6 that the Administrator personally owed the estate some Shs. 6,000/- odd and another Shs. 15,000/- for advances made by him by the deceased in his lifetime; item 3 was in respect of jewellery which the plaintiff alleged belonged to her and had been in effect converted by the Administrator in his personal capacity and not as Administrator. Item 4 was the question whether the Administrator had received a month's salary for the deceased and not accounted for this. Item 7 was whether payments made for medical attention to the plaintiff were chargeable against the estate and it is to be noted that this was the only item which the respondent's counsel conceded as being a proper matter for determination on an originating summons. Item 8 were payments made by the Administrator for medicines for the deceased, boy's wages and rents, etc., amounting to Shs. 1,802/- and queried by the plaintiff.

The learned trial judge treated these six matters as issues to be tried and decided. It is to be again noted here that of the items, 2 and 6 were issues really involving charges of dishonesty and a breach of trust against the Administrator and were issues of fact between the estate and the administrator in his personal capacity. Item 3 was really a claim by the widow against the Administrator personally and involved a charge of theft or at least a conversion of her jewellery and again item 4 suggested that the Administrator had fraudulently converted Shs. 1,200/- belonging to the deceased. His son was also involved under this item. The judge then proceeded to hear and decide these various issues. There were no issues clearly defined except as set out in the correspondence.

Evidence was taken and the trial lasted some ten days. The learned judge decided items 3, 4, 6 and 7 against the plaintiff and items 2 and 8 against the Administrator in his personal capacity and ordered the Administrator to pay into court to the credit of the estate Shs. 7,233/16 in respect of item 2 and Shs. 1,802/- on item 8 and he then further granted the prayer in the originating summons for the defendant to supply to the plaintiff particulars of true and fair accounts of the assets and liabilities of the estate and further ordered that the Administrator do personally pay to the plaintiff the costs of these proceedings.

The plaintiff appealed against the decision as to the jewellery (item 3); the salary (item 4) and also with regard to the amounts paid for the plaintiff's

medical expenses (item 7). There was no merit in the appeal and this court did not call on the respondent's counsel to reply. There was a cross-appeal which challenged the whole method of procedure and hearing. The crux of the whole matter is whether the learned trial judge had the power to act as he did on the particular originating summons before him. In approaching this matter I would first consider the two issues on which the court found against the Administrator. Item 2 was a claim that the deceased had made a loan to the Administrator in his personal capacity of Shs. 6,428/16, and that the Administrator had not mentioned this in his accounts. The Administrator's explanation, as appears in the correspondence, was that there had been a settlement of the accounts between the deceased and himself in the deceased's lifetime and that he had settled the outstanding debt. In effect this was a charge against the Administrator both as regards this debt and also that of Shs. 15,000/-, the subject of item 6, had acted fraudulently and not brought these loans into account. It is clear that in these two cases there are charges of wilful default against the Administrator as such and I would refer to the various cases mentioned by Spry, J.A. where it has been held that an enquiry under an originating summons is not the proper method of deciding such questions. That this should be so is apparent from what has occurred in this case. The Administrator has, on a summons asking only for accounts to be supplied, had to meet these two charges of fraud. He has not had the benefit of the procedure laid down by the Civil Procedure Ordinance. There have been no pleadings and I would refer in particular to the provisions of O. 6, r. 2, requiring particulars to be given where a fraud or breach of trust is alleged. He has for some reason been first called upon to give evidence and there he has made admissions without knowing what the case against him would be and then, on this originating summons asking only for accounts, he has been found liable to the deceased's estate and, although this amount was a debt owing by him to the deceased and not moneys which came into his hands as Administrator of the estate, he has been ordered to pay the amount into court. In effect he has had a judgment entered against him for a civil debt without having had the benefit of a trial by suit and of the provisions and safeguards that are provided in the Civil Procedure Ordinance.

I am clearly of the view that the decision of the court on item 2 and the subsequent decision to pay money into court should be set aside. The second item is number 8 and concerns payment of Shs. 1,802/- for medicines, wages, rent, etc. This matter has given me considerable thought, for here is a question that could, in my view, very well have been the subject of an originating summons, i.e., a decision could be asked for as to whether this payment had been properly made out of the funds of the estate. In the course of this case the Administrator agreed that certain of these charges were improperly made and that the Shs. 228/- for funeral expenses and Shs. 117/- for flowers should not be borne by the estate. The judge found that the other payments had not been properly vouched for by receipts or other satisfactory evidence and he found that the whole amount of Shs. 1,802/- were not proper charges against the estate and he also ordered the Administrator to repay this amount into court.

I agree with Spry, J.A. that it would appear that the plaintiff desired to ask the court to settle the various outstanding questions under the provisions of O. 36, r. 1 (*g*). This may have been so but this is not what the plaintiff asked for. She clearly asked for an order that "the defendant do supply to the plaintiff particulars of true and fair accounts of the assets and liabilities of the estate", and in respect of this item 8, her counsel again repeated at the trial that he only asked for particulars. I refer to the judge's ruling on the preliminary objection where he states

> "In connection with item 8, Mr. Bali-Sharma states that he merely asks for particulars."

So it appears that in the summons and during the hearing it was clearly stated that all that was required here was for the Administrator to supply particulars and yet what has occurred is that the court has again made a decision on a question not before the court, and found that these payments were either never made or at least not properly made because no receipts or sufficient evidence of payment had been produced and further ordered the Administrator to pay this amount into court. Here again, it is a possibility that if the question had been properly framed in the summons, the Administrator might have produced other evidence to prove the payment. I do not propose to examine the other items in detail. I have come to the conclusion that the judge had no power to act as he did on any of the matters in the originating summons before him. The wording of O. 36, r. 1, states, *inter alia*:

> ". . . may take out as of course, an originating summons, returnable before a Judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and the circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions: . . ."

The wording of the section limits the authority of the courts to the determination of the relief asked for in the summons. Here the plaintiff has only asked for the supply of particulars of true and fair accounts and I agree with Newbold, Ag. V.P., that the learned judge exceeded his jurisdiction in deciding issues not before him. I agree, therefore, that the appeal should be dismissed and that the cross-appeal should be allowed and that the order of the judge be set aside and in lieu thereof an order made dismissing the originating summons.

I agree with the order for costs proposed by the Vice-President.

Appeal dismissed. Cross-appeal allowed.

For the appellant:
S Bali Sharma
Bali Sharma & Co, Nairobi

For the respondent:
SC Gautama and *Zaher Ahmed*
Zaher Ahmed & Co, Nairobi

Kanti & Co Ltd v British Traders' Insurance Co Ltd
[1965] 1 EA 108 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	26 March 1965
Case Number:	21/1964
Before:	Newbold Ag V-P, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Sir John Ainley, CJ

[1] Insurance – All risks insurance clause – Claim for damage to insured articles – Onus on plaintiff to prove casualty – Manner in which such onus can be discharged – Damage from inherent vice an expected risk – Allegation that inadequate packing caused damage – Onus on insurance company to prove damage resulted from expected risk.

Editor's Summary

The appellant company had insured seven cases of enamelware during transit from Liverpool to Nairobi with the respondent insurance company. The insurance cover was against "All risks of loss or damage subject to the Institute Cargo Clauses (All Risks)". By cl. 1 of these clauses the insurance attached from the warehouse of the place of commencement of transit to the final warehouse at destination and by cl. 6 the insurance was against all risks

of loss or damage to the subject-matter insured but did not extend to loss, damage or expense proximately caused by delay or inherent vice or nature of the subject matter. It was not in dispute that the enamelware started the journey undamaged but on arrival in Nairobi though the cases appeared to be in good condition a very high percentage of the enamelware inside was found to be badly chipped. The appellant company thereupon filed an action in the resident magistrate's court claiming Shs. 1505/50 as estimated damage. At the hearing an insurance surveyor stated in evidence that the main cause of the damage was motor transport as, due to the continual jolting, the packing had settled or become loose. He also stated that in his opinion the packing was probably sufficient for rail transport but insufficient for road transport. The trial magistrate found as a fact, that transport by road between Mombasa – Nairobi was not contrary to the terms of the insurance policy, that the packing was reasonably adequate, that the appellant company had proved that some fortuitous circumstance had occurred to the goods and that it was not for it to show how the goods were damaged, that the respondent company had failed to prove that the damage was caused by inherent vice in the packing and accordingly gave judgment for the amount claimed. On appeal, the Supreme Court reversed the trial magistrate's decision on the ground that the appellant had failed to discharge the light onus that lay on it to prove that a casualty had occurred which resulted in the damage. On appeal to the Court of Appeal, it was argued for the appellant company that having regard to the facts found by the trial magistrate, the approach of the Supreme Court was wrong in law in that it placed upon the appellant company an onus which did not lie upon it.

Held –

(i) from the extent of the damage the court had no doubt that in law the appellant company had discharged the onus of proving that the damage had resulted from a casualty;

(ii) in this case, as damage from inherent vice was damage from an excepted risk, if the respondent company could have shown that the damage was directly caused by inadequate packing it would have been entitled to judgment; this was precisely what the respondent company sought to do before the trial magistrate but on the balance of probabilities, was rejected;

(iii) the Supreme Court had erred in law in placing on the appellant company any onus of showing that the damage did not arise from inadequate packing.

Appeal allowed.

Cases referred to in judgment

(1) *British and Foreign Marine Insurance Co. Ltd. v. Gaunt*, [1921] A.C. 41; [1921] All E.R. Rep. 447.

(2) *Gee & Graham Ltd. v. Whittall*, [1955] 2 Lloyd's Rep. 562.

(3) *Berk & Co. Ltd. v. Style*, [1955] 3 All E.R. 625.

(4) *Theodoru v. Chester*, [1951] 1 Lloyd's Rep. 204.

(5) *Electro Motion Ltd. v. Maritime Insurance Co. Ltd.*, [1956] 1 Lloyd's Rep. 420.

(6) *Ayoub v. Standard Bank*, [1961] E.A. 743 (C.A.).

March 26. The following judgments were read:

Judgment

Newbold Ag V-P: This appeal raises an important point of insurance law. As it is a second appeal it is, by reason of ss. 72 and 73 of the Civil Procedure Act, limited to matters of law.

The relevant facts are that the appellant company, which I shall call “the trader”, insured seven cases of enamelware during transit from Liverpool to

Nairobi with the respondent insurance company, which I shall call "the insurer". The insurance was what is known as an all-risks insurance and was against "All risks of loss or damage subject to the Institute Cargo Clauses (All Risks)". The insurance attached while the goods were being carried by steamer, conveyance, air, parcel post either singly or severaly and by cl. 1 of the Institute Cargo Clauses (All Risks) it attached from the warehouse of the place of commencement of transit to the final warehouse at destination. Clause 6 of these clauses reads as follows:

> "This insurance is against all risks of loss or damage to the subject-matter insured but shall in no case be deemed to extend to cover loss damage or expense proximately caused by delay or inherent vice or nature of the subject-matter insured. Claims recoverable hereunder shall be payable irrespective of percentage."

On arrival in Nairobi the cases appeared to be in good condition but on being opened a very high percentage of the enamelware inside was found to be badly chipped. The goods were surveyed by an insurance surveyor who; in respect of the articles damaged, agreed that the damage extended to 50 per cent of their value. In his original report he stated that the articles of enamelware were wrapped in paper in nailed wood cases packed in wood wool and that the nature and cause of the damage was chipping of the enamel probably due to rough-handling in transit. In his evidence he stated that at the time he made his first report he thought the goods had been transported from Mombasa to Nairobi by rail and it was for that reason that he stated the main cause of damage to be rough-handling. Having learned, however, that the goods were transported by motor transport, he considered that the main cause of damage was motor transport as, due to the continual jolting, the packing had settled or become loose. He stated also that in his opinion the packing was probably sufficient for rail transport but insufficient for road transport, and that it was unusual to get so much chipping of the enamel.

The resident magistrate before whom the case was heard found as a fact that transport by road between Mombasa and Nairobi was not contrary to the terms of the policy, that the packing was reasonably adequate, that the trader had proved that some fortuitous circumstance had occurred to the goods and it was not for him to show how the goods were damaged, that the insurer had failed to prove that the damage was caused by inherent vice in the packing; and, accordingly, he gave judgment in favour of the trader for the amount claimed.

On appeal to the Supreme Court this decision was reversed, the Chief Justice holding that the trader had failed to discharge the light onus that lay on it to prove that a casualty had occurred which resulted in the damage. From that decision the trader has appealed. In essence the main ground of appeal was that having regard to the facts found by the resident magistrate, the approach of the Chief Justice was wrong in law in that he placed upon the trader an onus which did not lie upon him.

Both counsel who appeared for the trader, and counsel who appeared for the insurer, in the course of interesting submissions accepted the law to be that a plaintiff must prove that the loss in respect of which the claim was made must have been caused by some casualty during transit, but they differed as to the precise manner in which this could be done. They differed also in relation to the judgment of the Chief Justice. Counsel for the appellants submitted that the Chief Justice, without disturbing the findings of fact of the resident magistrate that the packing was adequate and that there was no inherent vice, had arrived at his decision on a finding that the plaintiff had not proved a casualty, a matter which was not directly in issue before the resident magistrate, and which,

having regard to the facts found and to the extent of the damage, it was not open to the Chief Justice to find. Counsel for the respondents submitted that the finding of no casualty by the Chief Justice was in effect a finding that the loss was caused by inherent vice due to inadequate packing and that in any event the plaintiff must prove casualty either directly or by inference from exceptional damage and that the damage in this case was not exceptional. During the submissions reference was made to the cases of *British and Foreign Marine Insurance Co. Ltd. v. Gaunt* (1), *Gee and Garnham Ltd. v. Whittall* (2), *Berk and Co. Ltd. v. Style* (3) and *Theodorou v. Chester* (4) upon which last case counsel for the respondent relied strongly.

As Lord Birkenhead said in *Gaunt's* case (1) an all-risks policy does not cover all damage however caused; the damage must be due directly to some accidental cause of any kind which occurred during transit. There is thus an onus on a plaintiff to show that the damage occurred from some act or omission, either deliberate or unintended, which directly resulted in the damage. It is this act or omission which is usually referred to as a casualty; and a casualty, as Lord Sumner said in *Gaunt's* case (1), is something which injures the goods from without and not something which develops from within. An examination of the relatively few authorities on the position under an all-risks insurance, some of which authorities are not consistent one with the other, leads me to the conclusion that a plaintiff cannot succeed under an all-risks policy of the type in question in this appeal unless he proves that the damage resulted directly from some act or omission deliberate or unintended, to the goods during the period of transit covered by the policy and that the damage was not such as was natural and inevitable in any circumstances. For example, it is natural and inevitable that a piece of enamelware should receive minor abrasions and scratches either from use or from being put in proximity to anything else. Such damage may be described as fair wear and tear and, as it must inevitably arise quite irrespective of the transit, it cannot be the subject of a claim under a policy which, even though it covers all risks, does not cover damage which is in any circumstances inevitable and which, therefore, does not result from a risk. On the other hand, it is not natural and inevitable that any appreciable chipping should occur; if it does, then this must have been caused by some act from outside the article. Again, to take the example referred to by the Chief Justice in his judgment, if a fragile glass is placed in an iron box for transport, it is neither natural nor inevitable that the glass should be broken during transit. It may be so wrapped and packed as to enable it to withstand the normal jolts of the transport without damage, or, though this would be a much more difficult matter, the box might be so handled as to preclude any jolt which would result in the breaking of the glass during transport. It is thus neither natural nor inevitable that where a glass is transported in an iron box the glass should be broken. If it is, the damage will arise from some outside act and this outside act is a casualty.

As I have said, a plaintiff has to prove that the damage resulted from some casualty during the period of transport covered by the policy and that it was neither natural nor inevitable. Having said that, however, the question remains as to how he can prove it. In normal cases he can prove that the damage was neither natural nor inevitable from the mere nature of the damage; that is, he proves that it is damage of a kind which has been referred to in the cases as either exceptional or abnormal. These adjectives do not mean that the damage must be of an extraordinary nature; they merely mean that the damage is not such as must inevitably arise. The use of the epithets exceptional and abnormal has, I think, created an impression that before a plaintiff can succeed he must prove damage of an extraordinary nature; this is not so. Having proved, however, that the damage is of a nature which is neither natural nor

inevitable, the question still remains as to how a plaintiff is to prove the casualty. It is obvious that in the vast majority of cases the plaintiff would be completely unable to prove any specific act or omission which gave rise to the damage. As, however, the policy is against all risks, it is unnecessary, as Lord Birkenhead said in *Gaunt's* case (1), to show the exact nature of the casualty. It is sufficient, as Lord Sumner said in the same case, if evidence is given "reasonably showing that the loss was due to a casualty". If, therefore, it is admitted or proved that the goods were undamaged at the commencement of the period of insurance, that they arrived damaged and that the damage was of a nature which was neither natural nor inevitable, then the plaintiff has led evidence from which a casualty may reasonably be inferred and he has, therefore, subject to any further evidence, proved a casualty. It is at this point, with respect, that I consider that the Chief Justice erred. The difference between his approach to the onus which lay on the plaintiff and the approach of the resident magistrate to that some onus is exemplified by the difference between the approach of Croom-Johnson, J. in the *Theodorou* case (4) and that of Sellers, J., in *Electro Motion Ltd. v. Maritime Insurance Co. Ltd*. (5), a case which was not referred to by either counsel.

In the *Theodorou* case (4), Croom-Johnson, J., at the end of a very long judgment said:

> "In those circumstances, it seems to me that the only possible conclusion at which the court can arrive is, as I say, that, for some unexplained reason, in some unexplained way, which it is not for the plaintiff to prove, there was a casualty . . .".

He had, however, during the course of his judgment approached the problem on the basis that the onus was on the plaintiff to show that on a balance of probabilities the damage had not been caused by any theoretical way in which, according to the defendant, it could have been caused. As he said [1951] 1 Lloyd's Rep. at p. 238):

> "It is, I think, for the plaintiff to satisfy me that these theories, if I come to the conclusion that they are reasonable possible theories, are not right."

In contrast to that, Sellers, J. in the *Electro Motion Ltd*. case (5) said:

> "The evidence establishes that the goods complied with the contract when delivered free on board at Dublin that they arrived damaged in the way that has been indicated and although the precise instant which caused the damage cannot be ascertained on the evidence before this court, it is damage in transit which is covered by the policy of insurance . . . That policy covered transit from warehouse to warehouse and it occurred in the course of that period."

I consider that having regard to the terms of the policy and the speeches in the *Gaunt* case (1), the approach of Sellers, J. is correct and that of Croom-Johnson, J. is not. I do not consider that *Gee's* case (2) is of any assistance on this point as in that case the goods were not proved to have been undamaged at the commencement of the transport.

On the facts of this case it is not in dispute that the enamelware started the journey undamaged. It is also not in dispute that on arrival of 360 saucepans and lids 99 were undamaged but 261 were damaged to the extent of one half of their value and that the percentage of damage of the other articles was similar. On these facts I have no doubt that in law the appellant had discharged the onus on him of proving that the damage had resulted from a casualty. Indeed, as Law, J.A. has pointed out in his judgment, which I have had the advantage of reading in draft, this was accepted by the parties during the hearing of the case before the resident magistrate.

In this policy, as indeed in almost every all-risks policy, there are exceptions whereby the insurer excludes liability under the policy if the damage results from a risk which is excepted. In this case, by cl. 6 of the Institute Cargo Clauses (All-Risks), damage from inherent vice or the nature of the subject matter was excluded. It is clear that if an insurer seeks to avoid liability on the ground that the damage resulted from an excepted risk, then the onus is on him to prove that the damage was a direct result of the excluded risk. It is not, I think, suggested that the damage in this case occurred from the nature of the subject matter. That exception is intended to refer to damage which results naturally from within, irrespective of any outside act, though, of course, any such damage may be augmented by an outside act. An example of such damage would be for perishable goods to go bad or for certain chemical reaction to take place merely by reason of exposure to air. This type of damage is frequently referred to as inherent vice. But where, as in this case, there is a reference both to inherent vice and to the nature of the subject matter, I understand inherent vice to be somewhat different. I understand it to be a quality in the insured article which may, though it need not necessarily, result in damage in the circumstances in which the goods may be expected to be transported. An example of this would be fragile or brittle articles which, unless adequately packed, will in all probability suffer damage in the normal conditions to which they would be subjected in the course of transit. Another example is the propensity which certain articles, such as coal, have to spontaneous combustion under certain conditions.

As I have said, if an insured package contains an article of such a nature that it will, unless adequately packed, suffer damage from the conditions to which the package would be expected to be subjected during normal transit, then in my view such damage would arise from inherent vice. In this case, as damage from inherent vice was damage from an excepted risk, if the insurer could have shown that the damage to the enamelware was directly caused by inadequate packing it would have been entitled to judgment. This is precisely what the insurer sought to do before the resident magistrate but, on the balance of probabilities, the resident magistrate was not satisfied that it had succeeded and he therefore gave judgment in favour of the trader. In my view the resident magistrate was correct in law in placing the onus on this matter on the insurer and in holding that, as on the facts found that onus had not been discharged and as damage from a casualty had already been sufficiently proved or admitted, therefore judgment in favour of the trader followed. With respect, I consider that the Chief Justice erred in law in placing on the trader any onus of showing that the damage did not arise from inadequate packing.

For these reasons I would allow the appeal, restore the judgment and decree of the Resident Magistrate’s Court, set aside the judgment and decree of the Supreme Court and substitute therefor a judgment and decree dismissing the appeal to the Supreme Court with costs. I would allow the appellant his costs on the appeal to this court, with a certificate for two counsel. As the other members of the court agree it is accordingly so ordered.

Spry JA: I agree that this appeal must be allowed. I have reached this conclusion with the greatest reluctance, as I think that the judgment of the trial court might properly have been reversed on grounds other than those on which the appeal to the Supreme Court was decided, in particular, that the learned resident magistrate reached a conclusion on the question whether the goods were reasonably packed which was so inconsistent with his findings of primary fact as to amount to an error of law and that he misdirected himself in his approach to the expert evidence, but there has been no cross-appeal and I do not think it would be proper for this court on a second appeal to consider questions that have neither been advanced nor argued before us.

I am, if I may say so with great respect, substantially in agreement with the enunciation of the relevant law contained in the judgment of the learned Vice-President but as the subject is one of considerable importance, I think I should add certain comments.

It is clear on the authorities that in proceedings under an all-risks marine policy the initial onus is on the plaintiff to show that a claim lies under the policy. To do this, he must show that the goods started on their journey in good order and that they either failed to reach their destination or arrived in a damaged condition. He must either prove that an accident or "casualty" occurred or show that an accident should be presumed. The classic authority is the observation of Lord Birkenhead, L.C., in *British and Foreign Insurance Co. v. Gaunt* (1), when he said:

> "We are, of course, to give effect to the rule that the plaintiff must establish his case, that he must show that the loss comes within the terms of his policies; but where all risks are covered by the policy and not merely risks of a specified class or classes, the plaintiff discharges his special onus when he has proved that the loss was caused by some event covered by the general expression, and he is not bound to go further and prove the exact nature of the accident or casualty which, in fact, occasioned his loss."

The presumption that an accident has occurred will readily be inferred where it is proved that the goods were intact at the beginning of the journey and arrived in a damaged condition and where the nature and extent of the damage is not such as must have been expected by both parties having regard to all the circumstances. On the particular facts of *Gaunt's* case (1), Lord Birkenhead said:

> "The damage proved was such as did not occur, and could not be expected to occur, in the course of a normal transit. The inference remains that it was due to some abnormal circumstances, some accident or casualty."

The damage which the parties must be deemed to have expected, sometimes called "natural and inevitable" and sometimes "fair wear and tear", is not a "risk" and therefore not covered by the policy. I do not, with respect, favour the use of the word "inevitable", although there is the highest authority for its use. No damage is inevitable: goods may, and sometimes do, arrive undamaged. The matter is, I think, one of degree. Some goods are more fragile than others, and some are more valuable than others. The more fragile the goods, the more desirable it is that they be packed with care but obviously the time and money devoted to packing must be related to the value of the goods. It is, I think, for the court to determine on the particular facts of each case what measure of damage or "wear and tear" must be presumed to have been expected by the parties when the contract of insurance was entered into.

The defence to such an action will normally consist either of a denial that there has been a casualty or of a plea that an exception to the policy applies, or of both, and where an exception is pleaded, the onus is, of course, on the defence.

Theodorou v. Chester (4), was a case in which the defence was that the damage sustained by the goods was the ordinary wear and tear incidental to a long journey and was not the result of any fortuitous circumstance or any peril insured against. The onus was therefore on the plaintiff to satisfy the court that there had been a "casualty" and that involved rebutting various alternative suggestions put forward by the defence.

On the other hand, the cases of *Gee and Garnham Ltd. v. Whittall* (2) and *Electro Motion Ltd. v. Maritime Insurance Co. Ltd*. (5) were both cases where the defence was or included an allegation of inherent vice. In the former case, the goods were of light metal and very prone to denting and arrived, as in the present case, in a large number of boxes none of which showed any outward

sign of injury (apart from certain boxes which were dealt with separately in the judgment). There was no evidence of any accident or of anything unusual concerning the journey. The trial judge concluded that the damage had occurred either in the course of packing or as a result of defective packing and held that the onus of proving inherent vice had been discharged. In the latter case, the defence of the insurers was that damage to a diesel engine, the subject of the claim, had not occurred during the journey and there was an alternative defence that any damage that had occurred in transit was due to inherent vice, the engine being already cracked at the time of shipping. The defence depended entirely on expert evidence that a crack in the engine must have been antecedent to the loading of the engine on the ship. There was, however, direct evidence, which the trial judge accepted, that the engine was in good order when it was shipped and there was evidence, which the trial judge also accepted, which indicated that the engine had received a severe blow. The trial judge found no difficulty on the evidence in finding for the plaintiff company against the insurers.

I have dealt somewhat fully with these cases, because I think, with respect, that there is nothing irreconcilable in the decisions and that they all accord with the general principles I have sought to set out. Both *Gee's* case (2) and *Berk & Co. Ltd. v. Style* (3) (which was referred to at all stages of these proceedings) are clear authority for saying that inadequate packing may constitute inherent vice.

Law JA: I have had the advantage of reading the judgment of Newbold, Ag. V.-P., with which I agree. I wish to add a few observations on one aspect of this appeal, and that is the effect, on the trial of a civil case, of issues which have been properly framed and recorded, as was the case here.

The appellants (whom I shall refer to in this judgment as the plaintiffs) imported seven cases of enamel-ware to Kenya from the United Kingdom. These goods were insured for £205 by a certificate of insurance issued under a policy of marine insurance taken out by the plaintiffs with the respondents (hereinafter referred to as the defendants). The certificate covered the transit of the goods "at and from Liverpool to Nairobi" in respect of "All Risks of loss or damage, Subject to the Institute Cargo Clauses (All Risks) Including War and Strikes risks as per Institute Clauses". The goods arrived in Nairobi towards the end of February, 1959, having travelled from Liverpool to Mombasa by sea and from Mombasa to Nairobi by road. In Nairobi there was no damage to the cases apparent on external examination, but when the cases were opened it was found that the enamelware in all seven cases had suffered damage by chipping. The defendants' assessor examined the goods on March 4, 1959. He mistakenly assumed that the goods had travelled from Mombasa to Nairobi by rail. The following extracts are taken from his report–

"*Nature of packing.*	Pieces wrapped paper all in nailed wood cases packed with wood wool.
External condition on arrival.	Sound.
Nature and cause of damage.	Chipping of enamel, probably rough handling in transit."

The damage was estimated to amount to Shs. 1575/50. The defendants repudiated liability on the grounds that "the losses are not recoverable under the relative certificate".

The plaintiffs instituted a suit in the Resident Magistrate's Court, Nairobi, by filing a plaint claiming

Shs. 1575/50, interest and costs from the defendants, alleging that their goods “were damaged by one of the perils or causes” covered

by the certificate and policy of insurance issued by the defendants. The defendants in their defence pleaded a number of defences, of which the only one which is still material is:

> ". . . that the loss was not by one of the perils insured against".

At the hearing before the learned resident magistrate, the issue arising out of this defence was framed in the following terms:

> "1(*a*) Are the defendants entitled to refuse to pay the claim on the grounds that there was an 'inherent vice' in that the goods were insufficiently packed."

This issue was obviously framed with regard to clause 6 of the Institute Cargo Clauses (All Risks) which formed part of the policy of insurance and which reads as follows:

> "This insurance is against all risks of loss of or damage to the subject-matter insured but shall in no case be deemed to extend to cover loss damage or expense proximately caused by delay or inherent vice or nature of the subject-matter insured . . .".

Counsel for the plaintiffs then submitted that the burden of proof was on the defendants. The learned trial magistrate is recorded as having said "I think Mr. Ransley (counsel for the defendants) has admitted the onus is on him to prove that the exceptions apply", to which Mr. Ransley is recorded as having replied "Yes". To my mind this admission is of the utmost importance in deciding this appeal. From the outset the trial proceeded on the basis that the plaintiffs were relieved of the duty of proving a casualty, or accident, of such a nature as to bring their loss within the policy and no issue was framed posing the question "was the damage to the goods due to a risk covered by the policy?". On the contrary, the defendants undertook the onus of proving inherent vice in the goods. The learned resident magistrate, in a carefully considered judgment, found that the evidence was insufficient for him to find that there was inherent vice in the goods by reason of insufficient packing. He concluded "That being so, the damage was caused through a risk which was covered by the policy and the insurers should pay. On issue 1 (*a*) there was no inherent vice'."

The defendants appealed to the Supreme Court. The learned Chief Justice allowed the appeal, for reasons which appear from the following extract taken from his judgment:

> "Here however were seven cases, all undamaged, the contents of which had behaved in just the same way. The packing had separated from the goods. On the evidence that was due to 'somewhat continued shaking'. Upon the only evidence before the learned magistrate it does seem to me that the most likely cause of that separation was the road journey. There is no evidence at all that the road journey was other than normal. Given the packing used, the ordinary incidents of the road journey would, on the surveyor's evidence, cause the separation of the utensils and packing. I say again that the separation could have been caused in other ways, that it could have been caused by a casualty, but in a difficult case, and with respect to the learned magistrate, I think that the balance of probabilities lay with the appellants, and that on the whole of the evidence the respondents failed to discharge the admittedly light onus which lay on them.
>
> For these reasons I allow the appeal."

With great respect, the learned Chief Justice decided the appeal on an issue which was never an issue at the original hearing before the learned magistrate. As counsel has submitted for the plaintiffs, there was no issue as to whether or not the plaintiffs had established that a casualty had occurred, so as to bring their

loss within the terms of the policy. On the contrary, the relevant issue was framed by agreement of the parties in such a way as to place on the defendants the onus of proving the existence of inherent vice so as to entitle them to repudiate liability under the policy, and the defendants' counsel is on record as having specifically undertaken to discharge this onus. The learned magistrate found that the defendants had failed to discharge this onus, and there is nothing in the learned Chief Justice's judgment to suggest that in his opinion they had discharged this onus. The learned Chief Justice allowed the appeal solely on the ground that the plaintiffs had failed to discharge the onus of proving the occurrence of a casualty. As to this, I am of opinion that that onus was discharged, on the evidence, but even if the plaintiffs had not been able to prove a casualty, the trial, with the agreement of the parties, proceeded on the basis that the defendants had undertaken the burden of proving that they were entitled to repudiate liability because of inherent vice, within the meaning of cl. 6 of the Institute Cargo Clauses. This they failed to do. Where the parties agree an issue, the court should decide the case upon that issue, if it is properly framed and arises out of the pleadings, as was the case here. As Gould, J.A. (as he then was) said in *Ayoub v. Standard Bank* (6) ([1961] E.A. at p. 752):

> "Mr. Gratiaen submitted that . . . once one specific issue had been agreed upon it was wrong to take the view that even if the agreement did not create a trust certain other facts not pleaded gave rise to an independent trust. The court was tied by the agreement between counsel.
>
> I agree that, in the circumstances, what the court had to do was to decide the single issue upon which counsel had agreed that the success or failure of the action depended . . . it was an agreement between experienced counsel who had all the facts before them . . .".

In the same way, in the case now under consideration, experienced counsel who had all the facts before them agreed that the main issue upon which the success or failure of the action depended was:

> "1(*a*) Are the defendants entitled to refuse to pay the claim on the grounds that there was an 'inherent vice' in that the goods were insufficiently packed."

and counsel for the defendants unequivocally undertook to discharge the onus of proving that issue. It was never an issue that the plaintiffs should prove that a casualty or accident had occurred, and it is in my opinion wrong that the plaintiffs should be non-suited for having failed to prove something which was never made an issue between the parties at the trial.

For these reasons alone I would allow this appeal, set aside the judgment of the Supreme Court and restore the judgment of the resident magistrate.

Appeal allowed.

For the appellant company:
JM Nazareth, QC and *TG Bakrania*
Veljee Devshi & Bourania, Nairobi

For the respondent company:
BO'Donovan, QC and *PJ Ransley*
MacDougall & Wollen, Nairobi

G R Mandavia v Rattan Singh

[1965] 1 EA 118 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	29 March 1965
Case Number:	57/1963
Before:	Crabbe, Duffus and Law JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Rudd, J

[1] Practice – Appeal – Preliminary decree – Plea of res judicata – Point argued as preliminary issue – Plea of res judicata rejected – Leave to appeal not obtained – Appeal lodged – Whether decision of court amounted to "decree" or "preliminary decree".

Editor's Summary

The appellant, as defendant in a civil suit, pleaded that the suit was barred as res judicata. This was taken as a preliminary issue and the trial judge ruled that res judicata had not been made out. The appellant, without obtaining leave to appeal, lodged an appeal against this decision and at the hearing a preliminary objection was taken that the decision did not amount to a "decree" or "preliminary decree", within the meaning of s. 2 of the Civil Procedure Act (K), as it did not conclusively determine the rights of the parties with regard to any of the matters in controversy between them; alternatively it was submitted that if the judge's decision was an "order" as defined in that section it was not appealable as of right and, as leave to appeal had not been obtained, the appeal was incompetent.

Held –

(i) jurisdiction and res judicata are two distinct subjects;

(ii) where an issue such as liability is tried as a preliminary issue and the suit is finally disposed of at first instance, a preliminary decree arises from which an appeal lies;

(iii) where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or res judicata fails and a suit is permitted to proceed, no preliminary decree arises but only an order; the unsuccessful party has a right of appeal with leave and accordingly the appeal here was incompetent for want of leave. *Mandavia v. Income Tax Comr*. doubted.

Appeal dismissed as incompetent.

Cases referred to in judgment

(1) *Mandavia v. Income Tax Comr*., [1958] E.A. 410 (C.A.).

(2) *Tzamburakis v. Roderessokis*, [1958] E.A. 400 (P.C.).

(3) *William J. Baker v. Joseph P. Rush*, [1964] E.A. 602 (C.A.).

(4) *Chanmalswami v. Gangadharappa* (1915), 39 Bom 339.

(5) *Parsotam Rao Tantia v. Radha Bai* (1912), 15 I.C. 566.

(6) *Bharma Bin S. Pujari v. B. S. Bhamagavda* (1915), 39 Bom. 421.

(7) *R. v. Secretary of State for India*, [1941] 2 All E.R. 546.

(8) *Commissioner of Transport v. Kenya Co-operatives Creameries* (1954), 21 E.A.C.A. 70.

(9) *Champion Motor Spares Ltd. v. Barclays Bank D.C.O.*, [1964] E.A. 385 (C.A.).

March 29. The following judgments were read:

Judgment

Crabbe JA: The sole question on which the ruling of this court is required is whether the decision or ruling by the learned trial judge that the plea of res judicata raised by the appellant failed amounted to a "preliminary decree" from which an appeal lies as of right to this court. The matter arose shortly in this way. The respondent, who is an Indian contractor residing and carrying on business at Nairobi, instructed and retained the appellant, who is an advocate of the Supreme Court of Kenya, to assist the respondent's leading counsel in his appeal against income tax assessment. The respondent handed over to the appellant his account books and other documents relevant to the appeal. But subsequently the plaintiff withdrew his instructions from the appellant and asked for the return of his books, documents and papers, and the delivery by the appellant of his bill of costs. Despite repeated demands the appellant failed to return the respondent's books, documents and papers, and on November 2, 1959 the respondent applied to the Supreme Court for an order to compel the appellant to deliver his bill of costs together with all books, documents and papers to the respondent. The order was granted on December 15, 1959, but the appellant complied partially with it, and on June 3, 1960 the respondent took out a notice of motion in Miscellaneous Civil Application No. 106 of 1959 seeking for an order that the appellant be committed to prison for contempt of the court for failing to deliver one cash book, and that the appellant be made to pay costs incidental to the application and of the order. After several adjournments the court granted the application *ex parte* in the morning of February 24, 1961, when it was ordered that the appellant be committed to prison. The appellant appeared before the judge who made the committal order in the afternoon of the same day, and after he had been examined the learned judge made the following order:

> "Order
>
> This, although not framed in the appropriate terms, is an application by the respondent seeking the court's forgiveness for his contempt in disobeying its order of the 15th December, 1959. The respondent has given evidence on oath and has been cross-examined at great length on the matters in question. He has denied that he has ever received the book, the subject matter of the order. In these circumstances I am satisfied, but only now, that the respondent is not in contempt. The respondent should have made this perfectly plain to the court in the application and if he had chosen to file an affidavit in more specific terms than his previous affidavits filed in this matter. I am satisfied that the respondent has purged his contempt, if there was contempt. I am not, however, satisfied that the respondent has acted in good faith in this matter and I, therefore, order him to pay all the costs of these proceedings forthwith. The respondent is to be released from custody."

The appellant appealed against this order, but this court declined jurisdiction for reasons with which we are not concerned in this instant case.

In the meantime, however, the respondent instituted the present suit against the appellant in which he claimed *inter alia*, "the return of the omitted papers and damages for their detention." By his defence the appellant denied that he still had any papers of the respondent with him, and on April 27, 1963 the appellant filed a Notice of Motion pursuant to O. 6 r. 27 for an Order that the respondent's suit was barred (1) by reason of s. 7 of the Civil Procedure Act(K) on account of the court's decision dated December 15, 1959 in Miscellaneous Civil Application No. 106 of 1959 between the parties to this suit, and alternatively (2) under s. 34 of the same Act, by virtue of the order of December 15, 1959 and also the Order dated February 24, 1961 which was made in same Civil Application No. 106 of 1959. The order was made by Madan, J. in terms

prayed, but he reserved for subsequent consideration the issue of limitation raised by the appellant. The case eventually came before Rudd, J. for hearing, when the appellant's plea of res judicata was considered. The learned judge, after hearing arguments of counsel for both parties, and taking the evidence of the respondent's counsel in the application for committal Order in order to seek clarification on some matters in the record of proceedings of May 8, 1963, gave a decision whereby he rejected the plea of res judicata.

On May 22, 1963 the appellant gave Notice of Appeal, and his Memorandum of Appeal, which he subsequently filed on July 20, 1963, was headed as follows:

> "Between
>
> G. R. Mandavia *Appellant*
>
> and
>
> Rattan Singh s/o Nagina Singh *Respondent*
>
> (Appeal from the decision (Preliminary decree, according to this Court's decision in (1958) E.A. p. 410 in Mandavia versus Commissioner of Income Tax) of Her Majesty's Supreme Court of Kenya at Nairobi (the Honourable Mr. Justice Rudd) dated the 8th day of May, 1963 in its Civil Case No. 1175 of 1962,
>
> Between
>
> Rattan Singh s/o Nagina Singh *Plaintiff*
>
> Versus
>
> G. R. Mandavia *Defendant*)
>
> Memorandum of Appeal (As of right under above mentioned decision)."

Section 66 of the Civil Procedure Act (Cap 5.) (K) reads:

> "Unless otherwise expressly provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the Supreme Court to the Court of Appeal for Eastern Africa."

It is also provided by s. 68 of the Act as follows:

> "Where any party aggrieved by a preliminary decree passed after the commencement of this Act does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."

In this appeal, counsel for the respondent has taken two preliminary objections to the hearing of the appeal by this court. Firstly, that the ruling by the learned trial judge on a preliminary point that the plea of res judicata had failed did not amount to a "decree" or "preliminary decree" as it did not conclusively determine the rights of the parties with regard to any of the matters in controversy between the parties. Secondly (this is really an alternative ground), that if the ruling of the learned trial judge amounted to an "order", then (*a*) no appeal lies therefrom without leave, and leave to appeal therefrom has not been obtained by the appellant; and (*b*) that since such ruling has not been formally drawn up and signed by the court as an "order" and is not in point of law an "order" as defined in the Civil Procedure Act, no appeal lies therefrom; or the appeal brought by the appellant without annexing such signed copy of the "order" and is not competent. On the first point counsel for the respondent submitted that the order of Rudd, J., did not give rise to a preliminary decree, and that the appellant was entitled to challenge on appeal from the final decision

of Rudd, J. any wrong order made by him. Respondent's counsel referred to s. 76 (1) of the Civil Procedure Act (K) which is in the following terms:

> "Save as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal."

The appellant who appeared in person took his stand quite confidently, as he appeared, on the judgment of this court in *Mandavia v. Income Tax Comr*. (1), which he argued, has been good law ever since it was pronounced, and which he contended is an authority that is conclusive of this case, because, as he thought, res judicata is a matter of jurisdiction. In *Mandavia v. Income Tax Comr*. (1), Briggs, V.-P., said ([1958] E.A. at p. 413):

> "For reasons which appear from the judgments of this court in *Commissioner for Transport v. Kenya Co-operative Creameries Ltd*. (1954), 21 E.A.C.A. at pp. 72, 73 and 79, we were of opinion that the question of jurisdiction raised was decided by a judgment, and could properly have been embodied in a preliminary decree, since it 'conclusively determined the rights of the parties' with regard to one at least of the matters in issue in the suit. It was not merely an interlocutory order which this court could have set aside under r. 78.
>
> No appeal was brought from it. Indeed, the appellant specifically said that he did not intend to appeal, which suggests that he realised at the time of hearing the decision that he could have done so. The matters then decided were outside the scope of the judgment and decree now under consideration and the ground of appeal was therefore incompetent."

With respect, I do not agree with appellant's argument that we are bound to follow the *Mandavia* case (1), since in my view it is distinguishable from the present case. In the *Mandavia* case (1) the question which was said to affect jurisdiction was raised under s. 6 of the Civil Procedure Act (K), whereas in this case the question of res judicata was raised under s. 7 of the Act. Both ss. 6 and 7 appear in Part 1 of the Act under the general rubric "Jurisdiction of the Courts and Res Judicata". It seems plain therefore that res judicata and jurisdiction are two distinct subjects in the Act. Jurisdiction is created by statute; it is fundamental and can be raised at any time. Res judicata, on the other hand, is a matter of pleadings and can be raised only at the trial. The principles underlying the doctrine of res judicata are "Interest rei publicae ut sit finis litium" and "Nemo debet bis vexari pro eadem causa".

The court before which the plea is raised is not deprived of its jurisdiction to hear the case; the court only declines to exercise its jurisdiction to allow the parties to relitigate a matter when it is satisfied that the same parties are suing in the same capacity and that the issue before it is the same as that alleged to have been the subject of adjudication in previous proceedings. There is yet another reason why I think that we are not bound to follow the *Mandavia* case (1), even if the appellant is right in his contention that a plea of res judicata is one of jurisdiction. It seems to me that the *Mandavia* case (1) is in conflict with the Privy Council decision in *Tzamburakis v. Rodoussakis* (2), which incidentally was delivered on the same day as the judgment in the *Mandavia* case (1). In *Tzamburakis v. Rodoussakis* (2) it was said ([1958] E.A. at p. 404):

> "The Court of Appeal held that there having been no appeal entered within time from the decision of Mahon, J., which in their view was a preliminary decree within the meaning of s. 2 (2) and s. 97 of the Code of Civil Procedure, the grounds of appeal seeking to attack his decision were incompetent.

> Their lordships do not agree. They prefer the decision of the Full Court Bench in Bombay in the case of *Chanmalswami v. Gangadharappa* (1915), 39 Bom. 339 which overruled the case of *Sidhanath Dhonddev v. Ganesh Govind* (1912), 37 Bom. 60 in which it had been held that decisions as to misjoinder, limitation and jurisdiction were preliminary decrees from which the unsuccessful parties must at once appeal by reason of s. 97 of the Code."

It seems to me therefore, with very great respect, that the decision in the *Mandavia* case (1) cannot be regarded as good law, and therefore not binding upon us.

Nevertheless, the crucial question in this appeal is: Was the decision of the trial judge dismissing the plea of res judicata a preliminary decree?

There has been a plethora of cases before this court in recent years in which the definition of "Decree" in s. 2 of the Civil Procedure Act (K) has been exhaustively considered, and I do not think there is any special reason in this judgment to make a fresh attempt to re-examine the definition. The relevant portion of the definition in the Act reads as follows:

> " 'decree' means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint or writ and the determination of any question within s. 34 or s. 91, but shall not include–
>
> (*a*) any adjudication from which an appeal lies as an appeal from an ordea; or
>
> (*b*) any order of dismissal for default:
>
> Provided that for the purposes of appeal the word 'decree' shall include judgment and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up.
>
> *Explanation*. – A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of suit. It may be partly preliminary and partly final;"

This definition was considered recently by this court in *William J. Baker v. Joseph P. Rush* (3) where it was said:

> ". . . to constitute a decree there must be the following essential elements:
>
> (*a*) there must be an adjudication;
>
> (*b*) the adjudication must have been given in suit;
>
> (*c*) it must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit;
>
> (*d*) such determination must be a conclusive determination".

The real test in this case therefore is whether the dismissal of the plea of res judicata conclusively determined "the rights of the parties with regard to all or any of the matters in controversy in the suit". In *Chanmalswami v. Gangadharappa* (4) Beaman, J. said ((1915), 39 Bom. at p. 343):

> "As I understand the definition it describes two things, (1) the legal rights of the parties which are to be decreed or not decreed. These are in a vast majority of cases concrete, as a sum of money or piece of land or house, or some other form of real or personal property, (2) the said rights in respect of any or all the matters in controversy. This means, as I understand it, everything which is necessary in law, during the course of a trial, to the

> establishment or refutation of the alleged right. Every fact which a plaintiff alleges and a defendant denies comes under this head, as well as all the rules of procedure and evidence which have to be enforced and followed during the trial. But these latter are means to an end, and the end is the right or rights claimed, and to be or not to be decreed".

Where in any suit res judicata is pleaded the court can do one of two things – (1) it may uphold the plea and dismiss the suit, or (2) dismiss the plea and hear the suit on the merits. In the first, the result is that the plaintiff is debarred from establishing his right to the relief which he seeks or from litigating an issue, and in my view it is an adjudication which conclusively determines a right upon a matter or matters in controversy in the suit. In the second, the matters in controversy are still at large, since there has been no adjudication affecting the rights of the parties, and all the issues remain alive. It seems to me therefore that a finding or decision in limine which permits the suit to proceed is not a preliminary decree. Thus a decision of a court on a preliminary issue framed on a plea of res judicata is not a preliminary decree and is, therefore, not appealable. (See *Parsotam Rao Tantia v. Radha Bai* (5), *and Bharma Bin S. Pujari v. B. S. Bhamagavda* (6). I would therefore uphold the preliminary objection on the first ground. In view of this conclusion I have arrived at, it is unnecessary to consider further the alternative ground of the objection to the appeal.

In the result I would dismiss the appeal with costs.

On the question of costs counsel for the respondent asked for costs for two counsel if his objections were upheld. But this was opposed by the appellant who contended that counsel for the respondent's junior gave evidence at the trial and is therefore not permitted to appear in this appeal. The appellant cited the case of *R. v. Secretary of State for India* (7) in support of his contention and referred to the observations of Humphreys, J. at the conclusions of his long judgment ([1941] 2 All. R. at p. 556):

> "It has been brought to the attention of the court that, on the hearing at Bow Street, junior counsel on one side was called as a witness to prove certain aspects of Indian law and continued thereafter to act as counsel in the case. No objection was taken to this by counsel on the other side. We think it right to point out that this was irregular and contrary to practice. A barrister may be briefed as counsel in a case or he may be a witness in a case. He should not act as both counsel and witness in the same case."

With respect to the appellant, I do not think that Humphreys, J.'s observations apply in this case. The junior counsel on the respondent's side did not give evidence on any controversial issue in the case. His evidence was purely formal, and was directed towards explaining whether the unsigned typescript of the previous proceedings was accurate as to a statement attributed to a counsel in the case. I find no substance in the appellant's submission. I am, however, satisfied that this is not a case in which the court should certify costs for two counsel.

Law JA: I have had the advantage of reading the judgment of Crabbe, J.A. which sets out the history of this matter in such detail as to relieve me from the necessity of recapitulating the facts.

This case concerns an issue of law arising in a civil suit, dealt with by consent of the parties as a preliminary issue under O. 14 r. 2 of the Civil Procedure (Revised) Rules, 1948 (K). The appellant, who was the defendant in the civil suit, had pleaded *inter alia* that the plaintiff's suit was barred as res judicata. If this plea was well-founded, then the court by s. 7 of the Civil Procedure Act (K), was precluded from trying the suit. The learned trial judge found that the plea

of res judicata failed, and it is from this decision that the defendant now seeks to appeal as of right. The respondent has taken the preliminary objection that the judge's decision that the plea of res judicata had not been made out did not amount to a decree, or preliminary decree, within the meaning of s. 2 of the Civil Procedure Act; alternatively, the respondent submits that if the judge's decision was an order, as defined in s. 2 aforesaid, it was not appealable as of right under s. 75 of the Act, and as leave to appeal had not been obtained under s. 76, the appeal was incompetent.

There can be no doubt that if the plea of res judicata had succeeded in the Supreme Court, an appeal would lie, because judgment would have been entered for the defendant on the suit as a whole, and the rights of the parties would have been conclusively determined with regard to all the matters in controversy in the suit. Such a decision would clearly give rise to a decree appealable as of right under s. 66 of the Act. The question in the preliminary objection now under consideration is whether a decision that a plea of res judicata has not been made out likewise gives rise to an appealable decree.

The appellant in support of his argument that an adverse decision on his plea of res judicata gives rise to an appealable preliminary decree, relies mainly on *Commissioner for Transport v. Kenya Co-operative Creameries* (8) and *Mandavia v. Income Tax Comr*. (1). In the first case, the defendant had pleaded that he was absolved from the ordinary consequences of his negligence either by operation of a statute or by a term of the contract of bailment between the parties. These issues of law were by agreement of the parties heard and determined as a preliminary issue, and the Supreme Court held that the defendant was not so protected. From this decision the defendant appealed, and the Court of Appeal held that an appeal lay as of right, as the decision finally determined the question of liability between the parties. This court has recently confirmed that a decision on liability gives rise to an appealable preliminary decree, see *Champion Motor Spares Ltd. v. Barclays Bank D.C.O*. (9) and *Baker v. Rush* (3). In the second case, that is to say, *Mandavia v. Income Tax Comr*. (1), the defendant had objected to the Supreme Court's jurisdiction to try the suit pending the decision of other proceedings then pending before the Privy Council. This objection was dealt with as a preliminary issue, and the judge over-ruled the objection and proceeded with the trial of the suit. The defendant did not appeal against the finding on the preliminary objection but made it a ground of appeal when he appealed against the final decision on the merits. This court held that this ground of appeal was incompetent because the question of jurisdiction raised was decided by a judgment and could properly have been embodied in a preliminary decree and appealed against as such. In *Tzamburakis v. Rodoussakis* (2), however, the Privy Council held that a decision on a preliminary issue that a suit was not time-barred did not give rise to a preliminary decree from which the unsuccessful party had a right of appeal, and in his speech Lord Tucker referred with approval to the Indian case of *Chanmalswami v. Gangadharapp*a (4), over-ruling previous decisions to the effect that decisions as to misjoinder, limitation and jurisdiction are preliminary decrees from which the unsuccessful party must at once appeal. I have no doubt that the same principle applies to a preliminary issue of res judicata, indeed there is direct authority to this effect in *Bharma Bin Shadippa v. Bhamagavda* (6), in which it was held, following *Chanmalswami's* case (4), that a decision that a matter is not res judicata is not a preliminary decree from which an appeal will lie before the final disposal of the suit.

As *Chanmalswami's* case (4) has the approval of the Privy Council in *Tzamburakis*' case (2), anything to the contrary in *Mandavia v. Income Tax Comr*. (1) must be considered as no longer authoritative. The position is, in my opinion, clear: when a suit is disposed of on a preliminary point, an appeal will lie from

the decree dismissing the suit, and where an issue such as liability is tried as a preliminary issue and finally disposed of at first instance, a preliminary decree arises from which an appeal lies; but where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or res judicata fails, no preliminary decree arises from which the unsuccessful party has a right of appeal. It follows that in my view the preliminary objection succeeds. This appeal is incompetent and must accordingly be dismissed. I concur in the order for costs proposed by Crabbe, J.A.

Duffus JA: I have read the judgments of Crabbe, J.A. and Law, J.A. I agree with what they have stated and with the decision and order proposed by Crabbe, J.A.

Appeal dismissed as incompetent.

The appellant in person

For the respondent:
JM Nazareth QC and *JK Winayak*

For the appellant:
JK Winyak & Co, Nairobi

Lakhman Ramji v Shivji Jessa & Sons
[1965] 1 EA 125 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	15 July 1964
Case Number:	80/1963
Before:	Rudd J
Sourced by:	LawAfrica

[1] Evidence – Admissibility – Secondary evidence of document – Secondary evidence to prove contents of document – Receipt of letter denied by party – Carbon copy of letter admitted in evidence.

[2] Practice – Pleading – Sole proprietor of firm suing in firm's name – Procedure to be followed to rectify defective title.

Editor's Summary

The respondents, who were building contractors, had entered into a subcontract with the appellant whereby the appellant was to supply material and labour in respect of the plumbing in a building which the respondent had contracted to erect. The appellant later sued the respondents for Shs. 1143/95 in respect of extra work done and the defence was that the parties had discussed their respective claims and

agreed that the respondents should pay the appellant a sum of Shs. 360/- in full settlement and that a cheque for Shs. 360/- was tendered and accepted by the appellant. At the hearing evidence was called to show that the cheque was sent to the appellant in an envelope with a letter which stated that the cheque was in full settlement of all accounts between the parties. The appellant denied that there was any agreement as alleged and that he only received a cheque for Shs. 360/- without the covering letter. A carbon copy of the letter was produced in evidence and the magistrate relying on the letter as well as the receipt on the back of the cheque and the respondent's evidence held that the accounts had been settled and agreed as alleged. On appeal the point in issue was whether the magistrate had properly admitted the copy of the covering letter to prove its contents.

Held –

(i) the admission of secondary evidence was not wrong and even if it were the endorsement on the cheque together with the appellant's evidence was ample evidence to justify the finding in the respondents favour that the cheque was given and taken in full settlement;

(ii) a sole proprietor of a business cannot sue in the name of that business if that name is not his own name but he should sue in his own name simpliciter

and then in the body of the plaint say that he carries on business with a business name and is the sole proprietor of the business;

(iii) if a suit has been filed by a sole proprietor of a firm in a business name simpliciter and where an amended plaint can be filed without leave the alteration can be made without prior authority from the court, but where leave to amend plaint is necessary an application should be made to court;

(iv) a suit filed by a sole proprietor of a firm in a business name simpliciter is defective but it is not bad in law.

Appeal dismissed.

No cases referred to in judgment

Judgment

Rudd J: The appellant in this appeal carried on a plumber's business in the name of Oriental Plumbers. The respondent is a building contractor who entered into a sub-contract with the appellant whereby the appellant was to supply material and labour in respect of the plumbing in a building which the respondent had contracted to erect. The sub-contract was a lump sum sub-contract under which the appellant was to be paid Shs. 18000/- on completion. The appellant had used Shs. 140/- worth of cement which he took from the respondent and up to August 1960, he had been paid Shs. 17500/- by the respondent so that he was then entitled to Shs. 360/- further payment provided that he had fully completed the original contract. The appellant also did extra work on the contract and other work for the respondent in respect of which he claimed Shs. 1143/95. He received a cheque from the respondent in November 1960 for Shs. 360/- and sued for judgment for Shs. 1143/95.

The respondent's main defences as pleaded were (1) that the value of the work done by the appellant outside the original contract was overcharged and unreasonable and should have been reduced to Shs. 581/- and that the work in respect of the original contract was in certain respects not up to the standard of the specifications as a result of which the appellant had claimed a reduction of Shs. 855/-. And (2) that the appellant and the respondent had discussed their respective claims and agreed that the respondent should pay the appellant Shs. 360/- in full settlement and that the cheque for Shs. 360/- was tendered and accepted in full satisfaction of all their claims pursuant to that agreement.

The respondent gave some evidence to show that he was entitled to claim a rebate from the contract price of Shs. 18000/- and that the prices claimed for some of the extra work were excessive but this evidence was somewhat vague and hardly sufficient to establish a definite set off. It was however in my opinion sufficient if believed to show that there was a cross claim for work done below the standard of the specifications and claims for reducing the amount charged for the extra work.

The real defence relied on was that there were cross claims which had been discussed and agreed and that the cheque for Shs. 360/- was given and taken in full settlement of all the accounts between the parties.

The evidence as to this was of course conflicting the appellant claiming that no reduction was agreed in respect of the original contract price or the amount due for extra and other work and that the cheque for Shs. 360/- was only a final settlement of the amount due on the original contract leaving the other

work still to be paid for. While the respondent claimed that the whole accounts had been agreed and settled by the cheque for Shs. 360/-. The cheque had been sent to the appellant with a stamp on the back as follows:

> "Received the amount named on the face hereof
>
> Signature *Place for*
>
> Date *stamp*
>
> The receipt as above is also the endorsement of the cheque. No other receipt is required." and to this was added in manuscript "full and final settlement in your account."

The respondent signed this endorsement and receipt by putting his rubber stamp

> "For and on behalf of
>
> Oriental Plumbers
>
> *Proprietor*"

over a 10 cent receipt stamp and putting in his name as proprietor and the date time of the original stamp, November 11, 1960.

According to the appellant this cheque was handed to him personally by the respondent from hand to hand, not in an envelope and with no covering letter. But the respondent said that he put the cheque in an envelope with a letter of which he produced a carbon copy which stated very clearly that the cheque was in full settlement of all the accounts between the parties. He said that he gave the envelope with those contents inside it to his brother for delivery to the appellant.

The respondent's brother was called as a witness. It was argued for the appellant that the delivery of the covering letter with the cheque was not properly proved and that the copy of the alleged covering letter should not have been admitted in evidence. The magistrate relying on the covering letter as well as the receipt on the back of the cheque and the respondent's evidence found that the accounts had been settled and agreed as alleged by the respondent and that the cheque for Shs. 360/- was given and accepted in full settlement of all the accounts then subsisting between the parties.

It is a question as to whether the copy of the covering letter was proved to have been delivered to the appellant with the cheque sufficiently to allow secondary evidence of its contents to be proved by a carbon copy of the letter which the magistrate was satisfied had been in fact written contemporaneously to accompany the cheque which the appellant said had been put into an envelope together with the cheque for delivery to the appellant and of course it was clear that the appellant had in fact received the cheque. In the circumstances I think it was not an unreasonable inference that the appellant had also received the covering letter.

There does not appear to have been any objection in the lower court to the admission of secondary evidence of the contents of the covering letter though of course its receipt was denied.

In all the circumstances I am not inclined to say that the admission of secondary evidence was wrong. But even if it were the endorsement on the cheque together with the plaintiff's evidence was ample evidence to justify the finding in the respondent's favour that the cheque was given and taken in full settlement. One other point arose which I promised to deal with in my judgment. The appellant who was the sole proprietor for Oriental Plumbers sued in that business' name and not in his own name. It was objected in the lower court that that was not proper but no effective notice was taken of that and the defective title was not altered in the lower court. The appeal however was filed in the name of the appellant "trading as Oriental Plumbers" without any change in title having been authorised by any competent court.

At the outset of the hearing of the appeal counsel for the respondent submitted that the appellant should not have appealed under a different name without the

authority of a court. The point is technical and could in no circumstances affect the final result. This was appreciated by counsel for the respondent who admitted that he would not object to a proper amendment of the appellant's title in the proceedings and that no costs had been occasioned nor any prejudice resulted.

The legal position is quite clear. A sole proprietor of a business cannot sue in the name of that business if that name is not his own name. He should not even sue in his own name trading in the business name. He should sue in his own name simpliciter and then in the body of the plaint he can say that he carries on business in the name of whatever his business name happens to be and is the sole proprietor of that business. That is technically the correct procedure but nowadays rectification is allowed so easily that the matter is merely a technicality.

It is now so common in Kenya to find a person suing in his own name trading as some other name that probably no one here would raise any objection and even where the proceedings are brought in business name simpliciter the matter will be rectified and the suit will not be allowed to fail on that ground. It seems that where an amended plaint can be filed without leave the alteration can be made without prior authority from the court. In other cases I think the English practice should be followed and an application should be made to the court. It need not be a special application by motion or in chambers but can be made extempore at any time orally though it would be courteous to inform the opposite party in advance. If no such notice is given the other side can take the point. When in such a case the plaintiff wishes to appeal I think the better course is to appeal using the title of the case as *it was* at the time of the judgment appealed from if alteration has not been approved by the court in the meantime. The intention to apply to rectify the title can then be indicated in the memorandum of appeal. However I am not prepared to say that he can not appeal in his proper name but in that case I think he should explain the change in the memorandum. I think that there is so little difference in substance between these two choices that it is not worthwhile to make a great deal of distinction.

It is not proper however for the plaintiff suddenly to change the title of his own accord without the concurrence of the court during the pendency of a suit except perhaps where he is entitled to amend his plaint without leave under the rules.

The whole matter is one of relatively minor importance since it can easily be rectified at any stage. Nevertheless I am not to be taken as suggesting that it does not matter in such a case whether the plaintiff sues in his own name or not. He must sue in his own name and if he does not this should be rectified. If the plaintiff does not take steps to obtain the rectification the defence can take the point and make an application to force him to do so and may even get costs but normally the plaintiff can obtain rectification by formal verbal application at some convenient time after giving prior notice of his intention to the other side. If prejudice results it can be compensated by costs but very often no prejudice results and then I would usually allow the rectification without costs. On the main point the appeal is dismissed with costs.

Appeal dismissed.

For the appellant:
DN Khanna
Khanna & Co, Nairobi

For the respondents:

SL Chawla
Kean & Kean, Nairobi

Nunzio Colarossi v Michelina Colarossi

[1965] 1 EA 129 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	12 January 1965
Case Number:	27/1964
Before:	Newbold Crabbe and Spry JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Bennet, J

[1] Divorce – Judicial separation – Cruelty – Wife's petition – Isolated act of cruelty – No evidence that such act impaired mental or bodily health – Conditional threat to kill – Whether reasonable apprehension of danger of life or limb – Frequent quarrels about inadequate house-keeping allowance – During quarrels threat to throw articles at wife – Standard of proof necessary – Temperament of spouses and their character and habits to be taken into account – Whether husband had treated wife with cruelty.

Editor's Summary

The appellant and the respondent who were both Italians were married in 1945 in Sardinia and came to Uganda in 1951 and were living together until the marriage broke up on July 15, 1963. They had a son who was 20 years old. The year 1962 was one of financial stringency for the appellant and from the beginning of that year he gave the respondent only Shs. 400/- a month as house keeping money. This allowance was considerably less than the appellant had previously given to the respondent. When the time came for payment of the housekeeping allowance there were frequent quarrels, during which the appellant would sometimes pick up articles and threaten the respondent, although at no time did he ever strike her. On the night of July 15, 1963 the respondent asked the appellant for money for new spectacles for the son and the appellant, who had apparently recently quarrelled with the son over another matter, refused to do so. This led to a bitter quarrel during the course of which the appellant threw a glass of beer in her face and held his hands close to her face saying "I would like to smash you. . . ." At this stage the son intervened and instead of attempting to calm his father began a quarrel of his own and told him that if he touched the respondent he would break his neck. Thereupon the appellant completely lost his self-control, picked up a chair and smashed various articles in the room and also threatened to kill the respondent if she slept in his room that night. The respondent then left the matrimonial house and never returned. Later she filed a petition for judicial separation on the ground of cruelty. She never stated that her health had in any way been affected by the acts of the appellant; nor did she state at any time that she was afraid of the appellant except at the time of the violent outburst on the night of July 15. The trial judge found that there was no evidence that the respondent's mental or bodily health had in fact been impaired by the appellant's misconduct but that his conduct on the night of July 15, accompanied by the

conditional threat to kill, had inspired in the respondent a reasonable apprehension of danger to her life and limb and held that it amounted to a grave matrimonial offence which, when coupled with his oft-repeated threats to throw articles at the respondent, constituted cruelty. On appeal against granting of decree of judicial separation.

Held –

(i) the conduct of the appellant on July 15, 1963, was one of those occasional outbursts of temper which was a part of the "reasonable wear and tear" of their marriage and having regard to the temperament, character and habits of the spouses, and all the circumstances of the case, the conduct of the appellant was not so serious as to amount to cruelty;

(ii) the facts proved by the respondent did not reach the standard of proof

required in cases of cruelty and accordingly the petition for judicial separation should be dismissed.

Appeal allowed.

Cases referred to in judgment

(1) *Gollins v. Gollins*, [1963] 2 All E.R. 966.

(2) *Grossi v. Grossi* (1873), L.R. 3 P. & D. 118.

(3) *Watt v. Thomas*, [1947] A.C. 484; [1947] 1 All E.R. 582.

(4) *Westmeath v. Westmeath* (1827), 2 Hagg. Ecc. Supp. 59.

(5) *Reeves v. Reeves* (1862), 3 S.W. 8 T. 139.

(6) *Smallwood v. Smallwood* (1861), 5 L.T. 324.

(7) *Bater v. Bater*, [1950] 2 All E.R. 458.

(8) *Mulhouse v. Mulhouse*, [1964] 2 All E.R. 50.

(9) *Evans v. Evans*, 1 Hagg. Con. 35.

(10) *Russell v. Russell*, [1897] A.C. 394; [1897] All E.R. Rep. 1.

January 12. The following judgments were read:

Judgment

Newbold JA: This is an appeal by a husband against a judgment and preliminary decree of the High Court of Uganda whereby on a petition by a wife alleging cruelty a decree of judicial separation was granted.

The relevant facts are as follows: The husband and wife are Italians and they were married in Sardinia on January 21, 1945, and at the time of the trial they were aged about fifty four and fifty two years respectively. They have one son, aged about twenty years old. They came to Uganda in 1951, and from 1956 until the marriage broke up on July 15, 1963, they lived together in Kampala. The petition alleged one act of cruelty prior to 1962, and in relation to this the judge found that in 1948 the husband slapped the wife's face when she accused him of infidelity. The judge, however, came to the conclusion that this incident could not be relied on in support of the petition because it was followed by many years of married life during which no untoward incident occurred. With this finding I entirely agree. In 1960 the husband was involved in a serious motor accident as a result of which he lost his employment and was permanently injured, and at the time of the trial was still on crutches. He went to Italy in 1961 for medical treatment but returned to Uganda in the same year and started up in business on his own. The year 1962 was one of financial stringency for the husband as he was repaying debts and from that year onwards he gave his wife only Shs. 400/- a month as housekeeping money, although he did pay all bills such as light, water, staff, etc. This allowance was considerably less than he had previously given her and was inadequate and the wife supplemented it from her own earnings as a dressmaker. When the time came for the payment of the housekeeping allowance there were frequent quarrels, during which the husband would sometimes pick up any article which was ready to hand and threaten to throw it at the

wife, although at no time did he ever do so or strike her. The son had been educated in Kenya and, it would seem, spoke English fluently. Early in July, 1963, the husband asked his son to accompany him as interpreter when the husband was canvassing from a company business worth a considerable sum of money and the son refused to do so saying: “It is not my business.” Whether as a result of that refusal or for other reasons, the husband did not get the business. On July 15, 1963, when the husband returned home at about 9 p.m. the wife asked him for money for new spectacles for the son. The husband, still smarting from his son’s refusal to help him, stated that it was not his business and this led to a bitter quarrel between the husband and

the wife, which quarrel included a reference to the housekeeping money. During the quarrel the son accused the husband of making improper advances to his, the son's, girl friend. This the husband denied and the wife stated: "I know you very well". Thereupon the husband threw a glass of beer in her face. The son then left the room to return a book to its position elsewhere and while he was out of the room the husband held his hands close to his wife saying "I would like to smash you but I have been advised not to do it". The wife was afraid and called for the son to return into the room. This the son did and, as the judge stated, most unwisely, instead of attempting to calm his father, began a quarrel of his own with his father. The son had taken judo lessons and on his return used words to the effect that if the husband touched his wife he, the son, would break the husband's other leg as well as his neck. Thereupon the husband completely lost his self-control, picked up a chair and smashed various articles in the room. The husband then called for the servant and told him to remove the wife's belongings from their bedroom and to set fire to them the following morning. The husband also threatened to kill his wife if she slept in his room that night and her bed was put outside. The wife thereupon told the son: "Let us put the mattress in your room so that I may sleep there as I am very afraid tonight". When this had been done the son said that he was going to call the police and, as the wife said that she was afraid to stay alone in the house, both left and the wife stayed at the house of a friend while the son continued on to the police station. The wife took the key of the house because she was afraid that when they returned they would find the house closed. The son returned with a policeman, who advised the wife to remain in the friend's house until later. The son, the policeman and the friend then went to the husband's house where the husband told the policeman that he was unwilling to have his wife and son back again. The wife never returned to the matrimonial home and on the following day, through her advocates, stated that she proposed to institute proceedings and asked for maintenance pending the decision. On July 19, the husband replied stating that he had not ejected his wife from the house; that his son had threatened him with violence, as a result of which he had broken articles in the house; that the wife and son had left the house of their own accord; that the wife still had a key to the house, and that he is perfectly willing to have her return.

In due course a petition seeking a decree of judicial separation on the ground of cruelty was presented. At the trial it was agreed that the issue of cruelty should first be determined and that an inquiry as to the husband's means should only be made if the finding on cruelty was in favour of the wife. During the course of her evidence the wife stated that she trusted her husband and that she loved him "very, very much" though she went on to complain that he had slapped her frequently, that he was not a good husband and that he did not show her any affection. At no time in her evidence did it appear that her health had in any way been affected by the acts of the husband; nor did she state at any time that she was afraid of her husband except at the time of the violent outburst on the evening of July 15. The husband in his evidence stated that, like most Italians, he became very excitable, used his hands in gesticulation and made remarks which were never intended to be taken seriously; and that such is the position seems to have been accepted by the wife who stated in her evidence that while the husband frequently threatened to throw things at her he had never in fact done so.

The trial judge, having seen and heard the husband, the wife and the son, stated that the wife impressed him as being much given to exaggeration and distortion and that he accepted the husband's evidence as being substantially true and that he did not accept the husband to be the type of person that the wife had made him out to be. The trial judge also stated that there was no

evidence that the wife's mental or bodily health had in fact been impaired by the husband's misconduct but that the husband's conduct on the evening of July 15, 1963, accompanied by the conditional threat to kill, had inspired in the wife a reasonable apprehension of danger to her life or limb. The trial judge then continued that while a decree would seldom be granted on a single act of cruelty, nevertheless the husband's conduct on that evening amounted to a grave matrimonial offence which, when coupled with his oft-repeated threats to throw articles at the wife when she reproached him with the inadequacy of the housekeeping allowance, amounted in the trial judge's opinion to cruelty sufficient to entitle her to relief; and he pronounced a decree of judicial separation. From this the husband appealed on the grounds first, that the evidence did not disclose a sufficient ground for granting a decree of judicial separation as, *inter alia*, there was no evidence of any injury to health or any reasonable apprehension thereof; and secondly that the act, though a matrimonial offence, was a single, isolated act which arose basically out of the quarrel with the son and that in all the circumstances the judged erred in granting a decree of judicial separation.

The courts will not interfere in ordinary domestic quarrels nor will they give relief merely on incompatibility. As Lord Pearce said in *Gollins v. Gollins* (1), [1963] 2 All E.R. at p. 986.):

> ". . . From the days of Lord Stowell down to the present it has been acknowledged that to support a finding of cruelty the matter must be grave and weighty; and in *Russell v. Russell* this House finally settled that conduct must, in order to constitute cruelty in the legal acceptance of the term, be such as to cause danger to life, limb, or health, bodily or mental, or to give rise to a reasonable apprehension of such danger (See Lord Merriman in *Jamieson v. Jamieson*). Thus there have long been two safeguards against any extension of relief to cases founded on mere trivialities and incompatibility."

No comprehensive definition of cruelty has ever been accepted as satisfactory – much depends on the habits and circumstances of the matrimonial life of the husband and wife, their characters, the normal mode of conduct one to the other and the knowledge which each has of the true intention and feelings of the other. An essential element of every petition based on cruelty is, however, that the party seeking relief must prove actual or probable injury to life, limb or health. For this reason it is seldom indeed that a decree is granted upon a single act of cruelty, though should that act be serious enough and result in injury then the court will grant the decree (see *Grossi v. Grossi* (2)).

The facts of this case disclose a single act of cruelty which did not result in any actual injury to life, limb or health of the wife. The act was accompanied by a conditional threat to the life of the wife if she slept in the matrimonial room. Is this enough, taken in the light of the matrimonial life of the parties, to come to a conclusion that there is a reasonable apprehension of danger to the life, limb or health of the wife. The judge came to the conclusion that it was, but this is an inference of fact which this court is in as good a position to draw as was the trial judge. At no time did the wife say that she feared for her safety in the future. She did say that she was afraid that night, but she was not afraid to sleep in the house that night with her son and, indeed, when she left the house she took the key apparently intending to return. The outburst of the husband that night, however reprehensible it might be, was quite exceptional and was at least contributed to by words and acts of the son. Words of passion, even of threatened violence, are not sufficient to prove cruelty if they are spoken in the heat of anger and without any real intention that they are to be carried out. Before a charge of cruelty can be made out there must be something which would make continued cohabitation a danger. The wife has not said such is the position. With respect to the trial judge, I think it would

be wrong to draw the inference from what happened on the night of July 15, 1963, that continued cohabitation would probably result in danger to the wife, especially when regard is had to the characters, words and actions of the parties over nearly twenty years of married life and the circumstances in which this exceptionally violent outburst of the husband occurred. It is significant that even on this particular occasion, when the husband in a violent rage lost all self-control, he made no attempt to strike his wife but vented his rage on the furniture.

For these reasons I would allow the appeal, set aside the judgment and preliminary decree of the High Court and substitute therefor a decree dismissing the petition. I would, however, order that the husband should pay the costs of the wife both in the High Court and in this court. As the other members of the court agree with this view an order will be made accordingly.

Crabbe JA: I agree, and it is only because we are differing from the judge who heard the case below that I venture to add some words of my own. The sole question in this appeal is whether there was sufficient evidence to support the charge of cruelty alleged in the wife's petition. The trial judge came to the conclusion that there was, and his view is expressed in the following passage of his judgment:

> "There can be no doubt that the respondent's conduct on the night of July 15, 1963, amounted to a grave matrimonial offence. This, when coupled with the respondent's oft repeated threats to throw articles at the petitioner when she justifiably reproached him with the inadequacy of the housekeeping allowance amounts, in my judgment, to cruelty within the legal conception of that term."

Cruelty is a question of fact and of degree, and this court will not lightly disturb a finding of fact by a trial judge, who has had the advantage of observing the demeanour of the witnesses, "their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial": per Lord MacMillan in *Watt v. Thomas* (3) ([1947] A.C., at pp. 490, 491). But while accepting the specific findings of facts by the trial judge, this court is not debarred from holding nevertheless that in law those facts do not suffice to constitute the offence of cruelty.

The learned judge's finding of cruelty is founded on the isolated incident of the night of July 15, 1963, and the crucial question is whether that one isolated act was sufficient to amount to cruelty in law. It was said in *Westmeath v. Westmeath* (4) that "the law does not require that there should be many acts and if one act should be of that description which should induce the court to think that it is likely to occur again and to occur with real suffering, there is no rule that should restrain it from granting a decree". In *Reeves v. Reeves* (5), Sir Creswell Creswell held that there was sufficient evidence of cruelty to justify a decree when the husband demanded money from his wife, swore at her, said he did not want her, and attempted to strike her and kicked her on the leg. (See also *Grossi v. Grossi* (2)). However, in *Smallwood v. Smallwood* (6), the husband sprang on his wife, threw her down and nearly strangled her. The wife withdrew from co-habitation but continued to live under the same roof until the husband left some time later. In this case Sir Creswell Creswell refused to grant a decree. The result of this line of cases is that in considering whether a single act will be sufficient by itself to constitute cruelty, the court must have regard to the circumstances under which the isolated act took place, and also to the character of the respondent. If the act was committed during an unusual outburst or excitement without producing any considerable injury to the petitioner, it is not cruelty; but if the act is "grave and weighty" and the court takes the view that the injured spouse would be in danger of further

ill-usage, then cruelty is sufficiently established. In short, the real question that the court has to determine is whether the conduct complained of and its consequences are so deplorable that the complaining spouse must have a remedy.

The onus of proving cruelty lies on the petitioner, and the law requires that the proof must be beyond reasonable doubt: *Bater v. Bater* (7). In *Mulhouse v. Mulhouse* (8) ([1964] 2 All E.R. at pp. 56–57), Sir Jocelyn Simon, P., after considering the various judicial opinions in *Gollins v. Gollins* (1), stated what I think are the essential elements of the offence of cruelty. He said:

> "Cruelty is a serious charge to make and the law requires that it should be proved beyond reasonable doubt (*Bater v. Bater*, [1950] 2 All E.R. 458; [1951] P. 35). That involves that each of the ingredients of the offence must be proved beyond reasonable doubt. First, misconduct must be proved of a grave and weighty nature. It must be more than mere trivialities. In many marriages there are occasional outbursts of temper, occasional use of strong language, occasional offended silences. These are not sufficient to amount to cruelty in ordinary circumstances, though if carried to a point which threatens the health of the other spouse the law will not hesitate to give relief. Secondly, it must be proved that there is a real injury to the health of the complainant or a reasonable apprehension of such injury. Of course, if there is violence between the parties the court will not stop to inquire whether there is a general injury to health; but in the absence of acts of violence which themselves cause or threaten injury, the law requires that there should be proved a real impairment of health or a reasonable apprehension of it. Thirdly, it must be proved beyond reasonable doubt that it is the misconduct of the respondent which has caused the injury to health of the complainant. Fourthly, it must be proved beyond reasonable doubt that the whole of the conduct of the respondent, taking into account its repercussion on the health of the complainant, can properly be described as cruelty in the ordinary sense of that term."

I think that it is in the light of this onus and standard of proof that the case ought to be examined.

The facts relating to the incident of July 15, 1963, as found by the trial judge petitioner's are as follows:

> "On July 15, 1963, occurred the final scene which was the immediate cause of the break up of the marriage. The husband came home at 9.00 p.m. and the wife served him with dinner, she and Pietro having dined earlier in the evening. The wife asked the husband for the money for a new lens for Pietro's spectacles and the husband, who had apparently recently quarrelled with Pietro over another matter, somewhat indignantly refused to pay for a new lens. This led to a bitter quarrel during the course of which the husband threw the contents of a glass of beer in the wife's face. He also approached his wife and held his hands close to her face in a gesture which implied a suppressed desire on his part to strangle her. At this stage Pietro intervened, and most unwisely, instead of attempting to calm his father, began a quarrel of his own with his father. Pietro also threatened to break the respondent's leg if he touched his wife. At this stage the respondent appears to have completely lost his self-control. He picked up a chair from the dining room, came into the sitting room and proceeded to swing the chair about damaging various articles in the room. The respondent then called his African servant and ordered him to remove the petitioner's belongings from the bedroom and to set fire to them next morning. He also threatened to kill the petitioner if she slept in his room that night.
>
> Pietro went to the nearest police station to report the incident. The petitioner was too scared to remain in the house alone with the respondent and she accompanied Pietro who left her at the house of friends before proceeding to

> the police station. When Pietro returned to the house later that night with Sgt. Omara, the respondent told the Sergeant that he was unwilling to have his wife and son back again. The petitioner and Pietro have in fact never returned to the respondent's house since that fateful evening."

On these facts the question is whether this particular class of conduct by the appellant to his wife in all the circumstances of their married life was cruelty. The two vital matters to consider, therefore, if the petition is to have any chance of success, are:

(1) Is the conduct complained of sufficiently grave and weighty to amount to cruelty?

(2) Has the conduct complained of caused injury to health or reasonable apprehension of injury to health?

As regards the first, no comprehensive definition of cruelty has ever been formulated, but to be "grave and weighty" the conduct must be such that no reasonable spouse in the circumstances and environment of the spouse's could be expected to continue to endure. Thus in *Gollins v. Gollins* (1), Lord Pearce said ([1963] 2 All E.R. at p. 992):

> "It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from the normal standards of conjugal kindness causes injury to health or an apprehension of it, it is, I think, cruelty if a reasonable person, after taking due account of the temperament and all the other particular circumstances would consider that the conduct complained of is such that this spouse should not be called on to endure it."

And as Lord Morris also put it in the same case (at p. 977):

> "The conduct complained of must therefore go beyond what the particular complaining spouse ought reasonably in all the circumstances to have been expected to tolerate."

It seems to me that when the learned judge held that the appellant was guilty of a grave matrimonial offence, he did not take into account the temperament of the spouses and their character and habits. The real trouble between the parties started from the beginning of 1962, when, owing to financial stringency, the appellant allowed his wife Shs. 400/- as housekeeping money. As the learned judge found, this was far less than the allowance he had paid her in the past. When the time for payment arrived there were quarrels between the spouses, and these appear to have occurred at regular intervals in 1962 and during the first six months of 1963. But their son described these quarrels as "some slight squabbles and arguments". The appellant would sometimes pick up an article which was ready to hand and threaten to throw it at the wife. In his evidence under cross-examination the appellant said:

> "On a number of occasions I did pick up objects as if to throw them at her – a glass, a book, cigarettes, a dish, but not bottles. I was just pretending to throw things, but I never did. I never lost my temper, except perhaps for just a second. I never lost my temper on these occasions, except for a second. In my house I have never had an opportunity of speaking for more than three minutes. In a moment of losing his temper it is not unusual for an Italian to pick up something and pretend to throw it – Italians talk more with their hands than with their voices."

The learned judge was satisfied on the evidence that at no time during those quarrels did the appellant ever strike or throw anything at his wife. In my judgment, the conduct of the appellant on July 15, was one of those occasional outbursts of temper, which appears to me to be part of the "reasonable wear and tear" of their marriage. Cruel conduct ought to be judged only with reference to the person affected by it, and I do not think that, having regard to the

temperament, character and habits of the spouses, and all the circumstances of this particular case, the conduct of the appellant was so serious as to be stigmatized as cruel.

But even if the learned judge was right in arriving at the conclusion that the conduct of the appellant constituted a "grave matrimonial offence", the petitioner could still not succeed unless she could prove beyond reasonable doubt an actual injury to her health or reasonable apprehension of it. In this case there is no evidence of injury to the wife's health. The learned judge said:

> "There is no evidence that the petitioner's mental or bodily health has in fact been impaired by the respondent's misconduct. On the other hand there cannot be the slightest doubt that the respondent's misconduct on the night of July 15, 1963, accompanied as it was by a conditional threat to kill her, did inspire in the petitioner a reasonable apprehension of danger to her life or limb. This is amply demonstrated by her unwillingness to remain in the house alone with the respondent when her son went to call the police."

It is clear that in order to constitute cruelty the apprehension of injury should be "reasonable". In *Evans v. Evans* (9) (1 Hagg. Con. 35), Lord Stowell said:

> "Proof must be given of a reasonable apprehension of bodily hurt. I say apprehension, because assuredly the court is not to wait until the hurt is actually done; but the apprehension must be reasonable, not arising merely from diseased sensibility of mind."

With respect to the learned judge, I do not think that the conduct of the appellant inspired in his wife a reasonable apprehension of danger to her life or limb. The learned judge's impression of the wife was one given to exaggeration and distortion, and he did not believe that the appellant was such a monster as the wife depicted him in her evidence. The suggestion to report the matter to the police came from the son, whose conduct was the main cause of the appellant's outburst. Before leaving for the police station the petitioner said: "I took the key of the house with me because I was afraid that when I went back I would find the house closed". Later in her evidence she said: "On July 15, my husband did not tell me to go away, but he told me not to go into his room". It is plain that by taking the key of the house with her the petitioner showed an intention to return to the matrimonial home. I cannot think that any reasonable spouse will ever wish to return to a house where he or she justifiably anticipates hurt or injury to the body or mind.

Having given careful consideration to the evidence as a whole, I have come to the conclusion that the things the wife complains about her husband might have caused unhappiness in the home, and might have made him difficult to live with, but in my view, having regard to all the circumstances, they fall short of anything amounting to cruelty. For as Lord Herschell said in *Russell v. Russell* (10) ([1897] A.C. at p. 445):

> ". . . it was not every act of cruelty, in the ordinary and popular sense of that word, which amounted to saevitia, entitling the party aggrieved to a divorce;
>
> . . . there might be many wilful and unjustifiable acts, inflicting pain and misery, in respect of which that relief could not be obtained."

In my opinion the facts proved by the petitioner did not reach the required standard of proof, and I would therefore allow this appeal.

Spry JA: I have read the judgments of Newbold and Crabbe, JJ.A., with which I am in full agreement and I have nothing to add.

Appeal allowed.

For the appellant:
YV Phadke and *PV Parekhji*
Parekhji & Co, Kampala

For the respondent:
RE Hunt
Wilkinson & Hunt, Kampala

John Kakonge v Oriental Fire & General Insurance Co Ltd

[1965] 1 EA 137 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	14 April 1964
Case Number:	9/1964
Before:	Sir Samuel Quashie-Idun P, Sir Trevor Gould V-P and Sir Daniel Crawshaw JA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Bennett, J

[1] Insurance – Motor insurance – Discharge of insurers – Accident – Vehicle repaired on insurer's instructions – Discharge voucher signed by insured – Action for declaration that insured not bound by discharge voucher – Allegation that discharge voucher signed under misrepresentation of fact – Alleged misrepresentation made by employee of garage – Whether insured estopped from denying repairs satisfactorily executed.

Editor's Summary

The appellant was the owner of a car which had been insured with the respondent. The car having met with an accident was repaired on instructions from the respondent. It was alleged that when the appellant collected the car he was informed by an employee of the garage that the car had been fully repaired and was requested to sign a discharge voucher. The appellant signed the discharge voucher acknowledging that the repairs had been carried out to his entire satisfaction. Soon after the appellant had taken delivery of the car he found that the car was not in a good condition and that the repairs executed had not restored it to the state in which it was prior to the accident. Later the appellant sued the respondent for a declaration that he was not bound by the discharge voucher on the ground that the employee of the garage owners, as an agent of the respondent, had misrepresented to him that the car had been restored to its pre-accident condition. The respondent's case before the trial court was that the appellant was estopped from denying that the repairs had been satisfactorily executed or that the car had been satisfactorily restored to its pre-accident condition. The judge found that the employee did not make the alleged representation to the appellant before he signed the discharge voucher and held that the appellant

was estopped by his signing of the discharge voucher, from alleging that the repairs had not been carried out satisfactorily. On appeal,

Held –

(i) the trial judge was wrong in holding that the employee did not make the representation to the appellant before he signed the voucher;

(ii) the appellant having acted upon the misrepresentation, was not estopped from repudiating the discharge voucher and was entitled to the declaration sought by him;

(iii) the discharge voucher was no more than evidence against the appellant's case which he was entitled to displace and did displace, by evidence that in fact the car was not properly repaired;

(iv) the discharge voucher was obtained in circumstances which prevented the respondent from relying on it as an estoppel.

Appeal allowed. Declaration as prayed.

[**Editorial Note:** The Uganda High Court decision reported at [1963] E.A. 552 reversed.]

April 14. The following judgments were read:

Sir Samuel Quashie-Idun P: The appellant insured his car No. URV. 617 with the respondents under a comprehensive policy. The car was involved in a motor accident and after notice of the accident had been given to the respondents, the respondents caused the car to be taken to the garage of F. Boero & Co. Ltd. on March 15, 1963 for repairs. A report of the damage done to the car was submitted by the respondents' insurance assessor and was admitted in evidence as Ex. D.1. It appears from the report that the damage was extensive. The appellant was informed that the car would be ready for delivery to the appellant on June 11, 1963. On that day the appellant called at the garage of Messrs. Boero & Co. Ltd. and was informed by Mr. Patel, a reception clerk of Messrs. Boero & Co. Ltd., that the car had been fully repaired. Mr. Patel then asked the appellant to sign a discharge voucher form which the appellant did.

The discharge voucher reads as follows:

> "Re: *Claim No. OKUY*/7230 *under Policy No.* 420346/PC
>
> I acknowledge having this day received delivery of my car Fiat URV. 617 after repairs following the accident which occurred on the 9.3.1963, and I acknowledge that such repairs have been carried out to my entire satisfaction and that settlement by you of the repairs account constitutes a full discharge of your liability in respect of the paid accident under Policy No. 420346/PC.
>
> *Dated* 11.6.63. *Signature*: Sd. John Kakonge".

According to Patel, before the appellant signed the discharge voucher, the appellant took the car for test run, and brought it back after 12 or 15 minutes. This is denied by the appellant. It is my view that even if the appellant had driven the car as stated by Patel, it would be impossible for the appellant to detect any faults with the repairs executed on the vehicle. After the appellant had taken delivery of the car he found that the car was not in a good condition and that the repairs executed had not restored it to the state in which it was prior to the accident. The appellant therefore employed an independent automobile engineer who examined the car and submitted a report which was accepted in evidence as Ex. P. 4. The appellant's solicitor then wrote and complained to the respondents that the car had not been restored to its pre-accident condition and requested the respondents to indemnify the appellant and to treat the discharge voucher as inoperative. The appellant did not obtain his redress and therefore instituted the present action claiming a declaration that he was not bound by the discharge voucher on the ground that Patel, as an agent of the respondents, had misrepresented to the appellant that the car had been restored to its pre-accident condition. The engineer gave evidence for the appellant. It was his opinion that Messrs. Boero & Co. "did not do the best job possible on the car". The report submitted by the engineer enumerated defects in the car which had been caused by the accident and which should have been repaired. The learned trial judge, while not wholly accepting the evidence of the engineer who examined the car after the repairs had been executed, stated in his judgment that he accepted the evidence that the work done to certain parts of the vehicle was not completely satisfactory and that other jobs had been poorly finished. The learned trial judge stated, however, that he did not believe that Mr. Patel represented to the appellant that the car had been restored to its pre-accident condition. He also believed Patel's evidence that the appellant took the car for a short trial run before signing the discharge voucher. I have already stated earlier in this judgment that, in my view, it would have been impossible for the appellant to detect any serious defects still existing in the car due to the accident, after a trial drive lasting only 12 or 15 minutes.

As to whether or not Patel made the representation to the appellant, there was an admission by Patel that he told the appellant that the car had been fully repaired. He added that he told the appellant so because the foreman of Messrs. F. Boero & Co. had signed the job card. It is difficult to imagine that any person in the position in which the appellant was, would not regard the information given by Patel that the damage to the car had been repaired and that the car had been restored to its pre-accident condition. Having accepted that representation, the appellant signed the discharge voucher. He then found that the representation was not correct and that the car had in fact not been restored to the condition in which it was prior to the accident. It is noted that the respondents' assessor who submitted a report as to the damage done to the car after the accident was not called to give evidence for the respondents and the respondents' case before the trial court was that the appellant was estopped from denying that the repairs had been satisfactorily executed or that the car had been restored to its pre-accident condition. It is my view that the learned trial judge was wrong in holding that Patel did not make a misrepresentation to the appellant before the appellant signed the discharge voucher. It is also my view that the appellant having acted upon the misrepresentation, is not estopped from repudiating the discharge voucher which exonerated the respondents from indemnifying the appellant from any damage he had suffered from the unsatisfactory manner in which the car was repaired. I therefore think that the appeal should be allowed and the judgment of the learned trial judge set aside. It is accordingly allowed, and a decree granting the declaration as prayed in plaintiff's claim, substituted. The appellant is allowed his costs in this court and in the court below.

Sir Trevor Gould V-P: This action was for declaration that a discharge voucher signed by the appellant upon taking delivery of his repaired car is not binding on him and that the respondent, an insurance company, is bound to indemnify the appellant under an insurance policy. The discharge voucher was signed at the request of an employee of the motor garage employed by the respondent to repair the appellant's motorcar which had been extensively damaged in an accident. The voucher acknowledged that the repairs had been carried out to the appellant's entire satisfaction and that settlement of the repair account by the respondent company would be a full discharge. The appellant very shortly afterwards found that the motorcar had not been properly repaired and (after a short delay which was accounted for) sent the car back to the garage.

Why the action took the form it did, instead of covering all possible issues between the parties, is difficult to understand, but it is not contended that an action for the declaration claimed could not be brought.

The learned judge in the High Court found that the repairs to the chassis subframe were not completely satisfactory and that other jobs had been poorly finished. He said also that there was no suggestion that repairs which ought to have been carried out were not carried out.

That finding has been challenged on appeal, I think with some justification, but for the purposes of this action that is not a material question, in the light of the finding that what was done was not satisfactory.

The learned judge held that the appellant was estopped by his signing the discharge voucher, from alleging that the repairs had not been carried out satisfactorily. He found that the respondent acted to its detriment on the statement in the voucher by settling the garage's account for repairs. With respect, that finding was not in my opinion justified on the evidence. There was evidence, given almost as an afterthought in re-examination by a clerk and receptionist of the garage, that the account had been paid. That evidence was given four months after the repairs were completed. The motorcar, as I have said, was

returned to the garage, which must be regarded as the respondent

company's agents in relation to the repair and the voucher, within a few days and almost certainly before a bill had been rendered to, much less paid by, the respondent company. The dispute being known to the respondent company (which was directly informed by letter about eighteen days later) it must have been aware that the statement in the discharge voucher had been repudiated. There is no evidence that it acted upon the voucher by payment before that stage was reached and payment thereafter could not have been made in reliance upon the representation. No evidence was given for the respondent company that it acted in reliance upon the voucher, nor in any evidence of the terms of the contract between the respondent company and the garage. In my opinion the voucher was no more than evidence against the appellant's case which he was entitled to displace and did displace, by evidence that in fact the car was not properly repaired.

In any case I am of the opinion that the voucher was obtained in circumstances which prevent the respondent company relying on it as an estoppel. The appellant was held to have taken the car for a short trial run before signing, but the defects were not such as would readily be detected by that method. He was assured by the garage employee who requested him to sign the voucher that the car was "fully repaired". In that the employee was the agent of the respondent company, and in my opinion the assurance can only mean that it was repaired to the extent required by the contract of insurance. That has been shown by evidence not to have been the case and the representation was therefore false. It is immaterial that it may have been innocently false. In spite of the brief test it is impossible to say that the representation was not acted upon by the appellant.

For these reasons and for those given by the learned President I would allow the appeal with costs in this court and the High Court, set aside the judgment and decree of the High Court and substitute a decree granting the declaration as prayed in the plaint.

Sir Daniel Crawshaw JA: I agree with my brother judges. It seems to me that the unusual nature of these proceedings resulted from the respondent regarding the formal acknowledgment which they required the appellant to sign, as being an absolute estoppel whether or not the repairs had in fact been properly carried out. That is how I read para. 6 of the written statement of defence.

We are not concerned with whether the repairs were properly carried out, but only with the question of estoppel. Much has been said on misrepresentation but, for the purposes of estoppel anyway, I do not think it matters whether the words which the respondent alleges were used by the garage clerk on delivery of the car were used, or the words said to have been used by the appellant. In fact the position would, in my opinion, have been the same had delivery been given without any words being used, for the appellant would have been entitled to assume that the necessary repairs had been properly carried out. The fact that he may have tested the car by a short run in it could not have misled anyone in believing that thereby he was satisfied that all the repairs had been satisfactorily done; the magnitude and the nature of the repairs made such a test of little value.

In my opinion the acknowledgment and release created no estoppel. Counsel for the respondent has himself agreed before us that if in fact the repairs had not been carried out within the terms of the insurance indemnity the appellant would not be estopped from proving that fact. That seems to me to be the end of the matter so far as this appeal is concerned. The cases cited by the learned judge are readily distinguishable from the one before us, and counsel for the respondent does not appear to rely on them.

I agree the order proposed by my brother judges. Whether the method of conducting this action might, by reason of duplicity of proceedings, affect any future costs, will be a matter for the trial court.

Appeal allowed. Declaration as prayed.

For the appellant:
JS Shah
JS Shah, Kampala

For the respondent:
YV Phadke
Parekhji & Co, Kampala

Edher Ahmed v the General Manager of E A R & H Administration

[1965] 1 EA 141 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	5 March 1965
Case Number:	126/1964
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Railway – Carriage of goods – Non-delivery of goods – Goods delivered to third party – Claim for compensation in writing to be made within six months of acceptance of goods by railway – Claim not made within prescribed time – Whether plaint discloses a cause of action.

Editor's Summary

The plaintiff claimed from the defendant special damages suffered by him by reason of the failure of the defendant to deliver to the plaintiff certain goods consigned to him by railway from Kampala. Section 92 (1) of the East African Railways and Harbours Act provides that no person shall be entitled to compensation for non-delivery of a consignment of goods unless a claim in writing is given to the General Manager within six months of the date upon which such goods were accepted by the railway. It was common ground that no claim was made within the prescribed time and it was submitted that the plaint did not disclose a cause of action because the plaintiff had failed to comply with the provisions of s. 92 (1).

Held –

(i) s. 92 (1) of the East African Railways and Harbours Act regulates the procedure to be followed in order to be entitled to compensation and prescribes the steps to be taken for seeking compensation for non-delivery of goods; failure to comply with the prescribed steps and within the time limit deprives the person concerned of his right to compensation, but not, his right or cause of action;

(ii) the plaint disclosed a cause of action but the plaintiff was not entitled to compensation since he had failed to comply with the provisions of s. 92 (1) ibid.

Action dismissed.

Cases referred to in judgment

(1) *O'Keefe v. Great Western Rlwy. Co*. (1920), 123 L.T.R. 269.

(2) *Great Western Rlwy. Co. v. Wills* (1917), 116 L.T.R. 615; [1917] A.C. 148.

(3) *Lewis v. Great Western Rlwy. Co*. (1860), 5 H. & W. 867.

Judgment

Sir Udo Udoma CJ: This is a claim by the plaintiff, an Arab trader, against the General Manager, East African Railways & Harbours

Administration, for the sum of Shs. 3058/50, being special damages suffered by the plaintiff by reason of the failure of the defendant to deliver to the plaintiff four bags of cotton goods consigned to him from Kampala.

The plaintiff resides at Lake Katwe, Toro, and his postal address is P.O. Box 61, Lake Katwe, via Kasese. There is no railway station at Lake Katwe, the nearest railway station being at Kasese some 32 miles from Lake Katwe.

On June 24, 1963 the plaintiff ordered for a certain quantity of assorted cotton goods from Messrs. P. V. Mehta & Co., Kampala and instructed the latter to rail the same to him at Lake Katwe. Acting on those instructions, Messrs. P. V. Mehta & Co. sold the goods and had them packed in gunny bags; and, on June 26, 1963, consigned them by rail to the plaintiff by delivering the same at the railway station, Kampala, and completing a consignment note, Ex. B therefor. Accordingly an invoice, Ex. D, covering the goods so sold together with a copy of the consignment note, Ex. B, were forwarded by post to the plaintiff at P.O. Box 61, Lake Katwe.

I pause here to note that in the consignment note, Ex. B, the plaintiff's address was given as Box 60, Kasese, which the plaintiff has freely admitted was clearly wrong. P.O. Box 60, Kasese is the postal address of a woman by the name of Nakimera, the employer of one Eliabu, to whom more reference will be made hereafter. In the invoice, Ex. D, however, the address of the plaintiff was correctly given as Box 61, Lake Katwe. Both the plaintiff and his witness, Pravinchandra Mehta (P.W. 2) have admitted that because of the wrong address given in the consignment note, Ex. B, it would not have been possible for the plaintiff to have received the traffic arrival advice of the goods as the plaintiff maintains no P.O. Box at Kasese, even if the same had been posted to him.

On receiving the consignment note, Ex. B, the plaintiff says that he on July 2, 1963 went to the railway station, Kasese and enquired for the goods. He was informed that they had not arrived. Three days later, that is, on July 5, 1963, the plaintiff again reported at the railway station, Kasese. He was told that one, Eliabu had on July 4, 1963 taken delivery of the goods. The information as to delivery of the goods on July 4, 1963 to one Eliabu is also contained in the page out of the railway delivery book, Kasese, which is in these proceedings marked Ex. C.

In consequence of that information, the plaintiff went to Kampala and there consulted and retained the services of an advocate. On his instructions, the advocate addressed the letter Ex. A.1 to the District Traffic Superintendent, East African Railways & Harbours, P.O. Box 271, Kampala. The letter was dated July 27, 1963. In reply thereto the District Traffic Superintendent addressed a letter dated August 28, 1963, Ex. A.2 to the plaintiff.

The plaintiff was dissatisfied with his advocate and thereupon consulted and retained the services of another advocate, who, on his instructions, addressed another communication dated January 25, 1964, Ex. A.3, to the District Traffic Superintendent, Kampala, and again received in reply thereto the letter dated January 30, 1964, Ex. A.4. Thereafter this action ensued.

For the better appreciation of the issues involved in this case, it is necessary, I think, to set out in some detail the procedure of the railway administration in connection with the consignment and delivery of goods confided to it.

When goods are delivered at the railway station and consigned to a consignee at another railway station, it is the duty of the consignor or sender of the goods to complete in quadruplicate a consignment

note, that is to say, Ex. B in the instant case, and to sign at the foot thereof the instructions for the carriage of the goods, directed to the Railway Administration to the effect that the goods are to be received and forwarded at railway risk in accordance with such railway

risk conditions of carriage applicable to the particular goods as are contained in the Administration's tariff book. The instructions also contain an agreement by the consignor that "the said conditions shall be applicable to this contract in the same manner as though they were fully set out herein".

The consignment note so completed must contain the correct names and addresses of the consignor and the consignee and particulars and description of the goods consigned. Thereafter the Railway Administration, for its own purposes, completes the consignment note by filling in other particulars including the railway destination of the goods.

When accepting the goods for carriage to their railway destination, the Railway Administration receives from the consignor three copies of the consignment note duly completed. The consignor retains the remaining copy for onward transmission to the consignee as a means of apprising him of the consignment of the goods. Of the three copies delivered to the railway administration with the goods, two of them are despatched to the railway destination of the goods.

On arrival at the railway destination, one copy is forwarded by the receiving station by post addressed to the consignee at the address shown in the consignment note itself as a traffic advice of the arrival of the goods for delivery and requesting that the goods be removed as quickly as possible as from then on the goods would be "held subject to the storage and demurrage regulations".

The goods are delivered on presentation of the copy of the consignment note received from the Railway Administration, which copy is usually known as a traffic arrival Advice. For possession of the traffic arrival advice is regarded as the only proof required of the bona fide of the holder, and its production enables such holder to take delivery of the goods.

In the instant case, it would appear that the goods the subject-matter of the suit were available for delivery as from July 1, 1963 at Kasese railway station. They were in fact on the presentation of the traffic arrival advice to the Railway Administration delivered wrongly, it has been admitted by the defendant, on July 4, 1963 to one Eliabu – a stranger and servant of one Nakimera, whose postal address has been given as P.O. Box 60, Kasese, that being the address shown on the consignment note, Ex. B.

The defendant now contends that in virtue of the provisions of s. 35 (2) and of the proviso (*a*) (*v*) thereto the defendant cannot be held liable since the wrong delivery of the goods had arisen from the act or omission of the consignor in putting a wrong address on the consignment note, Ex. B.

I turn now to consider the preliminary point of law which was argued by counsel at the commencement of the hearing of this suit, and the ruling in which I had then indicated would be given in this judgment.

Counsel for the defendant, has submitted that the plaint filed by the plaintiff does not disclose a cause of action because the plaintiff had failed to comply with the provisions of s. 92 (1) of the East African Railways and Harbours Act, in that, prior to the institution of the suit no claim in writing was given to the general manager within the period prescribed by the Act.

Counsel referred to the bundle of correspondence exhibited by consent in these proceedings and marked Ex. A.1 to A.6, and submitted that the first letter therein dated July 27, 1963, Ex. A.1, was not a claim within the meaning of the provisions of the Act; and that the letter, Ex. A.3, cannot avail the plaintiff as the same was given after the expiration of the prescribed period. Counsel contended that until such a claim was given to the defendant no action for damages would lie as the cause of action must be considered barred by the provisions of the Act.

For the plaintiff, counsel submitted that the plaint disclosed a cause of action, and that, in any case, having regard to the provisions of s. 92 (3) of the Act, it would be unreasonable to determine the point of law raised in the absence of evidence. Counsel also submitted that the defendant was estopped from raising the point at this stage of the proceedings since he had before maintained that the goods had been delivered to the plaintiff, and therefore had waived such notice. It was further contended that the provisions of s. 92 (1) of the Act were unreasonable and should be so declared by the court.

It may be observed that the point of objection now raised was pleaded in para. 6 of the amended statement of defence and replied to in para. 3, 4, 5 and 6 of the reply to the said statement of defence as follows:

> "6. Further on (sic) in the alternative, the defendant will aver that the plaintiff is not entitled to compensation in respect of the packages the subject matter of this suit as the plaintiff did not give full particulars of the claim in writing to the defendant within six months of the date upon which the packages were accepted by the defendant as required by s. 28 (1) of the Tariff Book and s. 92 (1) of the East African Railways and Harbours Administration Act."

And in paras. 3, 4, 5 and 6 of the reply the plaintiff had averred:

> "3. With reference to para. 6 of the defence, the plaintiff states that he gave a notice in time in writing of his claim to the defendant required under the law. A copy of the letter is annexed herewith and marked "A" and the plaintiff shall refer it for the full meaning and effect thereof at the hearing of the above action.
>
> 4. In further or in alternative, the plaintiff will contend that the defendant is estopped in raising the question of notice under s. 92 (1) of the East African Railways and Harbours Administration Act and r. 28 of the Tariff Book because it was maintained by the defendant or his servants or agents in writing that the goods were in fact delivered to the plaintiff or his servant.
>
> 5. In further or in alternative, the defendant has waived the notice which is required to be given in the term of the above act and under the Tariff Book because the defendant claimed that goods were in fact delivered to the plaintiff or his servant.
>
> "6. In further or in alternative the plaintiff will contend that the requirement of s. 92 (1) of the said act and r. 28 (1) of Tariff Book is unreasonable and the defendant is not entitled to rely upon them in this case."

The provisions of r. 28 (1) of the Tariff Book entitled general condition, be it noted, are in identical terms with the provisions of s. 92 (1) of the East African Railways and Harbours Act, which are as follows:

> "92. (1). No person shall be entitled to compensation for nondelivery of the whole of a consignment of goods, or of any separate package forming part of such consignment, accepted by the Administration for carriage or warehousing unless a claim in writing, giving such particulars as may reasonably be necessary, is given to the Commissioner within six months of the date upon which such goods were accepted by the Administration."

By s. 2 of the Act "Commissioner" was defined as meaning the Commissioner for Transport. But by s. 2 of the East African Railways and Harbours (Amendment) Act No. 8 of 1961, which was brought into force on March 5, 1962 the expression "the General Manager" was substituted for the expression "Commissioner"; and s. 5 thereof created the General Manager a corporation sole by the name of the General Manager of the East African Railways and Harbours Administration.

Two letters, Ex. A.1 and A.3, were written in connection with the subject-matter of this action. Both were addressed to the District Traffic Superintendent,

Kampala. The letter, Ex. A.3, has been admitted by counsel for the plaintiff as having been written after the expiration of the prescribed period of six months from the date when the goods were accepted for carriage by the Railway Administration.

The only letter relied upon by the plaintiff as the claim in due compliance with the provisions of the Act, and which is referred to in para. 3 of his reply to the amended statement of defence as marked "A", is the letter dated July 27, 1963, Ex. A.1. It reads as follows:

27th July, 1963.

"District Traffic Superintendent,

E.A. Railways & Harbours,

P.O. Box N. 271,

Kampala,

Uganda.

Dear Sir,

My client Mr. Edhr Ahmed of Lake Katwe, Uganda, has instructed me to write to you as follows:

On the 24th June, 1963, my client bought goods worth Shs. 2,483/50 from M/s P.V. Mehta & Co. of Kampala and on June 26, 1963 these goods were railed to my client to Kasese. He has not received the four parcels sent to him under Railway Pro. No. 2952. Please investigate this matter and kindly let me know the position at your earliest.

Yours faithfully,

Yusuf G. Asarta

c.c.

Edhr Ahmed, Esq.,

P.O. Box 61,

Lake Katwe,

Uganda.

I do not think that the above quoted letter, Ex. A.1, can be regarded as a claim within the terms of s. 92 (1) of the Act. Indeed counsel for the plaintiff did not seriously contend that it was. It reads more like an enquiry than a claim. It gives particulars of the goods alleged to have been railed to Kasese on a particular date, complains of the goods not having been received and requests investigation into the matter and report at the earliest convenience.

If it is true that when, on July 2, 1963, the plaintiff enquired for the goods at the railway Station, Kasese, he was informed, by whom it has not been disclosed, that the goods had then not arrived; and on July 5, 1963 that the goods had in fact been delivered to someone not authorised by him, it is a matter for surprise that the letter, Ex. A.1 should have been couched in the above terms. The letter does not contain any complaint that the goods were delivered to a wrong person, nor any demand or claim for the goods or their value.

There is the further point which cannot escape notice. By the terms of the Act, the claim in writing is to be given to the General Manager of the East African Railways and Harbours Administration. The letter Ex. A.1, was written by an advocate and addressed, not to the General Manager, but to the District Traffic Superintendent, Kampala, who replied thereto by his letter, Ex. A.2. There is no evidence that the

letter, Ex. A.1 was ever brought to the notice of the General Manager.

Whatever else the letter, Ex. A.1, may be taken to be, I am satisfied and find as a fact that it is not and was never intended to be a claim within the terms of the provisions of s. 92 (1) of the Act. It is also my finding that no claim in writing “giving such particulars as may be necessary” was given by the plaintiff to the

General Manager of East African Railways and Harbours Administration within six months of the date upon which the goods were accepted for carriage by the Administration.

No reasonable explanation has been offered by the plaintiff before this court as to his failure to comply with the provisions of the Act. In his evidence, he merely says that he was not satisfied with his previous advocate and so had to withdraw his instructions from him and thereafter consulted and retained the services of another.

It has not even been suggested, let alone proved, that it was impracticable for him to give his claim to the General Manager within the time specified in the Act. In the absence of any reasonable explanation or excuse by the plaintiff, I hold that it would be unreasonable and inequitable for this court to invoke the provisions of s. 92 (3) of the Act for his benefit.

No question of an estoppel arises, and none can properly be raised on the evidence. Nor indeed would it be competent for this court to hold that the provisions of s. 92 (1) of the Act are unreasonable. It is difficult to see how this court can declare an Act of the Parliament of the three territories of Uganda, Kenya, Tanzania, unreasonable, not because it violates any constitutional enactment on the principle of inconsistency or repugnancy but because the plaintiff, acting through an advocate, had failed to comply with its provisions.

The condition laid down in s. 92 (1) of the Act cannot be treated as pari passu with the usual conditions to be found in railway byelaws and regulations, or in ordinary contracts in the United Kingdom. It is a statutory condition imposed by what might properly be regarded as the supreme legislature for East Africa.

I should have thought that the very fact that the Act was passed by the legislature and assented to in Her Majesty's name would have been the strongest possible evidence, and indeed, conclusive evidence, that the provisions are reasonable. Were it not superfluous so to hold, I would have had no hesitation whatsoever in holding as a fact that the provisions of s. 92 (1) of the Act are reasonable. The time prescribed therein is six months, whereas in the United Kingdom the usual period is between seven and fourteen days.

The submission by the counsel for the defendant is that by reason of the failure of the plaintiff to comply with the provisions of s. 92 (1) of the Act, the plaint filed in this suit does not disclose a cause of action. The reason advanced for this proposition is that until a claim is given, no action would lie; and that failure to give such a claim would bar the cause of action.

I do not think this submission is a sound one. In my view, it is misconceived. I am satisfied that the plaint in this action discloses a cause of action.

There seems to be some confusion between a cause of action and entitlement to compensation. The submission that the plaint does not disclose a cause of action seems contrary to the averments contained in para. 6 of the plaint already referred to. The pleading is consistent with the provisions of s. 92 (1) of the Act, which clearly have nothing to do with a cause of action but with compensation. It is therefore irrelevant to speak of a cause of action not being disclosed.

In my opinion, all that s. 92 (1) of the Act does is to regulate the procedure to be followed in order to be entitled to compensation. It affords protection, and acts as a kind of shield to the defendant. It is in its nature procedural. It prescribes the steps to be taken by anyone seeking compensation for nondelivery of his goods, and a time limit within which such steps should be taken, if the person is to be entitled to

compensation. Failure to comply with the prescribed steps and within the time limit deprives the person concerned of his right to compensation, but not, I think, his right or cause of action.

In *O'Keefe v. Great Western Rlwy. Co.* (1) R. the plaintiffs therein claimed damages for negligence and for breach of contract in carrying certain goods, or, alternatively, damages for nondelivery of the goods.

The plaintiffs sued as the executors of the late Patrick O'Keefe and as consignors of certain goods and Messrs. Spiers & Pond Ltd. as consignee of the goods. Patrick O'Keefe carried on business as a wine and spirit merchant. On November 6, 1918 the consignor delivered to the defendants two pipes of wine for carriage and delivery to the consignees for reward.

The plaintiffs alleged that on or about November 11, 1918, the defendants brought the said two pipes of wine to the warehouse of the defendants, and while unloading and before delivery of the same so unskilfully and negligently handled the said goods that one pipe of the wine was thrown from the waggon to the ground and was wholly lost and destroyed.

The defendants pleaded that the two pipes of wine were received by the defendants under and in accordance with a contract in writing contained in a consignment note signed by the plaintiffs and (or) their agents or servants. The said contract contained (*inter alia*) the following terms or conditions:

> "(3) The company shall not be liable for loss from or for damage or delay to a consignment or any part thereof unless a claim be made in writing within three days after the termination of the carriage of the consignment or any part thereof, or, in the case of traffic to places outside the United Kingdom, the termination of the carriage by a railway company of the United Kingdom, nor for nondelivery of a consignment unless a claim be made in writing within fourteen days after its receipt by the first contracting company", etc. etc.

The defendants said that no claim in writing as required by condition (3) above quoted of the contract was made in respect of the pipes of wine, part of the consignment. They denied that they were guilty of unskilful or negligent handling.

At the conclusion of the trial Darling, J. found that the defendants were negligent and assessed damages at £176. 18s.

The learned trial Judge then went on:

> "In ordinary circumstances that would be judgment for the plaintiffs; but this wine was carried subject to certain conditions. The condition which really applies here is condition (3) which says 'the company shall not be liable for loss from or damage or delay to a consignment, or any part thereof, unless a claim be made in writing within three days after the termination of the carriage of the consignment', and so on. Then they are not liable for nondelivery of a consignment unless a claim be made in writing within fourteen days after its receipt by the first contracting company.
>
> Mr. Barrington Ward has contended that these conditions are reasonable. He also says that whether they are reasonable or not does not arise, because they are merely conditions regarding the procedure which must be observed before a plaintiff can succeed in an action such as this. Certainly there is the statement of Lord Parmoor regarding this very condition (3) in the case of *Great Western Railway Co. v. Wills* (2) in his speech to this effect ([1917] A.C. at p. 168):
>
> > 'Condition (3) further provides "or in the case of nondelivery of any package or consignment within fourteen days after despatch". A provision of this character is obviously necessary where there has been a nondelivery of a package or consignment, or, in other words, where there has been a loss of the whole package or consignment.'

> So Lord Parmoor there holds that it is obviously necessary-which would certainly cover its being a reasonable condition. He also says on the same page:
>
> > 'Condition (3) is a rule of procedure which limits the time within which a claim must be made in respect of goods for loss or damage during transit.'
>
> If it were merely procedure and it was necessary to limit liability of the company in regard to compensation then the question of whether it is reasonable or not would not arise. But Lord Parmoor seems to have decided both things so that it was procedure and also that it was reasonable.
>
> For myself I think that the condition hardly goes beyond procedure; but I refrain from holding this. I hold that condition (3) and the others which are relied upon, 4, 5 and 6 (they are all almost immaterial), are reasonable, and that the plaintiff had not complied with them, particularly with regard to condition (3). . . .
>
> In these circumstances, although, as I say, I come to the conclusion that the cask was ruined and the wine lost by reason of the negligence of the defendant's servant, I think that the defendants are protected by the contract in writing which the plaintiffs entered into with them, and therefore that, there being no breach of that contract in the sense that the plaintiffs did not observe it themselves and make their claim in the proper time, within the contract time, judgment must be for the defendants."

See also *Lewis v. Great Western Rlwy. Co.* (3).

The difference between the wording of the conditions relied upon in the case of *O'Keefe v. Great Western Rlwy. Co.* (1) and of the conditions of s. 92 (1) would, in my view, appear to be immaterial. It is true of course that in the former it is positively stated that the company shall not be liable, etc.; whereas in s. 92 (1) it is that no person shall be entitled to compensation. But the results in both cases must be the same. I think also that the provisions of s. 92 (1) are more compelling and authoritative because they are statutory provisions.

The position in the instant case in relation to the provisions of s. 92 (1) of the Act appears to be that while the plaintiff might have a right to bring his action, and might even have a cause of action, even if he succeeds in proving that the defendant had broken his contract of carriage and had been guilty of negligence, he cannot recover compensation from him because he is not entitled to such compensation since he had failed to comply with the provisions of the Act.

In my view, the defendant is well protected by the provisions of the Act; and since the plaintiff had failed to comply with the said provisions, he shall not be entitled to any compensation. In the result, and on careful consideration of all the circumstances relevant to the point of law raised and argued; and finding as I do that the plaintiff had failed to comply with the provisions of s. 92 (1) of the Act, I have reached the conclusion that this action must fail. The plaintiff cannot succeed.

In the circumstances, it is unnecessary to consider the other issues raised in the case and on the evidence as to whether or not the defendant was negligent. I would enter judgment for the defendant and dismiss this action. Action dismissed.

Action dismissed.

For the plaintiff:
SH Dalal
Dalal & Singh, Kampala

For the defendant:

M Christian (Asst. Legal Secretary, E.A. Common Services Organisation)
The Legal Secretary, E.A. Common Services Organisation

Uganda General Trading co Ltd v N T Patel

[1965] 1 EA 149 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	10 February 1965
Case Number:	351/1964
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Practice – Company Winding up – Fraudulent preference – Action by Official Receiver as liquidator – Plaint filed seeking declaration that payment made to defendant constitutes fraudulent preference – Dispute as to facts in issue between parties – Whether proceedings should be commenced by suit or originating summons.

Editor's Summary

The Official Receiver as liquidator of the plaintiff company filed a suit against the defendant seeking a declaration, under s. 316 of the Companies Ordinance 1958 (U), that a payment to the defendant by the plaintiff company constituted a fraudulent preference and was void. For the defendant preliminary objections were taken that the action was not maintainable in law and that the Court had no jurisdiction. The defendant submitted that since the plaintiff company was in liquidation and the Official Receiver was appointed liquidator by the court, it was wrong in law to institute a suit claiming a declaration instead of proceedings commenced by an application by summons supported by affidavit. There was a dispute between the parties as to the facts in issue and there was an allegation of fraud.

Held –

(i) the court is vested with full jurisdiction to try all cases concerning companies, whether such companies are in liquidation or not and whether such cases are originated by suit, summons or motion;

(ii) having regard to the controversy on the facts and to the allegation of fraud, which was the substantial issue to be tried in the case, the plaintiff company was right to seek the declaration by suit instead of by originating summons.

Preliminary objection overruled.

Cases referred to in judgment

(1) *Peat v. Gresham Trust Ltd*., [1934] All E.R. Rep. 82.

(2) *Re G. Stanley & Co. Ltd*., [1924] All E.R. Rep. 242.

(3) *Gaslight Improvement Co. v. Terrell* (1870), L.R. 10 Eq. 168.

(4) *Re Blackpool Motor car Co. Ltd*., [1901] 1 Ch. 77.

(5) *The Liquidator of Sheikh Brothers Ltd. v. Sheikh Abdul Rashid*, [1961] E.A. 122 (C.A.).

(6) *Highlands Commercial Union Ltd. v. Abdul Malek Ahmed Jamal*, [1957] E.A. 641 (T).

(7) *Re Palace Restaurant Ltd*., [1914] 1 Ch. 492.

Judgment

Sir Udo Udoma CJ: This is a case in which the plaintiff, a limited liability company in liquidation, seeks a declaration that the payment of the sum of Shs. 13,000/- made on July 9, 1963 to the defendant, a relative of the directors of the plaintiff company, constitutes a fraudulent preference and is void. There is also a claim for consequential relief.

On February 4, 1965 when the case came up for hearing, counsel for the defendant, took a preliminary point of law. He referred the court to para. 3

of the statement of defence filed and submitted that the suit was not maintainable in law, and that the court has no jurisdiction to enquire into and determine the matter in dispute between the parties hereto because the suit has not been properly instituted.

In his interesting argument, counsel further contended that since the plaintiff company was in liquidation in the charge of which is the Official Receiver, duly appointed by the court for that purpose, it was wrong in law to institute a claim by suit for a declaration and the other relief sought, apparently brought pursuant to the provisions of s. 316 of the Companies Ordinance (U), 1958. The proper procedure, it was submitted, should be by summons supported by affidavit made to the court.

It was also contended that the relief of declaration that a preference is fraudulent and void is one available only to a liquidator in the course of the winding up of a company, and must therefore be a process in the cause instituted in accordance with the Companies Rules, 1960. It could not properly be sought by a fresh action instituted in the manner of the present suit. For to institute a fresh suit for that purpose outside the normal process of liquidation is to put the subject-matter of the suit beyond the control and supervision of the court exercising jurisdiction over the winding up of the company.

For these reasons counsel submitted that this action should be struck off.

For the plaintiff, counsel submitted that s. 316 of the Companies Ordinance, 1958 does not prescribe any special procedure for the institution of proceedings involving a claim for declaration in the terms sought in the instant case. The right declared in s. 316 of the Ordinance can therefore be enforced by a civil action in the ordinary way.

Counsel for the plaintiff further contended that a claim based on the provisions of s. 316 of the Companies Ordinance is not included among the list of proceedings stipulated in s. 5 of the Companies (Winding Up) Rules 1960 to be instituted by application. The objection by the counsel for the defendant to the instant action, it was submitted, was not well founded and cannot be supported in law. For it was entirely a matter for the liquidator whether he proceeds by summons or by action.

Now, certain acts done in connection with the affairs of a company during a stated period antecedent to its winding up are declared to be fraudulent preferences in s. 316 (1) of the Companies Ordinance, 1958, in the following terms:

> "316. (1) Any transfer, conveyance, mortgage, charge, delivery of goods, payment, execution or other act relating to property made or done by or against a company within six months before the commencement of its winding up which, had it been made or done by or against an individual within six months before the presentation of a bankruptcy petition on which he is adjudged bankrupt, would be deemed in his bankruptcy, a fraudulent preference, shall in the event of the company being wound up be deemed a fraudulent preference of its creditors and be invalid accordingly."

Thus the above provisions declare and define in what circumstances and what transactions or acts shall be deemed fraudulent preferences of its creditors by a company in the event of the company being wound up.

The present suit, it has been freely admitted by Counsel for the plaintiff, was instituted by reason and with the full awareness of the existence of the provisions of s. 316 of the Ordinance set out above and with the intention of relying thereon at the trial. Although not expressly stated in the plaint the action is by the Official Receiver as the liquidator of the plaintiff company.

The form and mode in which the proceedings have been instituted has been

questioned by counsel for the defendant, who objects thereto on the ground that it is bad in law.

The objection was first raised and duly pleaded in para. 3 of the statement of defence as follows:

> "3. The defendant will contend that the present action is unmaintainable in law and/or that this court has no jurisdiction to try the case."

Pleaded in that way, there appear to be two objections raised, the first of which I consider the more important and serious, being that the action is not maintainable in law; and the other that the court has no jurisdiction to try the case.

I do not think that the objection to the jurisdiction of this court in this case is well founded. It is unsound. It cannot be doubted, I think, that this court is not only competent but that it has jurisdiction to try this case. Defendant counsel's submission, as I understand it, is that because the action cannot be regarded as proceedings in the winding up of the company therefore the court can have no jurisdiction to try it. The reason for this, it has been contended, is that the proceedings were not commenced by an application by summonds in the course of liquidation.

The short answer to that, I think, is that this court is vested with full jurisdiction to try all cases concerning companies, whether such companies are in liquidation or not, and whether such cases are originated by suit, summons or motion.

In my opinion the issue involved in the objection raised is not strictly concerned with the jurisdiction of the court. It is purely a procedural question. The objection to the jurisdiction may be due to the tendency to confuse the issue of jurisdiction with the issue of the form of action or procedure. It does not necessarily mean that because the action is not maintainable in law therefore the Court before which the case has been brought would have no jurisdiction to try it. On the other hand, the court may have full jurisdiction over an action and it may yet be held that the action is not maintainable in law.

The objection in the instant case is that the action is not maintainable in law because it has not been properly instituted, since the proper form and procedure which ought to originate the proceedings has not been followed. That surely cannot be an objection to the jurisdiction of the court. It is merely an objection to the form and procedure by which the proceedings have been originated.

The mere omission to follow a prescribed procedure in instituting proceedings would not necessarily, in my view, oust the jurisdiction of the court where there is one as in the instant case. It may be considered incompetent for a court with jurisdiction to exercise such jurisdiction because the matter over which jurisdiction is sought to be exercised has not been brought properly before it in accordance with a prescribed procedure and in a prescribed form. In such a case the jurisdiction of the court is not exercised because it would be incompetent to do so. Incompetence or incapability to exercise jurisdiction already possessed must therefore be distinguished from a complete want of jurisdiction, which may be regarded as a question of incapacity.

In the case under consideration, if the submission that the action is not maintainable in law because of some vital and incurable defect in procedure is well founded, then it would be incompetent for the court to exercise its vested jurisdiction since the action has not been properly instituted, and cannot be said to be properly before it.

This seems an appropriate stage at which to deal with the main objection raised, namely that the action is not maintainable in law. I accordingly turn to consider it.

It is common ground that the plaintiff company is in liquidation and that the Official Receiver is the liquidator. The action has been brought by the liquidator in the course of winding up.

I think counsel for the defendant is right in his submission that normally one would have expected the plaintiff company in seeking the declaration sought in the present action to have applied to the court by originating summons. An application by originating summons would perhaps have been a quick, sharp, short and inexpensive procedure. That was the procedure adopted in England in *Peat v. Gresham Trust Ltd*. (1) and in *Re G. Stanley & Co. Ltd*. (2) to which the attention of the court was drawn by counsel for the defendant.

On the other hand there is the passage in Stiebel's Company Law and Precedents (3rd Ed.) Vol. 2, to which the court was also referred by counsel for the plaintiff. In the passage, the learned author, in dealing with the jurisdiction of the County Courts in England over the question of fraudulent preference, said at p. 981:

> "The County Court has jurisdiction in questions of fraudulent preference. *Such questions may be raised by an action in the name of the company*, or on a misfeasance summons, always assuming that the person against whom the summons is taken out is a person liable under s. 276 of the Act, they may also be raised by summons or motion in the winding up, and such questions have been raised, by summons in a debenture holders action."

As authority for the opinion that such questions may be raised by action in the name of the company, the learned author cited as a footnote two English cases, namely *Gaslight Improvement Co. v. Terrell* (3) and *Re Blackpool Motorcar Co*. (4).

In *Gaslight Improvement Co. v. Terrell* (3), the company was established in October 1864. The directors borrowed money perfectly bona fide for the sake of the company; and as the person who lent them would not lend it to the company without the security of the directors, the consequence was that the directors, acting bona fide became the creditors of the company.

In those circumstances an action was brought against the company by a person by the name of Bower in May 1867, and the solicitors for the company offered a judgment provided execution was not issued before July 16, 1867. That offer of judgment was accepted and the pleas in the action withdrawn, judgment being signed on July 4, 1867 in favour of Bower.

On July 15, 1867 Bower did not get the money. On July 17, a meeting of the directors took place. It passed a resolution to make a call as well as assignment of all the property of the company in favour of the directors who were creditors of the company. The assignment was accordingly carried out by a deed engrossed by the company.

Thereafter a "fi.fa." was issued against the company, and two days afterwards a conveyance was made in favour of Mr. Miles on behalf of five directors of the company of every particle of the property they held including a trust to get any outstanding property and enforce the payment of all calls due to the company.

The return of the "fi.fa." five days afterwards was "nulla bona"; and two days afterwards a petition was presented to wind up the company. The order to wind up was made on November 9, 1867 but the winding up dated as from July 31, 1867.

On that state of affairs a bill to set aside the security made in favour of Mr. Miles on behalf of the directors of the company was filed in the name of the company as plaintiff under s. 164 of the Companies

Act 1862. At the trial, it was argued that the company could not be a proper plaintiff in a suit of that kind It was held that the action was properly brought.

The important point to note in this case is that the action was brought in virtue and for the enforcement of the provisions of s. 164 of the English Companies Act of 1862, the terms of which were as follows:

> "Any such conveyance, mortgage, delivery of goods, payment, execution or other act relating to property as would, if made or done by or against any individual trader, be deemed in the event of his bankruptcy to have been made or done by way of undue or fraudulent preference of the creditors of such trader, shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this act, to have been made or done by way of undue or fraudulent preference of the creditors of such company."

It is to be observed that the provisions above quoted are similar to the present provisions of s. 316 (1) of the Companies Ordinance of Uganda. It is of particular significance that no procedure was prescribed by the Act for the institution of process for enforcement of those provisions. Although the point in controversy in the instant case is different from the actual decision of the court in that case, I am of the opinion that this case is relevant to show that the procedure which was adopted in that case was appropriate.

Two East African cases, namely, *The Liquidator of Sheikh Brothers Ltd. v. Sheikh Abdul Rashid* (5) and *Highlands Commercial Union Ltd. v. Abdul Malek Ahmed Jamal* (6) (T) though not directly in point, as the point involved for decision in this case would appear not to have been raised by anyone before in East Africa, were also brought to the notice of the court.

In *The Liquidator of Sheikh Brothers Ltd. v. Sheikh Abdul Rashid* (5), the liquidator of the plaintiff company applied for an order of the Supreme Court of Kenya under s. 200 of the Companies Ordinance requiring the respondent, Sheikh Abdul Rashid to deliver and transfer to the liquidator a sisal estate with all moneys, property, books and papers in respect of the estate. In the company's statement of affairs the estate was shown as an asset and was also found by the liquidator to be registered in the name of the company. It was in dispute that the respondent was in possession, and from an affidavit and an exhibit thereto, it was clear that the respondent claimed that four years before the winding up he had agreed to purchase a moiety of the estate for Shs. 400,000/-, that he had paid this sum but the company had so far been unable to make out an unencumbered title. Accordingly the respondent claimed that under s. 55 (6) (*b*) of the Indian Transfer of Property Act, he had a charge on the estate for a sum equal to the price he had paid and that in other proceedings the effect of the agreement to purchase and of the charge was awaiting decision. The judge, who heard the application, dismissed it on the ground that as there was dispute as to the ownership of the estate, which the court had no power under s. 200 of the Companies Ordinance to determine on the authority of *Re Palace Restaurant Ltd*. (7), the liquidator should have applied to the court for leave to institute proceedings to determine the dispute.

On appeal, the liquidator relied on the Registration of Titles Ordinance as giving the company an indefeasible legal title to the property and submitted that the sole question was, who had a *prima facie* right to the property?

It was held by the Court of Appeal, in dismissing the appeal, that:

(1) there was a dispute as to the facts which could not be determined under s. 200 of the Companies Ordinance, and if the court were to find on the application that the respondent was *prima facie* entitled to possession and the liquidator in other proceedings proved the facts were different, it would mean that the time of the court hearing the application had been wasted and its decision based on what were subsequently found to be wrong facts, was on the true facts incorrect; and

(2) each such application had to be decided on the particular circumstances relating to the property concerned and the nature of the dispute and in the circumstances, the judge was correct in dismissing the application.

By analogy from the fate of the liquidator's application in *The Liquidator of Sheikh Brothers Ltd. v. Sheikh Abdul Rashid* (5), counsel for the plaintiff contended, rightly I think, that on the face of the plaint and the statement of defence filed in the present action, there is a dispute as to the facts in issue, since the facts pleaded in the plaint have been expressly traversed in the statement of defence. There was also a charge of fraud. It would therefore have been inappropriate to seek to establish such controversial issues by an affidavit, which of necessity would accompany an application by summons. The burden of establishing fraud is a heavy one and would be difficult to discharge by mere affidavit evidence. The matter ought to be thoroughly aired in open court for which an action would appear to be the best forum. These submissions appear to me sound.

The fact that no special procedure has been laid down in s. 316 of the Companies Ordinance for proceedings instituted for the purpose of seeking a declaration that an act or transaction constitutes a fraudulent preference in terms of the definition contained in this section cannot be regarded as insignificant. Indeed neither the Companies Ordinance nor the Companies (Winding Up) Rules, 1960 contains any such specific provision. If it was intended that proceedings for the purpose of determining whether or not a preference is fraudulent should always only originate by summons one would have expected an express provision to that effect in the Ordinance or in the Rules made thereunder.

According to the prevailing practice there appears to be no rigid rule as to the procedure to be followed since none has been prescribed by law. It seems to be a question of choice by the litigant who may elect whether to proceed by summons or by a suit.

It may be that originating summons would be the appropriate procedure where there is no serious dispute as to the facts in issue; in which case, it would be a mere matter of application of the law to undisputed facts and of construction as to whether such undisputed facts constitute a fraudulent preference in terms of the provisions of s. 316 of the Companies Ordinance. Where, however, the facts are in dispute as in the instant case or are likely to be disputed proceedings by summons would hardly be appropriate and expedient.

Then there are the provisions of s. 200 (1) of the Companies (Winding Up) Rules 1960, which are as follows:

"200 (1) No proceedings under the Ordinance or these Rules shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceedings is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court."

Counsel for the defendant has not suggested that the defendant has in any way been embarrassed or prejudiced by the proceedings having been instituted by suit or that any injustice has thereby been caused. On the contrary, I think that it was in the interests of the defendant that the issues be fought out in a substantive action with the full advantage that implies; and, in particular, in order that the defendant be afforded an opportunity of a proper trial. The defect complained of (if defect it can ever be conceived to be) is, in my view, of a formal nature. It is incapable of causing injustice.

On a careful consideration of the submissions made to the court, and having regard to the controversy as to the facts in issue and to the allegation of fraud, which is the substantive issue to be tried in this case,

I am of opinion that the

plaintiff company was right in its decision to seek a declaration of this court by suit instead of by originating summons. The objection by the defendant is accordingly overruled. It is ill-founded. In my opinion this action is maintainable in law. It has been properly instituted. It is ordered that the hearing do proceed forthwith. Costs of this ruling to the plaintiff.

Preliminary objection overruled.

For the plaintiff:
ML Patel
ML Patel, Kampala

For the defendant:
JD Raichura
Visana, Raichura & Singh, Kampala

Ngarua Musisya v R
[1965] 1 EA 155 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	18 June 1964
Case Number:	408/1964
Before:	Sir John Ainley CJ and Madan J
Sourced by:	LawAfrica

[1] Criminal law – Charge – Particulars – Illegal movement of cattle – Prosecution must make clear choice of charges under r. 26 (1) *Animal Diseases Rules* (1954).

[2] Animal Diseases Act – Illegal movement of cattle – Whether court has power to order forfeiture – Animal Diseases (*Amendment*) *Act,* 1954, *s.* 22 (*K*).

Editor's Summary

The appellant was charged with illegal movement of cattle contrary to r. 26 (3) and 72 of the Animal Diseases Rules in that on February 11, 1964 at Thika District within the Central Region he moved 29 head of cattle from Muingi Location in Kitui District as defined by r. 2 without a permit authorising such movement. On being charged the appellant pleaded "It is true I moved 29 head of cattle from Muingi Location in Kitui District to Thika District and I had no permit". The trial magistrate convicted him on this plea, fined him Shs. 80/- and ordered that 5 head of cattle should be forfeited. The appellant thereupon appealed both against conviction and forfeiture. It was argued on behalf of the appellant that the plea was not equivocal and that the charge did not properly disclose an offence in that it was not

stated whether the cattle was moved from an area in the special areas or from a declared area as defined by r. 28 ibid. In the instant case, however, the facts were that the appellant was using a movement permit issued for 5 days in January, to move these cattle in February, and this was not denied in his allocutus at the trial. On the question of forfeiture, it was contended that this was illegal in view of the case of *Goga v. R.* (1953) 20 E.A.C.A. 333. The Court of Appeal had then held that in view of the enactment of s. 8 of the Animal Diseases (Amendment) Ordinance 1950 (K) the court had no power to order forfeiture on a conviction under what was then r. 21 ibid.; but on November 8, 1954, the Animal Diseases (Amendment) Ordinance, 1954 (K), was enacted and s. 8 of the 1950 Ordinance was repealed. The question, therefore, before the court was whether in view of this change the court had the power to order forfeiture as was decided in the later case of *Malinda v. R.*, Kenya Supreme Court, (Criminal Appeals 143 and 144 of 1956) (unreported).

Held –

(i) prosecutors should make it quite clear what breach of the provisions of r. 26 (1) ibid. they wish to allege; there were at least six ways of contravening the provisions of this sub-rule and a clear choice should be made;

(ii) it was sufficiently clear that whether or not the appellant fully understood the distinction between "areas in special areas" and "declared areas", his working knowledge of the law as cattle owner, was sufficient to inform him that he did require a permit for the movement of these cattle and that by moving them without a valid permit he was acting in breach of the law;

(iii) since the repeal of s. 8 of the Animal Diseases (Amendment) Ordinance 1950 there had been power to order forfeiture in cases of conviction under the rules: *Malinda v. R.*, followed;

(iv) the trial magistrate was, therefore, entitled to order forfeiture and the exercise of his power was not unduly harsh.

Appeal dismissed.

Cases referred to in judgment

(1) *Goga v. R.* (1953) 20 E.A.C.A. 333.

(2) *Malinda v. R.*, Kenya Supreme Court Criminal Appeals Nos. 143 and 144 of 1956 (unreported).

(3) *Kibiego v. R.*, Kenya Supreme Court Criminal Appeal No. 715 of 1958 (unreported).

(4) *Mutisya Mutua v. R.*, Kenya Supreme Court Criminal Appeal No. 1060 of 1961 (unreported).

Judgment

Sir John Ainley CJ: read the following judgment of the court:

In this appeal rr. 26 and 72 of the Animal Diseases Rules once more engage the attention of this court.

The appellant was charged as follows:

> "Illegal movement of cattle, contrary to r. 26 (3) and r. 72 of the Animal Diseases Rules. Particulars: Ngarua Musisya on February 11, 1964, at Thika District within the central Region moved 29 head of cattle from Muingi Location in Kitui District as defined by r. 2 of these rules without a permit authorising such movement."

To this charge the appellant pleaded "It is true I moved 29 head of cattle from Muingi Location in Kitui District to Thika District and I had no permit."

The magistrate regarded this as an admission of guilt, convicted the appellant, fined him Shs. 20/- and ordered that 5 head of the 29 head should be forfeited.

It is said that the plea was not unequivocal, that the charge did not properly disclose an offence and that the forfeiture was illegal. We very much wish that when framing charges under r. 26 of the Animal Diseases Rules, prosecutors would make it quite clear what breach of the provisions of sub-r. (1) they wish to allege. There are at least six ways of contravening the provisions of this sub-rule, and a clear choice should be made. If for instance the alleged offence lies on moving cattle from an area in the special areas that should be stated, and there should be sufficient geographical data to make the charge fully comprehensible to the court. The court it will be remembered has to explain the charge to the accused. A magistrate with experience in a given district probably will know the boundaries of the special areas as they affect cases in his court, but it is conceivable that there are magistrates who are unaware what "the special areas" are or are unaware of the boundaries of the special areas. It may be said

that “the special areas” are, clearly enough, “the special areas” defined in s. 2 of the Trust Land Act (Cap. 288) and set out in the First Schedule to that

Act. The boundaries of the special areas are delineated upon Boundary plans Nos. 156, 179 and 352 copies of which are deposited in the Survey Records Office, Nairobi, and it is to be hoped that prosecutors have copies or tracings available for the information of magistrates whose geography and knowledge of special areas is uncertain. The court in one way or another must be capable of appreciating what the charge is about. In the present case the particulars clearly indicate that the offence lies in moving cattle from an area and the choice of offences is therefore narrowed. It must be supposed that it was intended to charge the appellant either with moving cattle from an area in the special arers, or from a declared area as defined by r. 28 of the Animal Diseases Rules.

Now technically an offence was stated we think. It was said that by moving cattle from A to B the appellant contravened the provisions of the rule. Yet it could be argued, and strongly argued, that the particulars were so vague that the appellant must have been embarrassed and confused, and merely admitted the facts without admitting that he had been in breach of the rule. If we thought that there was indeed realism in such arguments in the present case we would send this case back for retrial, but there are features peculiar to this case. It was stated by the prosecution that the facts were that the appellant was using a movement permit issued for 5 days in January, to move these cattle in February. This was not denied by the appellant in his allocutus. We think it is sufficiently clear that whether or not the appellant fully understood the distinction between “areas in the special areas” and “declared areas,” and it would surely have been singularly difficult to explain that distinction in any useful way, his working knowledge of the law, as cattle owner, was sufficient to inform him that he did require a permit for the movement of these cattle and that by moving them without a valid permit he was acting in breach of the law. We have considered the situation of Muingi and the Kitui District relative to the Thika District together with the boundaries of the land units which comprise the special areas. There is no doubt that these cattle on the appellant’s admission were moved a great distance, and certainly from the heart of the Kamba Land Unit either to the Kikuyu Land Unit or to land outside a Land Unit. It is we think certain that an offence was committed, and that the appellant intended to admit an offence against the rule, and was properly convicted.

We turn now to the question of forfeiture. The case law on this subject is voluminous and it is unfortunate that the single case quoted to us from the Bar is not at the present time a valid authority. We refer to the case of *Goga v. R.* (1). That case was decided in 1953. The question arose whether what is now s. 22 of the Animal Diseases Act permitted a court to order forfeiture on a conviction under what was then r. 21 of the Animal Diseases Rules. References in the case to r. 21 may be read as references to the present r. 26.

The Court of Appeal held that in view of the enactment of s. 8 of the Animal Diseases (Amendment) Ordinance, 1950, the power did not exist. It is reasonably clear, however, that the Court of Appeal considered that had s. 8 not been enacted there would have been power to order forfeiture on conviction for a breach of the Rules.

On November 8, 1954, the Animal Diseases (Amendment) Ordinance, 1954, was enacted, and section 8 of the Animal Diseases (Amendment) Ordinance, 1950, was repealed.

In *Malinda v. R.* (2) a court of three judges consisting of the then Chief Justice (Sir Kenneth O’Connor) and Connell and Edmonds JJ. was specially convened to consider the change in the situation.

The court held, in a judgment of great elaboration, that since the repeal of s. 8 of the Animal Diseases (Amendment) Ordinance, 1950, the power to order

forfeiture had revived. This decision was approved, obiter, in *Kibiego v. R.* (3), and the law on the question in that year appeared to be well settled.

However in 1961 the Supreme Court decided in two cases, Criminal Appeal No. 276 and Criminal Appeal No. 518, to follow *Goga's* case (1). In neither of these cases was Malinda's case cited to the Supreme Court, nor was the attention of the court drawn to the repeal of s. 8 of the Ordinance of 1950.

Later in 1961 however a Resident Magistrate questioned, with the utmost propriety and respect be it said, the two decisions just referred to. He made an order of forfeiture in a case where he had convicted a man of an offence against the Rules, and the case came on appeal before the Supreme Court. This was the case of *Mutisya Mutua v. R.* (4), which was heard by the then Chief Justice, Sir Ronald Sinclair, and by Rudd, J. In a judgment which contained extensive quotations from *Malinda's* case (2) the court reaffirmed the decision in that case, and held that *Goga's* case (1) no longer governed the situation. The court concluded that since the repeal of s. 8 of the Animal Diseases (Amendment) Ordinance, 1950 there had been power to order forfeiture in cases of conviction under the Rules. Nothing has occurred since the decision of that case to change the situation, and in fact subordinate courts have exercised the power to order forfeiture since, in November, 1961, copies of the judgment in *Mutisya's* case (4) were circulated to all magistrates by the Registrar of this court. We consider that it is proper to follow the decision of this Court in *Malinda's* case (2) and in *Mutisya's* case (4), and we do so. It may be of help, however to set out the question with reference to the modern numbering of sections and rules.

Under s. 7 of the Animal Diseases Act the Minister may make rules for various purposes and the Animal Diseases Rules are the rules made under that section. Rule 72 states the penalty which the Minister has provided for a contravention of the Rules. An offender is under that rule liable to a fine not exceeding Shs. 2000/- or to imprisonment for a term not exceeding two months or to both such fine and such imprisonment. Since the Minister is given no special power under the Animal Diseases Act to impose penalties, the situation is governed by s. 31 of the Interpretation Act, and no penalties other than these set out in para. (*e*) of that section can be imposed by the Minister.

Section 17 of the Act provides that any person guilty of an offence "under this Ordinance" shall be liable to a fine not exceeding Shs. 5000/- or to imprisonment for a term not exceeding 6 months, or to both such fine and such imprisonment."

Section 22 of the Act provides that "Whenever any person has been convicted of an offence under this Act, the court convicting such person may in addition to or in lieu of imposing any other punishment authorised by law order that the animal, or all or any of the animals, in respect of which such offence or breach has been committed shall be forfeited."

Section 2 of the Act, contains the following provision – "'This Act' includes any subsidiary legislation made thereunder." We will not set out the reasoning which led the Court of Appeal for Eastern Africa to hold, in *Goga's* case (1), that the enactment of s. 8 of the Animal Diseases (Amendment) Ordinance, 1950 vitally affected the situation. The case is reported and may be read.

The reasoning of the Supreme Court in the two cases which we have decided to follow is, if reduced to its simplest terms this, that though it would be contrary to the ordinary rules of construction to permit s. 17 of the Act to prevail against r. 72, for there is an obvious conflict between the provisions of that section and that rule, yet there is no such conflict between s. 22 and r. 72. Therefore one may read s. 22 as saying "Whenever any person has been convicted of an offence

under this Act or of a contravention of Rules made under s. 7 of the Act, the court convicting may order forfeiture etc." The question is admittedly of some difficulty, but the question has twice received an emphatic answer by this Court and it is proper that we should give the same answer.

We hold that the magistrate in this case was entitled to order forfeiture, and we do not consider that the exercise of his power was unduly harsh.

For the above reasons the appeal is dismissed.

Appeal dismissed.

For the appellant:
DV Kapila
DV Kapila, Nairobi

For the respondent:
IE Omolo (Director of Public Prosecutions, (Supernumary) (Kenya))
The Attorney General, Kenya

Fakhri Stores Ltd v London Confirmers Ltd
[1965] 1 EA 159 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	19 March 1965
Case Number:	48/1964
Before:	Newbold Ag V-P, Sir Clement de-Lestang and Spry JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Dalton, J

[1] Bills of exchange – Material alteration – No evidence that defendant privy to alteration – No evidence how and by whom alteration made – Burden of proof on plaintiff to establish that party sued privy to alteration.

Editor's Summary

The respondent (as plaintiff) sued the appellant on four bills of exchange and alleged that the bills had been accepted unconditionally by the appellant. The defence to the suit was an allegation that the bills had received only qualified acceptance and that no liability had arisen on them. At the hearing the four bills were produced as exhibits and each of these bore on its face the words "Subject to Extension" or words to the like effect. The only witness for the respondent was a bank official who stated that when he

received the bills after acceptance by the appellant the acceptance was unconditional and that the bills had not borne the references to extension. He also stated that following acceptance the bills had been in the possession either of the bank or of the respondent and that he was unable to explain the alteration. The trial judge entered judgment for the respondent and rejected the appellant's argument that the respondent having produced from its own custody four bills the acceptance of which was patently qualified, was not entitled, under s. 92 of Indian Evidence Act, 1872, to lead evidence to show that acceptance had in fact been unqualified. On appeal it was submitted that when a person is suing on a bill which has been materially altered, he can only succeed by establishing that the party sued was privy to the alteration.

Held –

(i) the onus is on a plaintiff suing on bills of exchange which have patently been altered in a material respect to prove that the defendant was privy to the alteration;

(ii) the alterations were material, and under s. 64 of the Bills of Exchange Act the bills became void except as against the party who had been privy to the alteration and except in the case of alterations that were not apparent;

(iii) as the respondent had failed to discharge the burden of proof that the appellant was a privy to the alteration the bills were void against it.

Appeal allowed.

March 19. The following judgments were read:

Judgment

Spry JA: This is an appeal from a judgment and decree of the Supreme Court of Kenya in an action based on four bills of exchange. There was an alternative claim, but it was not seriously pursued and does not concern this appeal.

The defence to the suit was an allegation that the bills had received only qualified acceptance and that no liability had arisen on them.

The plaintiff company (the present respondent) called only one witness, a bank clerk, who produced the four bills on which the plaint was based. Each of these bore on its face the words "Subject to extension" or words to the like effect and one also bore a reference to a letter. The witness testified that in the course of his duty he had received the bills, duly accepted, and had delivered against them the documents of title to certain goods for which the bills represented payment. He said that when he received the bills, they had not borne the references to extension. He said that the bills had thereafter been placed in the bank's strong-room and had not thereafter passed into the possession of the defendant company. He could offer no explanation how the bills came to be altered.

No evidence was called by the defendant company.

No issues were framed at any stage of the proceedings. The case for the plaintiff company was that the bills had been accepted without qualification. Counsel for the defendant company, appears to have ranged over a wide field, but his main argument was that the plaintiff company, having produced from its own custody four bills the acceptance of which was patently qualified, was not entitled to lead evidence to show that acceptance had in fact been unqualified, and he relied particularly on s. 92 of the Indian Evidence Act, 1872.

The learned trial judge rejected the argument based on s. 92. He accepted the evidence of the witness for the plaintiff company that the bills had been accepted unconditionally. He dismissed the qualifying words on the bills with the remark that "how the words got there we will probably never know". He accordingly found for the plaintiff company.

At no stage of the trial does there appear to have been any reference to s. 64 of the Bills of Exchange Act (Cap. 27) which reads as follows:

> "64. *Alteration of bill.* (1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent endorsers:
>
> Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor.
>
> (2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition

of a place of payment without the acceptor’s consent.”

There was, however, reference to the corresponding English provision and the effect of a material alteration appears to have been argued, although the learned judge made no reference in his judgment to this aspect of the case.

At the hearing of the appeal, counsel for the appellant's main argument for the defendant company (the present appellants) was that when a person is suing on a bill which has materially been altered, he can only succeed by establishing that the defendant was privy to the alteration. In the present case, the plaintiff company was asserting that the bills had been accepted unconditionally and that could only be so if the words of qualification had been added later. The plaintiff company had, however, made no attempt to show when, by whom, or in what circumstances the alteration had been made.

To this submission, counsel, for the plaintiff company, argued that the defendant company was precluded by its pleading from arguing any defence other than that the acceptance of the bills was qualified. He also argued that the qualifying words were vague and uncertain and should therefore be disregarded. On this basis he contended that they should not be regarded as material alterations. Finally, he submitted that the form of the defence raised an inference that the defendant company had been privy to the alterations and that this inference was not rebutted by the evidence of the witness.

As regards the first of these arguments, the written statement of defence amounts to a denial that the defendant company had accepted without qualification the "alleged" bills. I think there was, therefore, an initial onus on the plaintiff company to prove the acceptance of the bills. The second argument has, in my view, no merit: I think the words alleged to have been added to the bills, whatever their effect, cannot be regarded as other than material, particularly having regard to sub-s. (2) of s. 64 of the Bills of Exchange Act, quoted above. As regards the third argument, I think there are indications that suggest that the defendant company may have been privy to the alterations, if alterations there were, but it has certainly not been proved.

In my opinion, the matter comes down to this: it is part of the plaintiff company's case that the bills were altered; the alterations were material; material alterations avoid a bill, under s. 64 of the Bills of Exchange Act, except as against a party who has been privy to the alterations and except in the case of alterations that are not apparent; it has not been proved that the defendant company was privy to the alterations; it has not been, nor, in my opinion, could it reasonably be argued that the alterations are not apparent. The plaintiff company was basing its case on documents which were *prima facie* void and failed to call sufficient evidence to prove their validity. I appreciate that it may have been impossible to prove affirmatively who had made the alterations, but if that were so, it was, I think, essential for the plaintiff company to call as witnesses all available persons who had had custody of, handled or made endorsements on the bills.

If I am correct in this, it follows that the appeal must be allowed and it is unnecessary to consider the other aspects of the appeal which were argued before us.

I would allow the appeal, though not without reluctance, set aside the judgment and decree of the Supreme Court and substitute an order dismissing the suit, with costs, and I would award the defendant company the costs of the appeal.

Newbold Ag V-P: It is perfectly obvious that this appeal must succeed. The respondent, as plaintiff, sued the appellant, as defendant, on four bills of exchange. The plaintiff alleged that the bills of exchange had been accepted unconditionally by the defendant. On the suit coming for trial the plaintiff produced, as it had to, the four bills. On the face of each of these bills there

appears a qualified acceptance. The only witness for the plaintiff was a bank official who stated that when he received the bills after acceptance by the defendant the acceptance was unqualified. He also stated that following acceptance the bills had been in the possession either of the bank or of the plaintiff and that he was unable to explain the alteration or, indeed, certain other writing on the bills which must have been placed thereon subsequent to acceptance. In these circumstances it is clear that each bill has been materially altered and is thus avoided unless the alteration was made with the consent of the defendant as acceptor (see s. 64 of the Bills of Exchange Act).

The evidence led on behalf of the plaintiff is to the effect that subsequent to acceptance the defendant did not either himself make or authorise the alteration; thus it is quite clear that the learned judge erred in giving judgment in favour of the plaintiff on the bills. Whatever lack of merit there may be in the defendant's case a plaintiff cannot possibly hope to succeed where he produces evidence of the type this plaintiff produced: it is clear that either all the witnesses who could have spoken as to what happened to the bills after acceptance have not been produced or there has been considerable carelessness on the part of the bank or the plaintiff. I would allow the appeal with costs and, as the other members of the court agree, an order shall be made in the terms proposed by Spry, J.A.

Sir Clement De Lestang JA: I agree and have nothing to add.

Appeal allowed.

For the appellant:
Bryan O' Donovan and *JK Winayak*
JK Winayak & Co, Nairobi

For the respondent:
SL Chawla
Kean & Kean, Nairobi

Mathias Kitimbo alias Matyansi Ngobi v Busoga
[1965] 1 EA 162 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	12 February 1965
Case Number:	3/1965
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Criminal law – Practice – African District Courts – Appellant charged with obtaining money by false pretences contrary to customary law – Charge as laid grounded in the Penal Code – Whether such offence exists under customary law.

Editor's Summary

The appellant was charged with and convicted of obtaining money by false pretences contrary to customary law, by the District African Court of Busoga and sentenced to three years imprisonment. At the hearing of the appeal the appellant did not appear and was not represented, but the State Attorney informed the court that he was unable to support the conviction, firstly, because the terms of the charge as laid were grounded in the Penal Code, though incorrectly described as being contrary to customary law, and consequently the District Court had no jurisdiction at the material time to try the case, and secondly, the incidents, the subject matter of the charge were lumped together in one charge making it bad in law for duplicity. In his judgment, the Acting Chief Judge made reference to essential elements of the offence and made findings which appeared to be in accord and consistent with the definition of false pretences as contained in s. 288 of the Penal Code. The question for consideration at the hearing of the appeal was whether the offence with which the appellant

was charged, tried and convicted by the District Court was the offence defined under s. 288 ibid. and created by s. 289 ibid.

Held –

(i) although the judges of the Busoga District African Court may be presumed to be the repository of customary law and therefore of customary offences, there was no evidence whatsoever that the offence of obtaining by false pretences was known to customary law; it was highly unlikely that there existed such an offence under customary law;

(ii) assuming that there was an offence of obtaining by false pretences known to customary law, then s. 288 and s. 289 ibid. would seem to cover the ground so that there would be no room for an offence of an identical nature under customary law; the offence in the Penal Code was a creature of statute and therefore supervened, eliminated and extinguished the customary law offence of that name;

(iii) the District Court had no jurisdiction to try the appellant of the offence charged on the material date and the trial was therefore a nullity;

(iv) it was unnecessary to consider the question of duplicity in the charge.

Appeal allowed. Conviction and sentence set aside.

Judgment

Sir Udo Udoma CJ: The appellant in this case was charged with obtaining money by false pretences contrary to customary law. He was convicted and sentenced to three years imprisonment by the District African Court of Busoga. The appeal is against conviction and sentence.

At the hearing of the appeal the State Attorney, informed the court that he was unable to support the conviction for two reasons. In the first place he submitted that the terms of the charge as laid are grounded in the Penal Code, although the offence is wrongly described as being contrary to customary law. The offence being a Penal Code offence the Busoga District African Court had no jurisdiction at the material time to have tried the case and convicted the appellant. Secondly, he contended that the incidents the subject-matter of the charge occurred, if they did occur, on various dates between 1958 and 1964. The charge was therefore bad in law for duplicity as all the incidents were dumped together in one charge.

The charge preferred against the appellant reads as follows:

> "*Statement of Offence*
>
> Obtaining money by false pretences contrary to customary law.
>
> *Particulars of Offence*
>
> On 29.6.64 Matyansi Ngobi unlawfully obtained money by false pretences for authorising 26 people to cut mivule trees belonging to Busoga Government."

According to the statement of offence, the offence in the charge is described to be contrary to customary law. On its face therefore the offence may be regarded as a customary law offence and consequently within the jurisdiction of the Busoga District African Court.

Although the judges of the Busoga District African Court may be presumed to be the repository of

customary law and therefore of customary offences, there is no evidence whatsoever that the offence of obtaining by false pretences is known to customary law. It is highly unlikely that there exists such an offence under customary law.

On the other hand obtaining by false pretences is an offence provided for in the Penal Code. It is to be found in s. 289 of the Code, the definition thereof being contained in s. 288 of the Code. Indeed, the whole of cap. 30 of the Penal Code is devoted entirely to the offence of obtaining by false pretences in one form or other.

Assuming that there is an offence of obtaining by false pretences known to customary law, then by reason of the provisions of ss. 288 and 289 of the Penal Code in which the offence is both defined and created, it would seem that it is an offence to obtain money by false pretences both under the Penal Code and under the customary law. Thus we have in existence in one community one offence recognised as such but cognisable by two different systems of law, that is to say, by both the Penal Code which might be regarded as statute law, and by customary law, which, of course is based on custom.

I think it is highly undesirable that there should be the same or one kind of offence created by two different systems of law existing side by side. Such a situation must lead to confusion and uncertainty, particularly as to the question of proof. There is also the question of mens rea. For instance, what are the elements necessary to constitute the offence of false pretences under customary law? Are they the same as those prescribed by the Penal Code? If they are, it stands to reason that the offence is one and the same whether the charge is laid under the customary law or under the Penal Code. In which case the provisions creating the offence in the Penal Code would seem to cover the ground so that there would be no room for the customary offence of obtaining by false pretences.

The offence in the Penal Code is a creature of statute and therefore supervenes eliminates and extinguishes the customary law offence of that name. For the purpose of the enactment might well have been to define and declare more precisely the offence as existed under customary law. It may be of interest at this juncture to refer to the findings made by the Acting Chief Judge in his judgment in this case. He said:

> "I do not believe that the accused did not deceive the witnesses for the prosecution. He did deceive them and induced them to believe that he had authority to issue permits, a fact which was false. It is true that the accused knew that he was deceiving by words, conduct and writing with intent to defraud. I am satisfied that all the necessary ingredients to constitute the offence of obtaining money by false pretences are present in this case."

I think if there was any doubt that the elements necessary to constitute the offence of obtaining by false pretences under customary law are the same as those prescribed by the Penal Code, this passage of the Acting Chief Judge's judgment must serve to clear such doubt. The judgment of the Acting Chief Judge is important and significant as indicating in some ways the essential elements, which the court had to consider in order to determine whether the offence charged had been established on the evidence. The court, after due consideration, found itself satisfied that all the elements necessary to constitute the offence were present and therefore that the appellant was guilty as charged.

It should be noted, however, that the passage of the judgment above quoted has the ring of some extracts taken from s. 288 of the Penal Code, in which the offence of obtaining by false pretences is defined in the following terms:

> "288. Any representation made by words, writing or conduct of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence."

The findings of the Acting Chief Judge would appear to be in accord and consistent with the

definition of false pretences as contained in s. 288 of the Penal

Code set out above. Which in effect, is another way of stating that the offence with which the appellant was charged, tried and convicted of by the Busoga District African Court was the offence defined under s. 288 of the Penal Code and created by s. 289 of the said Code.

That being so, it is obvious that the expression "contrary to customary law" is a misnomer. It is a fiction reminiscent of the ancient doctrine of suppressio veri suggestio falsi cleverly devised and intended to conceal the true fact that the court was administering and enforcing the provisions of the Penal Code, for the administration and enforcement of which it had on July 9, 1964 no jurisdiction. In my opinion, the trial of the appellant was a nullity, and I so declare it, since the court had no jurisdiction to have tried him on the material date.

In view of the conclusion I have now reached, it is unnecessary to consider the second submission made by the State Attorney on the question of duplicity in the charge.

Before concluding this judgment, there is a point I consider ought to be taken notice of. In the charge as laid the appellant was called Matyansi Ngobi. But in the proceedings of the trial he is called and he also calls himself in his evidence Mathias Kitimbo. It would therefore appear uncertain what the correct name of the appellant is. But I think it is only right that the name admitted by the appellant should be accepted as his correct name. For the purpose of this appeal, however, the appellant is known as Mathias Kitimbo alias Matyansi Ngobi.

This appeal is allowed. The judgment of the court, the conviction and sentence are set aside.

Appeal allowed. Conviction and sentence set aside.

The appellant did not appear and was not represented.

For the respondent:
TS Cotran (State Attorney, Uganda)
The Director of Public Prosecutions, Uganda

Rev Canon Kezekia Kaggwa v Vallabhdas Vithaldas & Sons Ltd and another
[1965] 1 EA 165 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	17 February 1965
Case Number:	390/1964
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Practice – Pleading – Action for trespass and conversion – Claim for value of trees cut without

permission – Type and number of trees cut and converted set out in plaint – Value of trees not specifically pleaded – Whether plaint discloses cause of action.

Editor's Summary

The plaintiff filed a suit against the defendant claiming damages for the value of the trees alleged to have been cut and thereafter converted to their own use by the defendants. In the plaint the number and type of trees were set out but the value of the trees had not been specifically pleaded and at the hearing a preliminary objection was taken that the plaint was bad in law because it did not disclose a cause of action. It was submitted that the claim was for special damages only and therefore the value of trees claimed should have been specifically pleaded. Since this was not done the plaint was bad in law for failing to show a cause of action.

Held –

(i) the rule that a claim for special damages must be specifically pleaded does not mean that the plaintiff must state a specific amount in money for each item of damage claimed, or that he must give an overall figure for his total claim; where the claim is not for liquidated damages a statement that the plaintiff claims damages would be sufficient provided the facts giving grounds for a claim for such damages are pleaded;

(ii) failure to plead special damage could not itself be a ground sufficient to render a plaint bad in law on the ground that it does not disclose a cause of action, except in special cases of tort in which liability must be reflected in the pleadings e.g. certain cases of slander not actionable per se without proof of special damage;

(iii) in failing to put a statement of the value of the trees in the plaint the plaintiff had failed to comply with O. VII r. 1 (i) of the Civil Procedure Rules (U) and accordingly the plaint was defective but the court was not entitled to reject the plaint as O. VII r. 11 was not applicable.

Order accordingly.

Cases referred to in judgment

(1) *Hayward v. Pullinger & Partners Ltd*., [1950] 1 All E.R. 581.

(2) *Monk v. Redwing Aircraft Co Ltd*., [1943] 1 All E.R. 133.

(3) *Ratcliffe v. Evans*, [1892] 2 Q.B. 524.

(4) *Longdon Griffiths v. Smith*, [1950] 2 All E.R. 662.

(5) *London and Northern Bank v. Newnes* (1900), 16 T.L.R. 433.

Judgment

Sir Udo Udoma CJ: When this case came up for hearing on February 10, 1965, counsel for the defendants, raised a preliminary objection in point of law. He submitted that the plaint was bad in law because it does not disclose a cause of action. He contended that since the claim was only for the value of trees alleged to have been felled by the defendants it was a claim for special damages only. Therefore the value of the trees claimed should have been specifically pleaded in order to give the defendants reasonable notice of the amount sought to be recovered.

It was further submitted that since the value of the trees has not been pleaded, and his letter asking for particulars yielded no valuable results, the plaint was bad in law for failing to disclose a cause of action and should be rejected by the court.

Counsel for the plaintiff submitted that the objection was ill founded, and that the plaint was not bad in law because it does disclose a cause of action.

Counsel, however, agreed that the claim was only for the value of the trees felled by the defendants and taken away from the plaintiff's land without the authority or consent of the plaintiff. Counsel further agreed that ideally the value of the trees claimed should have been pleaded, but that, as in the instant case, the plaintiff was not in a position to fix the value of the trees, it was for the court to assess damages

to which the plaintiff may be found to be entitled after due hearing. In any case, contended counsel, the defect was curable by amendment, for which he intended to apply to court for leave; since the defendants have already filed their defence they could not complain that they would be embarrassed or prejudiced by such an amendment.

The suit in this case was commenced in the usual way by the presentation of a plaint. For the purpose of this ruling only paras. 4 and 5 of the said plaint and the prayer thereto need be set out. They are as follows:

4. Between January 1963 and September 1963 (later amended by leave to April and December 1961) without the plaintiff's consent, permission or authority whatsoever the defendants entered upon the plaintiff's land as described in para. 3 hereof and cut down the following number and types of trees and converted them to their own use.

Trees felled down by defendants:

Tree	*Quantity*
Migavu	30
Ennongo	1530
Endagi	840
Emigaali	440
Endezi	240
Enkomakoma	1470
Obusaana	2330
Emiwaawa	15
Nnabaluka	200
Enkoba	7250

5. The trees felled down by the defendants have commercial value for timber or firewood.

Wherefore plaintiff prays for judgment against the defendants for:

(*a*) damages to be assessed by this honourable court in respect of loss of trees felled down by the defendants.

(*b*) Costs of this suit.

(*c*) Further or any other relief.

In answer to the above allegations, the defendants pleaded in paras. 1, 2 and 3 of their statement of defence as hereunder appearing:

1. The plaint is bad in law and does not disclose a reasonable cause of action.

2. In the alternative the defendants deny the allegations of trespass and conversion contained in para. 4 of the plaint or at all and accordingly deny their liability to pay the damages as claimed in the plaint or at all.

3. In the further alternative, the defendants state the plaintiff's land and the defendants' land have a common boundary which is not clearly demarcated. Without making any admissions whatsoever, the defendants will contend that a few trees on the plaintiff's land might have been cut by the defendants' employees while cutting the defendants' trees. The value of such trees cut accidentally could not have exceeded sum of Shs. 500/- in value which sum the defendants have paid to the plaintiff's counsel in or about the month of February, 1964.

Now the objection which has been raised is that the plaint is bad in law because it does not disclose a cause of action since the value of the trees claimed has not been specifically stated in the plaint. In support of this submission the case of *Hayward v. Pullinger & Partners Ltd.* (1) was cited and relied upon. The court was also referred to certain passages in Mayne and McGregor on Damages (12th Edn.)

at pp. 813–815.

Hayward v. Pullinger & Partners Ltd. (1) was an action for damages for wrongful dismissal. In his statement of claim the plaintiff therein alleged the contract and its breach, and included a claim for damages for wrongful dismissal in his prayer; but there was no separate paragraph alleging damages through loss of salary and commission. At the trial the defendant objected that the damage sought to be proved was special damage, and that since it was not specifically pleaded no evidence could be given of it.

The objection was upheld by Devlin, J., as he then was, who took the view that on the authority of the decision of the Court of Appeal in *Monk v. Redwing Aircraft Co. Ltd.* (2) the damage was special damage and that the statement of claim was defective since it did not cover a claim for special damages.

It is trite law that if special damage is sought to be claimed it must be specifically pleaded in the plaint. Failure to do so might result in the plaintiff not being allowed to prove such damage at the trial. For "special damage" in the words of Bowen, L.J. in *Ratcliffe v. Evans* (3) ([1892] 2 Q.B. (C.A.) at p. 528) "means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleading in order that there may be no surprise at the trial."

In my view, the decision in *Hayward v. Pullinger & Partners Ltd.* (1) does not appear to go beyond the general proposition of law that where a plaintiff desires to claim special damages in a suit, he ought to plead such damages specifically in order to give notice to the defendant, thereby avoiding an element of surprise. It is of course true that the case also decided that in a claim for wrongful dismissal, damage through loss of salary and commission, which could have been earned during the period of notice to which a plaintiff was contractually entitled, was special damage.

I think this English authority is of doubtful relevance to the point which has been argued in this case. I do not think it supports the submission that the plaint is bad in law because it does not disclose a cause of action. Indeed if the statement of claim in *Hayward v. Pullinger & Partners Ltd.* (1) was bad in law because it had failed to disclose a cause of action, it is inconceivable that it could have proceeded to trial.

One should have thought that as far as the practice in English courts is concerned, the averment pleaded in para. 4 of the plaint filed in this suit would have been sufficient to satisfy the requirements of pleading in a claim for special damages, since on the admission of the plaintiff's counsel, and it is common ground, the claim is only for special damages. There is no claim for general damages for trespass quare clausum fregit.

It is also doubtful whether the point raised in the instant case could successfully have been argued in England, except probably in the County Courts, the jurisdiction of which is limited to actions in which damages claimed do not exceed £400, and the fees for hearing are fixed by the amount stated in the claim. I think I am right in stating that an objection of the kind could only probably be raised where a defendant is asking for particulars of special damages before filing his defence so as to consider whether to pay money into court.

As was said by Slade, J. in *Longdon Griffiths v. Smith* (4) ([1950] 2 All E.R. at pp. 677–678) in a passage quoted with approval in Mayne and McGregor on Damages (12th Edn.) at p. 818:

> "The function of pleadings is to make it clear to your opponent what case he has to meet, and I cannot help feeling that anyone reading paragraph 8 and seeing the words 'and his said service agreement was terminated on November 6, 1947' must have been aware that special damage was being claimed . . . Where the statement of claim suggests the probability that a claim for special damage is intended, I think it is a question of degree whether the statement of claim does not put forward a claim for special damages; albeit without the particulars which the Rules of pleading strictly require, or whether it is so nebulous that the defendant can treat it as not being a claim for special damages."

Counsel for the defendants in the instant case was the first to describe the damages claimed in the plaint as special damages. That surely is an admission

that the defendants knew on the pleading that the claim was only for special damages, their complaint being that such damages were not quantified. Which must be some evidence to show that, on the principles stated in the above case, the plaint could not have been so nebulous that the defendants could treat it as not being a claim for special damages.

The rule that a claim for special damages must be specifically pleaded does not mean that the plaintiff must state a specific amount in money for each item of damage claimed, or even to give an overall figure for his total claim, where the claim is not for a liquidated damage. The bare statement that the plaintiff claims damages would be sufficient, provided the facts giving grounds for a claim for such damages are pleaded. For instance in *London and Northern Bank v. Newnes* (5) it was held that the defendants therein "were not entitled to particulars of the quantum of damages".

Another point I think ought to be mentioned is that failure to plead special damages would not itself be a ground sufficient to render a plaint bad in law on the ground that it does not disclose a cause of action, except in special cases of tort in which liability must be reflected in the pleadings, e.g. certain cases of slander not actionable per se without proof of special damage. Failure to plead special damages can only affect the question of proof in that a plaintiff would be precluded from calling evidence with a view to establishing such damages at the trial.

To raise an objection in such a case successfully therefore, the better tactics is to wait and see; and, to object, if evidence of special damages not pleaded is sought to be given at the trial.

I think I have said enough to show that the objection that the plaint is bad in law because it does not disclose a cause of action, based as it is on the English authorities to which I was referred by counsel, is misconceived. It is not well founded.

In my judgment, the objection that the plaint in this suit is bad in law is not one which should be decided on the basis of English authorities, rules and practice. It must be governed by the Rules of this Court, which unhappily neither counsel had cared to bring to the notice of the court.

Order VII, R. 1 (i) provides, *inter alia*, as follows:

> "1. The plaint shall contain the following particulars:
>
> * * * *
>
> (i) A statement of the value of the subject-matter of the suit so far as the case admits."

A cursory glance at para. 4 of the plaint shows clearly that the subject-matter of the suit as therein pleaded is a certain well enumerated number of trees of also well known and named varieties and types. It seems obvious that this is a case which admits of the value of the subject-matter of the suit.

Counsel for the plaintiff has admitted that the claim is only for the value of the trees alleged to have been felled and thereafter converted to their own use by the defendants.

The question then must be, has the plaintiff by merely setting out the number and types of trees, alleged to have been converted by the defendants, without a statement of the value of such trees, the subject-matter of the suit, sufficiently complied with O. VII, r. 1 (i) of the Civil Procedure Rules (*U*)? I think not. For the claim is not for the return to the plaintiff of the trees felled and converted, but for their value. Without a statement of such value methinks it would be well nigh impossible for the court to assess fair and reasonable damage, especially if what is stated by counsel for the plaintiff is correct, that the plaintiff is not in a position to fix values to the trees because he is too old.

I am of the opinion that it was the duty of the plaintiff to comply with O. VII, R. 1 (i) in his plaint. It was obligatory that he should comply with the said order. He has failed to do so since his plaint does not contain a statement of the value of the subject-matter of the suit.

In my judgment the plaint filed in this suit dated June 23, 1964 is defective for non-compliance with O. VII, r. 1 (i), and I so declare it.

The next question is, having reached that conclusion, would it be competent and reasonable for the court to reject the plaint on the ground that it does not comply with O. VII, r. 1 (i)? I do not think so. The grounds upon which a plaint shall be rejected by the court are set out in O. VII, r. 11 and are as follows:

> "The plaint shall be rejected in the following cases:
>
> (*a*) Where it does not disclose a cause of action;
>
> (*b*) Where the relief claimed is undervalued and the plaintiff, on being required by the court to correct the insufficiency within a time fixed by the court, fails to do so;
>
> (*c*) Where the relief claimed is properly valued but an insufficient fee has been paid, and the plaintiff, on being required by the court to pay the requisite fee within a time to be fixed by the court, fails to do so;
>
> (*d*) Where the suit appears from the statement in the plaint to be barred by any law;
>
> (*e*) Where the suit is shown by the plaint to be frivolous or vexatious."

It will thus be seen that a ruling that a plaint is bad in law for noncompliance with the rules of this court, is not specified as a ground for rejecting a plaint; whereas a ruling that a plaint does not disclose a cause of action is one such ground. I have already held that the objection that the plaint does not disclose a cause of action is based on a misconception. Therefore O. VII, r. 11 does not apply.

I suppose in exercise of its inherent power and jurisdiction it would be competent for the court to strike out the plaint. But the objection raised by counsel for the defendants was not based on noncompliance with the Rules of this court, and counsel for the plaintiff has indicated an intention to apply for leave to amend. Counsel for the defendants has offered not to oppose such an application. I think it will be reasonable to give consideration to such an application if, and when made.

Order accordingly.

For the plaintiff:
L Sebalu
Kiwanuka & Co, Kampala

For the defendants:
JD Raichura
Visana Raichura & Singh, Kampala

Kanjee Naranjee Ltd v Tulsidas Dharamshi Ghadialy
[1965] 1 EA 171 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment:	15 January 1965
Case Number:	11/1963
Before:	Sir Samuel Quashie-Idun P, Crabbe and Spry JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Wicks, J

[1] Landlord and tenant – Creation of tenancy – Absence of express tenancy – Lease executed subsequently – Premises later bought by limited company – Arrears of rent – Denial of landlords interest for period prior to lease – Part payment of arrears of rent covering period prior to lease – Whether tenant estopped from denying title of landlord.

Editor's Summary

In 1935 the respondent became the tenant of a half shop in Nairobi and in 1940 he became the tenant of one K.N. of the same shop. K.N. then sold the property to the appellant company, K.N. Ltd., which was incorporated in 1955, and in consideration for the transfer of the property on May 8, 1958 received shares in K.N. Ltd. On May 1, 1958 the whole shop was leased by the appellant company to the defendant for a term of 10 years. The appellant company now filed an action on the lease for possession, rent and mesne profits and claimed that arrears of rent were owing and that the rent had been in arrears for 21 days, which consequently gave it a right of re-entry. The respondent in his defence admitted that he was the appellant company's tenant under the lease but not before its commencement on May 1, 1958, and contended that before that date he was the tenant of K.N. It was agreed that on March 14, 1959 the appellant company had written to the respondent demanding rent from 1957 to April 30, 1958 and in reply received a cheque and a promise to pay the balance on or before July 31, 1959. The issue before the trial judge was whether there was evidence which showed that the respondent acknowledged that the appellant company was his landlord before May 1, 1958. The trial judge held that there was no such evidence, that there was no evidence of either agency or an assignment, and that the respondent's landlord was K.N. who was not a party to the suit. The appellant company appealed. There was no evidence of an express tenancy agreement between the parties before May 8, 1958. The substantial issue before the court was whether the respondent was by his conduct estopped from denying that the appellant company had become his landlord since 1955 when it was incorporated and took over management of the suit premises from Kanjee Naranjee.

Held –

(i) though the legal title was transferred to the appellant company on May 8, 1958, the legal possession of the property was vested in it as from the date of its incorporation; the appellant company's possession was, therefore, sufficient to enable it to maintain an action for recovery of rent;

(ii) the part payment of the amount claimed as rent by the appellants for a period prior to May 1, 1958 and the promise to pay the balance due, constituted an acknowledgment of a tenancy for the entire period for which rent was claimed by the appellants.

Appeal allowed.

Cases referred to in judgment

(1) *Ram Nath v. Chiranji Lal* (1934), 57 All. 605.

(2) *Slatterie v. Pooley*, 6 M. & W. 665, 151 E.R. 579.

(3) *Dickinson v. Coward* (1818), 1 B. & Ald. 677, 106 E.R. 249.

(4) *Peacock v. Harris*, 10 East 107, 103 E.R. 715.

(5) *Phillips-Higgins V. Harper*, [1954] 1 All E.R. 116.

(6) *Firm B. Chand v. Seth G. Lal* (1934), 50 T.L.R. 465.

(7) *Siqueira v. Noronha*, [1934] A.C. 332.

January 15. The following judgments were read:

Judgment

Crabbe JA: This is an appeal from a decision of the Supreme Court in a landlord and tenant case. The learned trial judge dismissed the plaintiffs' claim for possession, rent and mesne profits and ordered them to pay the defendant's costs of the suit. From that decision the plaintiffs have appealed.

In 1935 the defendant became the tenant of half of Shop No. 14 on Plot L.R. 209/2647, Hussein Suleman Road, Nairobi, and subsequently in 1940 he became the tenant of one Kanjee Naranjee of the same shop. The plaintiff company was incorporated in 1955, and the consideration for the transfer of the property, of which the defendant's shop was a part, from Kanjee Naranjee to Kanjee Naranjee Ltd., on May 8, 1958, was the issue of shares in that company to Kanjee Naranjee. The whole shop had previously on May 1, 1958, been transferred by the plaintiffs to the defendant under a lease for a term of 10 years at a yearly rent of Shs. 14,400/- payable monthly in advance. The plaintiffs' claim was that prior to the commencement of the lease the defendant occupied half the shop as their tenant on a verbal monthly tenancy at a monthly rent of Shs. 610/-, which included water and conservancy charges, and that both under the lease and the monthly tenancy the defendant was liable to pay a proportion of the site value tax and in addition the water and conservancy charges. The plaintiffs further claimed that on June 30, 1960, arrears of rent amounting to Shs. 6,610/30 were owing, and on July 21, 1960, the rent had been in arrears for 21 days, which consequently gave the plaintiffs a right of re-entry. By his defence the defendant admitted that he was the plaintiffs' tenant under the lease, but not before its commencement on May 1, 1958. He averred that before that date he was the tenant of one Kanjee Naranjee, and raised issues on the amount of rates and site value tax and alleged that sums claimed for periods up to April 30, 1958, were the subject of another pending action (Suit No. C.C. 471/58). The defendant finally denied that he owed the plaintiffs any rent or that he had been served with a valid notice of intention to determine the lease.

It seems to have been agreed at the trial that:

> "1. Plot No. L.R. 209/2647 was transferred from Kanjee Naranjee to the plaintiff by a deed of assignment dated May 8, 1958 and
>
> 2. Payment claimed to have been made by the defendant to the plaintiff amounting to Shs. 33,722/74 has been received by the plaintiff.
>
> 3. The case file relating to C.C. 471/58 is before the court."

In arguing this appeal, leading counsel for the appellants made no complaint about the dismissal of the claim for possession, and the short point that arises for our determination is whether the defendant was a

tenant of the plaintiffs during the whole period for which the claim was made.

In this case there was no evidence of an express tenancy agreement between the plaintiffs and the defendant before May 8, and in his judgment the learned trial judge, after referring to para. 3 of the plaintiffs' plaint, in which it was

averred that the defendant had been the plaintiffs' tenant before May 1, 1958, said:

> "This is a clear averment that the defendant was the tenant of the plaintiff before May 1, 1958 and this is not supported by the evidence, for it is an agreed fact that the defendant's landlord before May 8, 1958 was Kanjee Naranjee who is not a party to this action."

Later in his judgment the learned judge observed:

> "The plaintiff is bound by their pleading and is entitled to succeed only to the extent that they can prove they are the defendant's landlord and that is from May 8, 1958. Kanjee Naranjee is not a party to this case and any claim that he may have against the defendant in respect of the shop is not an issue in this case."

After referring to the payment of Shs. 9,000/- by the defendant to the plaintiffs, the learned trial judge again said in another passage of his judgment:

> ". . . the plaintiff is bound by their pleadings and not only have they failed to plead agency or that they took an assignment of the previous owners rights, they have claimed to be the defendant's landlord throughout, and in their plaint they have acknowledged, without reservation, receipt of the whole of this amount of Shs. 9,000/- as the defendant's landlord."

It is clear the Kanjee Naranjee Ltd., the plaintiffs herein, are a separate legal entity from Kanjee Naranjee, but it was submitted by counsel for the appellant that, even if Kanjee Naranjee Ltd. were not the defendant's landlords up to May 1, 1958, there was nothing to prevent the plaintiffs from receiving the sum of Shs. 9,000/- paid on account by the defendant and then appropriating that amount in discharge of his earlier debt to Kanjee Naranjee. For this submission counsel relied on the authority of the Privy Council's decision in the Indian case of *Ram Nath v. Chiranji Lal* (1). I do not think, however, that that case is of any assistance to this court, because there the debt was owing to one creditor, whereas here, on the basis of counsel for the appellant's own argument, there were two separate debts owed to separate persons. In the absence of proof of agency, I do not see how the payment of money to one creditor can be appropriated in extinguishing a debt owed to another creditor.

The second point argued by counsel for the appellant was that at the incorporation of the plaintiffs' company in 1955, the plaintiffs became by novation the landlords of the defendant. For novation to be effective as a new contract, the consent of all the parties to the original contract is essential. In this case the correspondence which took place between the parties before May 1, 1958, does not lead me confidently to the conclusion that in 1955 the consent of the defendant was obtained to a novation.

But a plaintiff in a landlord and tenant suit does not necessarily fail because he cannot prove an express agreement creating the relationship of landlord and tenant. It is sufficient if he proves circumstances from which that relationship can be inferred. In Foa's General Law of Landlord and Tenant (7th Edn.), at p. 6, para. 8, the various modes of creating tenancies are stated thus:

> "The relation of landlord and tenant may be created by lease, by entry under agreement for lease, by occupation under implied demise, by assignment, by attornment, and by estoppel."

In the particular circumstances of this case the question that arises is whether the defendant is by his conduct estopped from denying that the plaintiff had become his landlord since 1955 when the plaintiffs' company was incorporated, and took over ownership of the suit property from Kanjee Naranjee. Dealing with the creation of tenancy by estoppel under the heading "Estoppel as regards

person recognised as landlord", Foa's General Law of Landlord and Tenant (7th Edn.) states at p. 462, para. 741:

> "With regard to the title of a person from whom the possession was not obtained, but who has been recognised as landlord by the tenant, such recognition may be by express agreement (*Cornish v. Searell* (1828), 8 B. & C. 471; *Gregory v. Doidge* (1826), 3 Bing. 474), by attornment (*Gravenor v. Woodhouse* (1822), 1 Bing. 38; *Cooper v. Lands* (1866), 14 W.R. 610) or other formal acknowledgment (as by paying a nominal sum of money (*Doe v. Brown* (1837), 7 A. & E. 447)), by payment of rent (*Cooke v. Loxley* (1792), 5 T.R. 4; *Doe v. Francis* (1837), 2 Moo. & R. 57; *Rogers v. Pitcher* (1815), 6 Taunt. 202; *Fenner v. Duplock* (1824), 2 Bing. 10; *Doe v. Wiggins* (1843), 4 Q.B. 367; *Doe v. Clarke* (1809), Peake, Add. Ca. 239) or of a nominal sum as rent (*Doe v. Wilkinson* (1824), 3 B. & C. 413), or by submission to a distress (*Panton v. Jones* (1813), 3 Camp. 372; *Doe v. Mitchell* (1819), 1 B. & B. 11; *Cooper v. Blandy* (1834), 1 Bing. N.C. 45; *Knight v. Cox* (1856), 18 C.B. 645 (reported as *Cox. v. Knight*, 25 L.J.C.P. 314)). And where such payment is to an agent who pays it over to his principal, it makes no difference that the principal has remained undisclosed (*Hitchings v. Thompson* (1850), 5 Exch. 50. Cf. *ante*, p. 459, note (*d*))."

The crucial issue in this case is whether there is evidence which shows that the defendant acknowledged that the plaintiffs were his landlords before May 1, 1958. The learned trial judge came to the conclusion that there was no such evidence; and further, that there was no evidence of either agency or an assignment. He said:

> "It is an agreed fact that the defendant's landlord before May 8, 1958 was Kanjee Naranjee who is not a party to this action."

With respect to the learned judge, I think he clearly misdirected himself for this was the real issue in controversy between the parties. The fact agreed upon was that the plot No. L.R. 209/2647 was transferred from Kanjee Naranjee to the plaintiff by a deed of assignment dated May 8, 1958. But, as counsel for the appellant contended, and rightly in my view, though the effect of the execution of the deed was to transfer the legal title in the property to the plaintiffs, the legal possession of the property was vested in the plaintiffs as from the date of the incorporation of the plaintiffs' company. The plaintiffs' possession was, therefore, sufficient to enable them to maintain an action for recovery of rent.

It would appear from the letter of April 23, 1958, that Kanjee Naranjee was at that date holding himself out to the defendant as acting for the plaintiff company, though it is not clear whether the terms of the lease which the defendant had asked for had also been agreed upon.

But be that as it may, on March 14, 1959, the plaintiffs wrote to the defendant the following letter:

> "Dear Sir,
>
> Re:- Plot No. 2647, Shop No. 14
>
> *Hussein Suleman Road – Nairobi*
>
> We enclose herewith our demand note No. 2332 for Shs. 18747/83 and shall be glad if you will kindly settle this account within 10 days from the date of this letter, failing which, we shall be compelled to hand over to our advocate for necessary action, which please note.
>
> Yours faithfully,
>
> (*Signed*)
>
> for Kanjee Naranjee Ltd."

The demand note included items for rent and rates for a period in 1957 to April 30, 1958. The defendant's reply to the plaintiffs' letter throws a considerable light on the real problem that arises in this appeal. The reply reads as follows:

> "
>
> Date 6th April, 1959.
>
> Dear Sir,
>
> I refer to our interview of this afternoon and enclose herewith my cheque for Shs. 9,000/- as agreed.
>
> I promise to pay the balance as claimed by your letter of 14th March, 1959, on or before 31st July, 1959.
>
> I shall be obliged if you will kindly instruct your advocates to draw up the lease of the shop at present occupied by me for a period of 10 years on the conditions and covenants as contained in the enclosed draft lease as agreed by us.
>
> I will pay the future rent as when it shall become due.
>
> I will be obliged if you will kindly let me have written permission to carry out certain alterations as requested in my letter of this morning and as agreed verbally.
>
> Kindly acknowledge receipt of the said sum of Shs. 9,000/- and oblige.
>
> Yours faithfully,
>
> (Sgd.) T. D. Ghadialy."

In my judgment, the defendant's reply was an implied admission that he had been the plaintiffs' tenant since 1957, and that he was willing to pay the rent which had accrued in accordance with the plaintiffs' demand note dated March 14, 1959. What a party admits to be true may reasonably be presumed to be true. (*Slatterie v. Pooley* (2), per Parke, (B. 6 M. & W. at p. 669). In spite of the defendant's denial of the authorship of the letter of April 6, 1959, the learned trial judge found as a fact that the letter was prepared and signed by the defendant in the normal course of his business. Unfortunately, the learned judge failed to direct his mind to the significance of the admissions contained in the letter. He proceeded to base his judgment mainly on the plaintiffs' failure to plead and prove either agency or an assignment. But, with respect, I think that that was unnecessary in the particular circumstances of this case. In my view, the part-payment of the amount claimed as rent by the plaintiffs for a period prior to May 1, 1958, and the promise to pay the balance due, constituted an acknowledgment of a tenancy for the entire period for which rent was claimed by the plaintiffs. The circumstances of themselves clearly raised a strong presumption that the defendant made the part-payment of the account stated to the plaintiffs as his landlords for a period between 1957 and May 1, 1958. The case of *Dickinson v. Coward* (3), though not on all fours with the present, appears to me to be helpful in arriving at a just decision in this case, for it does emphasize the principle that the recognition of a person as standing in certain relationship to another is sufficient evidence, though not conclusive, that the relationship exists. The headnote to that case reads as follows:

> "The defendant (in an action at the suit of the assignee of a bankrupt) had attended a meeting of the commissioners, and exhibited the account between him and the bankrupt, and afterwards made a part-payment to the plaintiff on that account: Held, in an action for the balance remaining due, that this was *prima facie* evidence, as against the defendant, that the plaintiff was assignee, and that it was not necessary to produce the proceedings under the commission, the defendant not having given notice of his intention to dispute the bankruptcy."

In his judgment Lord Ellenborough said ((1818) 1 Ba Ald. at p. 679):

> ". . . I take it to be quite clear, that any recognition of a person standing in a given relation to others is *prima facie* evidence against the person making such recognition that that relation exists. If indeed it were made in a loose conversation, I should consider the evidence but very slight; but here a part-payment is made. I have, therefore, no doubt that this was sufficient evidence of the plaintiff's being assignee . . ."

The defendant in the course of the transaction between the parties on which the plaintiffs' action was founded admitted the title by virtue of which the plaintiffs sued. He had an interview with the plaintiffs on April 6, 1959, and on the same day made a payment of Shs. 9,000/- to the plaintiffs and promised to pay the balance of the amount due. If the defendant accounted with the plaintiffs in their capacity as landlords, having received credit from them as such, thereby admitting them to be the persons to be accounted with as landlords, he should not now be permitted to dispute the plaintiffs' title to recover the balance of that account. (See *Peacock v. Harris* (4). For, as a general rule, a tenant is not permitted to dispute the title of the landlord from whom he holds. I think there can be no doubt that the defendant recognised the plaintiffs as his landlords for the period covered by the demand note dated March 14, 1959.

For the defendant counsel contended that the defendant never acknowledged the plaintiffs as his landlords, and, relying on *Phillips-Higgins v. Harper* (5) and *Firm B. Chand v. Seth G. Lal* (6) he submitted that the demand note dated March 14, 1959, did not constitute a true account stated on which the plaintiffs could sue. He argued that there was no evidence that the parties had agreed on both items of credit and debit and that a balance having been struck, the defendant had agreed to pay the agreed balance. As regards counsel for the respondents' first submission, I think I have said enough to show that there is sufficient evidence to justify an inference that the defendant recognised the plaintiffs as his landlords. On the question of account stated, I am not prepared to accept counsel for the respondent's invitation to apply the narrow meaning of that term to the facts of this case. In my view the facts of the cases cited by him are distinguishable from those of the present case, because the transactions between the parties in both cases were not the same as the present. An action on an account stated proceeds on the assumption that the defendant has admitted a debt to be due to the plaintiffs. In Salmond and Williams on Contracts, (2nd Edn.) at p. 191, it is stated:

> "The term account stated applies to three separate kinds of case: (1) where a claim for payment by one party is admitted by the other to be correct; an action can be brought on the admission; (2) where parties having claims against each other bring them into account and strike a balance; the party against whom the balance stands becomes liable to pay the amount; (3) where one party makes a claim against another and that other for valuable consideration accepts it as correct (*Cantillo Tank S.S. Co. v. Alexandria Engineering Works* (1921), 38 T.L.R. 134, *per* Viscount Cave, 143; *Siqueira v. Noronha*, (1934) A.C. 332.)"

(See also *Siqueira v. Noronha* (7) ([1934] A.C. at pp. 337, 338). I think it is beyond question that the defendant's letter of April 6, 1959, brings the plaintiffs' action within the first meaning of the term "account stated", and in my judgment, there is no merit in counsel for the respondent's second argument.

Counsel for the respondent next dealt with certain procedural objections to the plaintiffs' action. It seems to me that the only point of some apparent substance which can be urged in support of the defendant's contention is that rent for 1957, which is included in the plaintiffs' present claim, had already been claimed by Kanjee Naranjee in Suit No. C.C. 471/58. But the short answer

to this contention can be found in s. 6 of the Civil Procedure Code (Cap. 5) (K) which reads as follows:

> "No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in the Colony to grant the relief claimed . . ."

It is plain that Kanjee Naranjee and Kanjee Naranjee Ltd. are two different persons; the plaintiffs are not claiming under Kanjee Naranjee. In this suit they are relying on their own title. It follows, therefore, in my view, that Kanjee Naranjee's action in Suit No. C.C. 471/58 is of no avail to the defendant.

It was agreed at the hearing of this appeal that the sole question was whether the defendant was liable to the plaintiffs in the sum of Shs. 6,610/30, less Shs. 420/-. The sum of Shs. 6,610/30 was the balance due from the defendant as shown on the demand note dated March 14, 1959, and the sum of Shs. 420/- was a debit for legal charges itemised on the said note. This debit for Shs. 420/- was withdrawn at the trial by counsel for the plaintiffs as not being recoverable. Having come to the conclusion that the defendant recognised the plaintiffs as his landlords, and that he admitted the account stated, I think the learned judge erred in dismissing the plaintiffs' claim.

For these reasons, with respect to the learned trial judge, I have come to a different conclusion, and I would allow the appeal and set aside his judgment and decree, and would enter judgment for the plaintiffs on their claim for Shs. 6,190/30, with costs in this court and in the court below.

The defendant's cross-appeal was not pursued and it is accordingly dismissed with costs.

Sir Samuel Quashie-Idun P: I agree with my brother Crabbe, J.A. that this appeal should be allowed for the reasons stated in his judgment. The issues before the learned trial judge were simple involving facts and law of landlord and tenant. The learned trial judge appeared to have attached undue importance to the fact that in a previous suit Kanjee Naranjee had claimed some rents alleged to have been due to him by the respondent in respect of a portion of the property leased by Naranjee to the defendant prior to the date when the entire property became vested in the appellants. Whether the amount claimed by Naranjee in the prior suit was due to him or not was not relevant to the issues before the learned trial judge as, although, Naranjee was a partner of the appellants' company, he did not sue as an agent or representative of the appellants and the appellants were entitled to claim from the respondent what they believed was due to them from the defendant who was, from the evidence, legally a tenant of the plaintiffs. The evidence before the learned trial judge supported the plaintiffs' averments in their pleadings and it was wrong for the learned trial judge to have come to the conclusion that the defendant was not the tenant of the plaintiffs and that they were in effect agents of Kanjee Naranjee.

The appeal is accordingly allowed, the judgment of the learned trial judge is set aside and judgment is entered for the plaintiffs on their claim for Shs. 6,190/30 with costs. Appellants also to have costs in this court and in the court below.

Spry JA: I also agree.

Appeal allowed.

For the appellant:
JM Nazareth QC and *AE Hunter*
Daly & Figgis, Nairobi

For the respondent:
GR Mandavia
GR Mandavia, Nairobi

Kirpal Singh v Jagat Singh and others t/a Jagat Singh & Co
[1965] 1 EA 178 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	11 February 1965
Case Number:	90/1962
Before:	Newbold Ag V-P, Sir Clement De Lestang and Law JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Miles, J

[1] Practice – Reference to referee – Partnership accounts – Preliminary decree – Referee's certificate to be taken as determining the issues – Whether court has divested itself of responsibility – Whether order a nullity – Civil Procedure (*Revised*) *Rules* 1948, *O.* 27, *r.* 12 (*K*).

[2] Partnership – Reference to referee – Accounts – Preliminary decree – Referee's certificate to be taken as determining the issues – Whether court has divest itself of responsibility – Whether order a nullity – Civil Procedure (*Revised*) *Rules* 1948, *Order* 27, *r.* 12 (*K*).

Editor's Summary

The appellant filed a suit in the Supreme Court claiming a declaration that the partnership between himself and the respondents was dissolved by his retirement and prayed that an account be taken and judgment entered for such sum as was found due to him. Subsequently, the parties agreed to the date of dissolution and Harley, J., made an order referring the accounts to a referee. A preliminary decree was drawn up and approved by the advocates for the parties, and clause 8 thereof after setting out that the referee was to file his report in court and to certify how much was due to the plaintiff stated: "The referee's certificate shall be taken as determining the issue "and this court thereafter not requiring further hearing of the action will "enter judgment in terms of the certificate . . ." By cl. 3 of the preliminary decree the referee was to have the powers and duties of a special referee as laid down in England in R.S.C., O. 36A. The report was subsequently filed in court and thereafter the appellant moved the court for judgment in terms of the report but later filed another motion requesting that the report be treated as evidence in the proceedings. The respondents countered with a notice of motion praying for an order that the report be wholly rejected or remitted to the referee for consideration. Both the motions came up for hearing before Miles, J., and the advocate for the respondents took the preliminary point that the order of Harley, J. was made without jurisdiction and was a nullity because cl. 3 indicated that the judge was purporting to exercise jurisdiction vested exclusively in the High Court in England and because by cl. 8 he was deputing the final decision on the merits of the suit to the referee. Miles, J. held that the final

order which was embodied in the preliminary decree was made without jurisdiction and he ordered that that order, insofar as it was not made by consent, and the report of the referee, be set aside. The appellant thereupon appealed and contended that Miles, J., had misdirected himself (*a*) in holding that the order by Harley, J., was made without jurisdiction and was a nullity, and (*b*) in holding that cl. 8 of the preliminary decree meant that the referee was to be the final arbiter in the suit and that his award finally decided the issues between the parties. The respondents also cross-appealed in support of the decision of Miles, J. on additional grounds.

Held – by Newbold, Ag. V.-P and de Lestang, J.A. (Law, J.A., dissenting):

(i) the mere fact that the referee was by reference invested with the powers

of a special referee as set out in the English R.S.C., O. 36A did not mean that the order was made thereunder or that the order and preliminary decree were thereby bad;

(ii) looking at the preliminary decree as a whole, though with special reference to cl. 8, the court was unable to arrive at any conclusion other than that to which Miles, J. arrived, that is, that Harley, J., sought to divest himself of the responsibility for determining the matters in issue in the suit.

Appeal, insofar as it related to the decision of Miles, J., on the validity of the preliminary decree and matters other than the question of costs, dismissed.

Cross-appeal also dismissed.

Cases referred to in judgment

(1) *MacFoy v. United Africa Co. Ltd.*, [1961] 3 All E.R. 1169.

(2) *Craig v. Kanseen*, [1943] 1 All E.R. 108.

(3) *Cooper v. Cooper*, [1964] 3 All E.R. 167.

(4) *Keeble v. Shelton*, (1948), 15 E.A.C.A. 14.

February 11. The following judgments were read:

Judgment

Law JA: This appeal arises out of a suit instituted in the Supreme Court of Kenya as long ago as May 8, 1957, by the filing of a plaint by the appellant (hereinafter referred to as the plaintiff) claiming a declaration that the partnership between himself and the respondents (hereinafter referred to as the defendants) was dissolved by the plaintiff's retirement therefrom on or about February 6, 1957, and praying that an account be taken and judgment entered for the plaintiff for such sum as was found due to him as a result of the taking of such account. By their defence, the defendants alleged that the partnership stood dissolved at the end of January, 1956, and counterclaimed for a declaration accordingly. On November 7, 1957, an application was made to Rudd, J., who ordered accounts to be taken by one Mr. C. P. Thian. Nothing seems to have happened for the next two years, when the matter came before Harley, J. on November 16, 1959. On this occasion, the defendants agreed to accept February 6, 1957, as the date on which the partnership was dissolved by the retirement of the plaintiff, and on November 18, 1959, both sides asked for an immediate order referring the accounts to a referee. The learned judge undertook to prepare two draft orders of reference for the consideration of counsel. On November 30, 1959, counsel for the plaintiff indicated that he was prepared to accept either draft, but that he preferred draft "A". Counsel for the defendants does not seem to have committed himself. The learned judge then made the following order:

> "I grant a preliminary decree in accordance with O. XX r. 14 and by O. XXVII r. 11 make an order for examination of accounts in terms of draft 'A'."

Counsel for the defendants gave notice of appeal against this order, but no appeal was in fact prosecuted.

The preliminary decree was drawn up in the following terms by defendant's counsel, approved by counsel for the plaintiff, and sealed by the court on January 8, 1960:

> "Preliminary Decree

This case coming for hearing before the Honourable Mr. Justice Harley on the 16th day of November, 1959 and thereafter for mention on the 17th and 18th and 30th days of November, 1959 It Is Ordered:

That the partnership between the plaintiff and the defendants be by consent of the parties deemed to have been dissolved as from the 6th day of February 1957, by the retirement of the plaintiff therefrom:

That it is declared that the proportionate shares of the parties in the partnership are equal:

And it is further ordered:

1. That these proceedings and all questions of account arising therein be referred to a member of the firm of Cook, Sutton & Co., Chartered Accountants, such member as Cook, Sutton & Co., themselves may specify, and each of the Four partners to deposit with Cook, Sutton & Co., as security or part security of costs Shs. 1,750/- within 7 days after Cook, Sutton & Co., have specified the Referee and mentioned their consent to act on receipt of the sums specified by order of the court.
2. The referee is to base his enquiry and report on:
 (*a*) The existence of a partnership between plaintiff and defendants subsisting over the period from the 1st March, 1944 to 6th February, 1957, it being agreed between the parties and the Court does so declare that the plaintiff retired from the partnership on 6th February, 1957.
 (*b*) The fact that plaintiff and the three defendants were to share equally in the profits and losses; that is to say, the plaintiff's share in the partnership was one quarter.
3. The referee is to have the powers and duties of a special referee as laid down (in England) in R.S.C. O. 36A (mutatis mutandis).
4. The referee is particularly to enquire and report on the profit and loss made during the stated period of the partnership and is to make a finding as to how much, if anything, is in consequence due to the plaintiff.
5. The referee is to be remunerated for his work and such remuneration is to be paid to the referee by the four partners in equal shares.
6. The referee is to appoint a day and place for proceeding with the accounts and for hearing the parties, and shall give all directions necessary.
7. The referee appointed and agreeing to act is to make his report to the court within three months from the date of appointment.
8. After receipt of his remuneration, the referee is to file his report in court and to certify how much, if anything, is due to the plaintiff. The referee's certificate shall be taken as determining the issues and this court thereafter not requiring further hearing of the action will enter judgment in terms of the certificate. The question of costs is adjourned to chambers for further consideration, after the report of the referee will have been made to the court.

And That the defendant's application for leave to appeal is hereby Refused except so far as they have a right to appeal without leave."

Consequent upon the preliminary decree, Mr. Blackhall, a member of Cook, Sutton & Co., examined the accounts of the partnership, and transmitted his report to the Supreme Court. Both the plaintiff and the defendants took part in the examination, in that they supplied Mr. Blackhall with documents and information which he from time to time required, although no specific day and place appears ever to have been appointed by Mr. Blackhall for proceeding with the accounts and for hearing the parties, as required by cl. 6 of the preliminary decree. In due course Mr. Blackhall transmitted his report to the Supreme Court, and the Deputy Registrar informed the parties of the receipt of the report by a notice dated August 2, 1961, worded as follows:

> "Take notice that the award in the above case has been filed by Messrs. Cook, Sutton & Co., Chartered Accountants, Nairobi, and is now open for inspection during office hours in their Registry."

The use of the word "Award" was not appropriate to describe a report made and transmitted under rr. 11 and 12 of O. XXVII. On October 13, 1961, counsel for the plaintiff filed a notice of motion asking that judgment be entered for the plaintiff "in terms of a report made by the referee appointed by this Honourable Court". By a subsequent notice of motion, counsel applied to amend the first notice so as to include an alternative prayer, to wit, "that the report . . . be treated as evidence in these proceedings". The defendants countered with a notice of motion praying for an order that the report be wholly rejected or remitted to the referee for further consideration.

These motions came for hearing before Miles, J. on March 26, 1962, when counsel for the defendants argued, as a preliminary objection to the plaintiff's motions, that Harley, J.'s order, as embodied in the preliminary decree, was made without jurisdiction and was consequently a nullity, because cl. 3 thereof indicated that the learned judge was purporting to exercise jurisdiction vested exclusively in the High Court in England by R.S.C., O. XXXVI A, which provides for the appointment of official referees and special referees, and because by cl. 8 he was in effect deputing the final decision on the merits of the suit to the referee, to the exclusion of the court, a state of affairs not permissible under O. XXVII rr. 11 and 12 of the Kenya Civil Procedure Rules, under which the proceedings before, and report of, the referee are no more than evidence in the suit, the final decision on the merits being a matter exclusively for the court. To this counsel for the plaintiff replied that cl. 3, which purported to confer the powers of an official referee on the referee, was not acted upon by the referee, and should be disregarded, and that cl. 8, which purported to leave the decision on the merits to the referee, should be read as meaning that if the court, after considering the report, did not consider further examination necessary, the court would enter judgment in terms of the report. Counsel for the plaintiff submitted that cl. 8 should not be read as an attempt by the judge to divest himself of responsibility for the decision, and that even if his interpretation of cl. 8 was wrong, no more than an irregularity was involved which did not affect the question of jurisdiction. Counsel for the plaintiffs abandoned his motion for judgment in terms of the report but submitted that his motion for the report to be evidence in the suit should be allowed, and that the trial should proceed on that basis.

The learned judge, in a careful and reasoned judgment, held that Harley, J.'s order of November 30, 1960, was made without jurisdiction, and he ordered that that order, insofar as it was not made by consent, and the report of the referee, be set aside and the plaintiff's motion dismissed. In particular, he held that cl. 8, which provided *inter alia* that the referee's certificate "shall be taken as determining the issues", was more than a mere irregularity. He said:

> "It seems to me that the learned judge was determined to make the referee the final arbiter in the case, taking the very understandable view that this dispute, being purely a matter of account, could be suitably dealt with in that manner. To this end he has devised a hybrid procedure which is unknown to the law of Kenya. There is no provision in the Code of Civil Procedure for referring a matter to a referee for final decision. I am constrained to hold, therefore, that the order made by Harley, J. as embodied in the preliminary decree was made without jurisdiction."

The effect of this decision is that the plaintiff today finds himself in the same position as he was when the pleadings closed in July, 1957, except for that part of the preliminary decree, founded on the consent of the parties, which orders

that the partnership be deemed to have been dissolved as from February 6, 1957. This is a most unsatisfactory state of affairs.

The plaintiff now appeals against the decision of Miles, J. on the following grounds:

"1. The learned judge misdirected himself in law:

(i) in holding that the Order of Harley, J., made on November 30, 1959, was made without jurisdiction and was a nullity;

(ii) in considering that the said Order was made under the provisions of R.S.C., O. 36.A (in England) instead of under O. XXVII. r. 11 of the Civil Procedure Rules (in Kenya);

(iii) in failing to appreciate that para. 3 of the preliminary decree, dated November 30, 1959, and sealed by the court on January 8, 1960, only furnished the referee appointed under the said O. xxvii. r. 11 with instructions as to his powers and duties in the examination of the accounts, in compliance with the provisions of O. XXVII, r. 12.

2. The learned judge further misdirected himself in law–

(i) in construing para. 8 of the said preliminary decree as meaning that the said referee was to be the final arbiter in the suit and that his award finally decided the issues between the parties;

(ii) in failing to construe the said paragraph as meaning

(*a*) that the said referee was to file his report in the court, certifying how much, if anything, was due to the appellant,

(*b*) that the said referee was to make a report to the court,

(*c*) that the court would not require to receive any further evidence other than the said report, or to hear addresses from counsel except on the question of costs;

(iii) in failing to appreciate that the proceedings before the said referee and his said report were evidence in the said suit, as provided by O. XXXVII. r. 12 (2);

(iv) in failing to appreciate that no further inquiry into the said accounts was required, unless the court had reason to be dissatisfied with the said proceedings and or report, and in failing to give any or any proper weight to this provision in O. XXVII, r. 12. (2).

3. Alternatively, if there was any defect in the said order or preliminary decree, the learned judge erred in law in failing to treat the same as a mere irregularity and not a nullity.

4. That, having regard to the conduct of the respondents, the learned judge was wrong in awarding them the costs of the proceedings before the said referee."

The defendants support the decision of the learned judge, and rely on the following additional grounds by way of cross-appeal

"(i) That the report of the referee is a nullity in that he did not appoint a day and place for proceeding with the accounts and for hearing the parties and further that the referee did not afford any opportunity to the respondents of cross-examining the appellant and to refute his allegations and nor the referee took down any evidence either from the respondents or from the appellant and further that the respondents were never informed by the referee of any specific allegations of the appellant or the appellant's criticism upon the balance sheets prepared by qualified accountants appointed by the appellant and the respondents during the currency of their partnership.

(ii) That the said report of the referee is a nullity in that he never submitted and nor he possessed any record of proceedings before him.

(iii) That the said report is a nullity in that the said referee has based his report upon mere surmises and conjectures as opposed to any evidence of the parties concerned.

(iv) That the said report is a nullity in that the said referee completely disregarded the figures shown in the balance sheets of the firm without giving any or cogent reasons for doing so and instead proceeded to compile his report upon mere surmises and guess work."

Counsel for the appellant's main ground of appeal is that the learned judge misdirected himself in holding that the order of Harley, J. made on November 30, 1959, was made without jurisdiction and was a nullity. In ordering accounts to be taken, Harley, J. specifically stated that the order was made under O. XXVII r. 11, which reads:

> "In any suit in which an account is necessary, the court may refer the accounts to such person as it thinks fit, directing him to make such examination."

As regards the reference to R.S.C., O. 36A in cl. 3 of the preliminary decree, counsel for the appellant submits that the learned judge was not purporting to assume jurisdiction under that order, but was giving instructions as to the method of taking the accounts, as he was entitled to do under r. 12 of O. XXVII of the Civil Procedure Rules. As regards cl. 8 of the preliminary decree, counsel submits that it should not be construed as meaning that the learned judge was attempting to divest himself of the responsibility for the final decision, but as meaning no more than that the court would accept the figure found by the referee, if satisfied with the report. If not satisfied, he could always remit the report for further inquiry, under r. 12 (2) of O. XXVII. Counsel's argument is that Harley, J. had jurisdiction to order the reference, and that if some of the procedure adopted by him was wrong, this was no more than an irregularity which did not affect jurisdiction. In particular counsel for the appellant submits that the defendants, with knowledge of the irregularities of which they now complain, nevertheless participated actively in the reference, and must be deemed to have waived the irregularities. In this respect counsel for the appellant relies on the speech of Lord Denning in *MacFoy v. United Africa Co. Ltd*. (1) which was quoted in extenso by Miles, J. in his decision the subject of this appeal, and which I now set out again:

> "The defendant here sought to say therefore that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was void and not merely voidable. The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity. But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside: and the court has a discretion whether to set aside or not.
>
> It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it. So will this statement of claim be a support for the judgment, if it was only voidable and not void.

> No court has ever attempted to lay down a decisive test for distinguishing between the two: but one test which is often useful is to suppose that the other side waived the flaw in the proceedings or took some fresh step after knowledge of it. Could he afterwards, in justice, complain of the flaw? Suppose for instance in this case that the defendant, well knowing that the statement of claim had been delivered in the long vacation, had delivered a defence to it? Could he afterwards have applied to dismiss the action for want of prosecution, asserting that *no* statement of claim had been delivered? Clearly not. That shows that the delivery of a statement of claim in the long vacation is only voidable. It is not void. It is only an irregularity and not a nullity. It is good until avoided. In this case, the statement of claim not being avoided, it took effect at the end of the long vacation and the time for defence then began to run. Likewise when the plaintiffs signed judgment in default of defence, that too was voidable but not void. It was not a nullity. It was therefore a matter for the discretion of the court whether it should be set aside or not."

Counsel for the appellant also referred to *Craig v. Kanseen* (2) and *Cooper v. Cooper* (3), both of which cases deal with the distinction between what is a nullity, and therefore void, and what is an irregularity, and therefore voidable.

Counsel for the defendants did not, as I understood him, seek to contend that Harley, J.'s order was made without jurisdiction, but he supported the rejection of the report by Miles, J. on the grounds that it was quite wrong for Harley, J. to have sought to divest himself of the responsibility for the final decision in the suit. This, in counsel for the respondents' submission, was something "incurably illegal", and not a mere irregularity, and the learned judge's attempt in cl. 8 of his order to make the referee's certificate conclusive of the issues between the parties and thus restrict their right to call evidence, was equally "incurably illegal" (*Keeble v. Shelton* (4)). In support of the cross-appeal, counsel for the respondents argued that the referee's report was defective because there were no proceedings before the referee, as envisaged by r. 12 of O. XXVII and which the referee was specifically required to hold under cl. 6 of the preliminary decree. This point was argued by counsel for the respondents in the court below, but as counsel for the appellant has pointed out, it was not dealt with by the learned judge who rejected the report solely for the alleged want of jurisdiction. This court has not sufficient material before it to say whether or not there were "proceedings" before the referee such as to justify him coming to the conclusions contained in his report.

The question for decision seems to me to be whether Harley, J. necessarily intended to divest himself of all responsibility for the final decision in this suit, by appointing a referee whose report was to be final and by limiting the court's function to entering judgment in terms of that report. If such was the case, then Miles, J. was clearly right in holding that Harley, J.'s order was made without jurisdiction. By cl. 3 of the preliminary decree, Harley, J. purported to invest the referee with:

> "the powers and duties of a special referee (in England) in R.S.C., O. 36A mutatis mutandis."

Although a special referee's powers in England, as laid down in r. 7 of O. 36A, go far beyond the powers of a referee in Kenya, it is nevertheless clear that the report of a special referee to whom a matter has been referred for enquiry and report, as in this case, has no more finality than that of a referee in Kenya. Rule 9 (3) of O. 36A, which also applies to special referees, provides as follows:

> "On the receipt of an Official Referee's report, the court may:
>
> (*a*) adopt the report in whole or in part;

(*b*) vary the report;

(*c*) require an explanation from him;

(*d*) remit the whole or any part of the question or issue originally referred to him for further consideration by him or any other Official Referee; or

(*e*) decide the question or issue originally referred to him on the evidence taken before him, either with or without additional evidence."

In Kenya, by r. 12 (2) of O. XXVII:

> "The proceedings and report (if any) of the referee shall be evidence in the suit, but where the court has reason to be dissatisfied with them it may direct such further enquiry as it shall think fit."

There would appear to be no fundamental difference in the effect of an official or special referee's report in England and that of a referee in Kenya. In both cases, the court has the power to adopt the report, if satisfied with it, or to remit it for further consideration, if not satisfied. In my opinion, the reference to R.S.C., O. 36A in the preliminary decree was an irregularity, but did not involve a failure of jurisdiction. As regards cl. 8 of the preliminary decree, it contains *inter alia* the following words:

> "The referee's certificate shall be taken as determining the issues and this court thereafter not requiring further hearing of the action will enter judgment in terms of the certificate."

Miles, J. gave careful consideration to the meaning of these words and concluded:

> "I can only construe this clause as meaning that the award of the referee is to be final."

I find it difficult to believe that this is what Harley, J. really intended. He had in mind O. XXVII r. 11 when he made his order which is embodied in the preliminary decree. Nothing in O. XXVII envisages a referee's report being in itself the final determination of the issues between the parties. Rule 12 (2) of O. XXVII clearly states that the report shall be no more than evidence in the suit, and, therefore, like any other evidence, capable of being accepted or rejected. In my opinion Harley, J., in drafting cl. 8 as it appears in the preliminary decree, intended no more than that the referee's report should *prima facie* be conclusive. He did not say that the court would in no circumstances exercise its power to remit the report for further inquiry, or that it would refuse to hear further evidence from the parties. The words in cl. 8 ". . . and this court not requiring further hearing of the action will enter judgment in terms of the report" mean, in my opinion, that if the court should not require any further hearing of the action, it would enter judgment in terms of the report. The court did not preclude itself from referring the report for further examination or from hearing further evidence. It follows that in my opinion, with all respect to the learned judge, he was wrong in holding that the order of Harley, J. embodied in the preliminary decree was made without jurisdiction and in setting aside the referee's report for that reason. That jurisdiction exists in O. XXVII r. 11, and it was specifically invoked. Furthermore, whatever defects the preliminary decree may have contained, the defendants by not appealing against the preliminary decree, and by taking an active part in the referee's examination of the accounts, cannot, in my opinion, now challenge these defects.

It follows that in my opinion this appeal succeeds. I would dismiss the cross-appeal and set aside the order of Miles, J. of April 9, 1962. The plaintiff's motion that the referee's report be treated as evidence in the suit should in my opinion, go back to the Supreme Court for further hearing, as also the defendants' motion that the report be rejected or remitted, on the basis that Harley,

J.'s order of November 30, 1959, as embodied in the preliminary decree was not made without jurisdiction. The orders in paras. (*c*), (*d*) and (*f*) of the order of Miles, J. dated April 9, 1962, relating to the payment of costs before the referee by the plaintiff, should in my opinion not have been made in any event; the respondents are as much to blame for the present state of affairs as the plaintiff. Those costs should in my view be costs in the cause.

Newbold Ag V-P: The facts relating to this appeal are fully set out in the judgment of Law, J.A. and I find it unnecessary to restate them. I agree with Law, J.A. that the basic issue for decision is whether Harley, J. in his order which is embodied in the preliminary decree, sought to divest himself of the responsibility for the final decision in this suit and to appoint a referee with power to assume that responsibility. If he did, then, as the judge had no jurisdiction to do any such thing, the order of Harley, J., the preliminary decree consequent thereon and anything which stemmed therefrom are all incurably bad and in each case a nullity. If he did not, then even if there are defects in the preliminary decree, nevertheless Harley, J. would have had jurisdiction to refer the matter to a referee and any defect could and should have been challenged on appeal. As this was not done, any such defect cannot now be challenged collaterally before a court of co-ordinate jurisdiction.

I do not consider that the mere fact that the referee was by reference invested with the powers of a special referee as set out in the United Kingdom O. 36A means that the order of Harley, J. was made thereunder or that the order and preliminary decree are thereby bad. Harley, J. clearly purported to act under O. 20, r. 14 and O. 37, r. 11, of the Civil Procedure (Revised) Rules, 1948 (hereinafter referred to as "the Rules"). Equally clearly the proceedings and report of a special referee under the United Kingdom O. 36A are, save in special circumstances which are irrelevant in this appeal, in effect to be treated as evidence before the judge and to that extent there is no fundamental clash with the provisions of O. 37 r. 12 (2) of the Rules. I accept that this court should seek, if possible, to uphold as valid a preliminary decree of the Supreme Court made five years ago, which, though appealable, was not appealed against and was for two years acted on by both parties as valid. I also accept that there are phrases in the preliminary decree which, in a somewhat strained manner, are capable of a construction consonant with validity. Accepting all of this and anxious as I am to avoid putting the parties in the same position (save as regards costs) as they were five years ago, nevertheless I regret that, looking at the preliminary decree as a whole though with special reference to cl. 8, I am unable to arrive at any conclusion other than that to which Miles, J. arrived, that is, that Harley, J. sought to divest himself of the responsibility for determining the matters in issue in the suit.

At the time that the order of Harley, J. was made the sole remaining issue in the suit, having regard to the agreements between the parties, was the amount due after the taking of the accounts. That was an issue in the suit and it was the responsibility of the judge to determine it. Under O. 37, rr. 11 and 12, the judge could, in determining this issue, refer the matter to a referee so that the proceedings and report, if any, of the referee should be evidence in the suit, which evidence, together with any other evidence which the parties might choose to lead, would be the foundation for the determination of the issue by the judge. Clause 8 of the preliminary decree, after setting that out the referee was to file his report in court and to certify how much was due to the plaintiff, continues:

> "The referee's certificate shall be taken as determining the issues and this court thereafter not requiring further hearing of the action will enter judgment in terms of the certificate. The question of costs is adjourned to chambers for further consideration, after the report of the referee will have been made to the court."

I can see no other meaning to these words than that Harley, J. was seeking, as Miles, J. put it, "to make the referee the final arbiter in the case" and to divest himself of the responsibility for determining the amount in issue between the parties on the evidence before him. The only function which the judge reserved to himself thereafter was the determination of costs, and the manner in which they were to be determined is a further indication that the issue in the suit was, so far as the judge was concerned, no longer a matter for him. It is also to be noted that there is no reference in the preliminary decree to the referee forwarding his proceedings to the judge; he is required to file only his report. This, in my view, is a further indication that Harley, J. was purporting to invest the referee with jurisdiction to determine the remaining issue in the suit, an act which, of course, would be a complete nullity.

For these reasons in my view the appeal, in so far as it relates to the decision of Miles, J. on the validity of the preliminary decree and matters other than the question of costs, fails and should be dismissed. As de Lestang, J.A. is also of this view, it is so ordered. As regards that part of the decree under appeal which orders that the costs before the referee be paid by the plaintiff to the defendant, I consider, with respect to Miles, J., that as both parties had acted on the preliminary decree as valid it would not be proper at this stage of the suit to burden either party with those costs and that they should be costs in the cause to await the final determination of this suit. As the other members of the court agree, it is so ordered and the decree of April 9, 1962, is amended accordingly. As regards the cross appeal, I do not consider that it should have been brought as Miles, J. never went into the merits of the defendants' application and thus it is not open to this court to consider the matters raised in the cross appeal. I would dismiss the cross appeal, and as the other members of the court agree, it is so ordered. As the appeal has in a large measure failed and as the cross appeal should not have been filed, I would order that the appellant do pay three-quarters of the respondents' costs in this court and that no order for costs be made on the cross appeal. As the other members of the court agree, it is so ordered. There will be a certificate for two counsel.

Sir Clement De Lestang JA: I agree with the judgment of the learned Acting Vice-President and for precisely the same reasons. I also agree with the orders proposed.

Appeal in so far as it related to the decision of Miles, J., on the validity of the preliminary decree and matters other than the question of costs, dismissed. Cross-appeal also dismissed.

For the appellant:
CW Salter QC and *GS Pall*
GS Pall, Nairobi

For the respondents:
BO' Donovan QC and *JK Winayak*
JK Winayak & Co, Nairobi

Okeyo Kigeni v Republic
[1965] 1 EA 188 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment:	30 March 1965
Case Number:	185/964
Before:	Crabbe Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Chanan Singh, J

[1] Criminal law – Trial – Summing up – Evidence – Child – Unsworn evidence – Corroboration – Failure of trial judge to direct himself and assessors as to necessity for corroboration – Corroboration required as a matter of law – Whether fatal to conviction – Application of proviso to r. 41 (1) *of the East African Court of Appeal Rules*, 1954.

[2] Criminal law – Murder – Provocation – Withdrawal of issue of provocation from assessors – Defence of provocation not specifically raised – Function of the trial judge – Test to be applied.

Editor's Summary

The appellant was convicted of murder and the principal witness for the prosecution was a boy of 12 years who gave unsworn evidence to the effect that he had seen the appellant hitting the deceased with a spear on the right side of his chest while the deceased was sitting and that he had reported the matter to his mother. The mother gave evidence that on receiving the report of the death she rushed to the scene of the crime and there she saw the deceased lying dead with a wound on his body and the appellant standing nearby holding a blood-stained knife. The medical evidence was that the deceased was probably sitting when the injury on his chest was inflicted and that it was most likely that the injury was inflicted by a spear. The trial judge failed to direct himself or the assessors on the necessity for the corroboration of the child's evidence and withdrew the question of provocation from the assessors. It was common ground that a defence of provocation was not specifically raised at the trial although there was evidence in which it was suggested that there had been a fight between the appellant and the deceased, and also that the appellant was alleged to have told one prosecution witness that he (appellant) had fought with the deceased. On appeal it was submitted that the judge's failure to give any directions both to himself and the assessors on the need for corroboration of the child's evidence was fatal to conviction of the appellant and that the defect could not be cured.

Held –

(i) the court will, as a rule, quash a conviction where no direction on the necessity for corroboration has been given in a case where corroboration is required as a matter of law or in practice, unless where the court, after considering the whole evidence comes to the conclusion that there was such ample and satisfactory evidence capable of amounting to corroboration that the court does not feel there has been a miscarriage of justice;

(ii) having regard to all the evidence the court came to the conclusion that there was circumstantial evidence to corroborate the child's evidence;

(iii) it is the duty of a trial judge to deal with such alternative defences as they clearly emerge from the evidence as fit for consideration even though they are not put forward by the defence;

(iv) the trial judge erred in telling the assessors that there was no suggestion of provocation, but the effect of this misdirection in withdrawing the issue of provocation from the assessors would have been the same as if there had been no direction at all on that issue;

(v) if there is no sufficient material, even on a view of the evidence most favourable to the accused, for the assessors to form the view that a reasonable person so provoked could be driven to kill then the issue of provocation should be withdrawn from the assessors; however, if on the other hand, the case is one in which the view might fairly be taken (*a*) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (*b*) that the accused was in fact acting under the stress of such provocation, then the issue of provocation should be left to the assessors;

(vi) the court was satisfied that the trial judge's failure to direct himself or the assessors on the question of corroboration and provocation did not cause any injustice and that this was a special case in which the proviso to r. 41 (1) of the East African Court of Appeal Rules, 1954 should be applied.

Appeal dismissed.

Cases referred to in judgment

(1) *R. v. Davies* (1915), 11 Cr. App. R. 272.

(2) *R. v. Trigg* (1963), 47 Cr. App. R.; [1963] 1 All E.R. 490.

(3) *R. v. Murray* (1913), 9 Cr. App. R. 248.

(4) *R. v. Savory* (1942), 29 Cr. App. R. 1.

(5) *R. v. Todd* (1965), Cr. L.R. 117.

(6) *Lee Chun-Chuen R.*, [1963] A.C. 220; [1963] 1 All E.R. 73.

(7) *Holmes v. Director of Public Prosecutions*, [1946] A.C. 588; [1946] 2 All E.R. 124.

(8) *Mancini v. Director of Public Prosecutions*, [1942] A.C. 1; [1941] 3 All E.R. 272.

Judgment

Crabbe JA: read the following judgment of the court:

The appellant was convicted for the murder of his step-brother, Mayaka, in the village of Mwamusioma, and the principal witness for the prosecution was one Magangi, the brother of the deceased, a boy aged 12 years. His evidence was unsworn, and the material part of it was as follows:

> "Mayaka was my brother. He is dead. I remember the day that he died. It was a Monday. It was the 17th day of the 8th month. About lunch-time 1 was at Mayaka's house. Mururi, my brother, was also there. I and my two brothers were sitting outside the hut. Mayaka and Mururi were mending a cloth. One of them was holding it and the other was mending it. I saw Okeyo and Kimuntu come. Okeyo is in Court (Witness points to accused). He is my step-brother. Kimuntu hit Maruri with a wooden stick on his head. Okeyo hit Mayaka with a spear. Both of them fell down. I ran to call my mother Kwambuka (P.W. 1 identified). Neither Mayaka nor Mururi hit back. Mayaka did not hit either of them before. Nor did Mururi hit either of them before. Mayaka was hit with the spear on the right side of his chest.
>
> I found my mother in her house. I told her that Okeyo had killed Mayaka."

By virtue of the proviso to s. 19 (1) of the Oaths and Statutory Declarations Act (Cap. 15) (K) an accused

person is not liable to be convicted of an offence solely on the unsworn evidence of a child of tender years, unless that evidence is corroborated by some other material evidence in support thereof implicating the accused. It is also stated in s. 124 of the Evidence Act, 1963 (No. 46) as follows:

> "Notwithstanding the provisions of s. 19 of the Oaths and Statutory Declarations Act, where the evidence of a child of tender years is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him."

In our view, therefore, it was imperative that the learned judge should direct himself and the assessors on the necessity for corroboration of the child's evidence. In this case neither the learned judge's notes for the summing-up nor his judgment contain any reference to the topic of corroboration.

In this appeal counsel for the appellant addressed us on several grounds of appeal, but we think that the only point of substantial merit which he argued was an alleged misdirection which consisted in the learned judge's failure to give any directions both to himself and the assessors on the need for corroboration of Magangi's evidence. Counsel for the appellant submitted that the omission by the learned trial judge to give any directions on corroboration was fatal to conviction of the appellant and that the defect could not be cured. Whilst conceding this misdirection, counsel for the Republic submitted that there was in fact ample corroboration of Magangi's evidence and that there had been no miscarriage of justice.

The legal position on a failure to give directions on the necessity for the corroboration of a child's evidence was considered in *R. v. Davies* (1) where Lord Reading, C.J. said ((1915) 11 Cr. App. R. at pp. 274–5):

> "The judge failed to direct the jury that this was evidence by a boy of tender years, and that under the statute 'a person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused'. That is by s. 30 (*a*) of the Children Act, 1908, which has been applied to all offences by s. 28 (2) of the Criminal Justice Administration Act, 1914; it therefore applied to this case. Where evidence is given by a child not on oath, in pursuance of these two statutes, it is necessary that the judge should direct the jury not to convict the prisoner on that evidence unless it is corroborated by some other material evidence in support thereof implicating the accused. It is possible that there might be a case where the corroboration is so clear and ample that the court would not interfere with the conviction, although no such direction was given; . . . We must remember, in dealing with the evidence of children who are allowed to give evidence without taking the oath, that Parliament thought it necessary that their evidence should be corroborated; so when the judge in his discretion admits the evidence he should not fail to direct the jury on the point".

In the recent case of *R. v. Trigg* (2) the court, in considering the question of failure by a trial judge to give direction on the necessity for corroboration, said as follows ((1963) 47 Cr. App. R. at p. 100):

> "In the present case Mr. Charles conceded, and rightly conceded, that there was material in the evidence which the jury, on proper direction, could accept as corroborative of Patricia Cobb's evidence. That was a perfectly proper concession to make. So one finds this court in the position that the summing-up contains an omission in regard to corroboration where there was evidence that could have been accepted as such. In these circumstances the only way in which this conviction can be upheld is by the application of the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, because the absence of a direction on corroboration, as the cases already cited show, is *prima facie* fatal to the conviction".

The court further observed (ibid at p. 101):

> "In principle this court feels that cases where no warning as to corroboration is given where it should have been should, broadly speaking, not be made the subject of the proviso to section 4. There are cases where the evidence has been such that this court has felt it possible to apply the proviso, but those cases, in the view of this court, must be regarded more as exceptional than as in any sense a regular matter".

See also *R. v. Murray* (3) ((1913) 9 Cr. App. R. at p. 250), *R. v. Savory* (4) ((1942) 29 Cr. App. R. at p. 3) and *R. v. Todd* (5).

After full consideration of the relevant cases on the point we are satisfied that this court will, as a rule, quash a conviction where no directions on the necessity for corroboration has been given in a case where corroboration is required as a matter of law or in practice, unless where the court, after considering the whole evidence, comes to the conclusion that there was such ample and satisfactory evidence capable of amounting to corroboration that the court does not feel there has been a miscarriage of justice.

Was there such evidence in this case? The mother of the child, Kwambuka, testified that on receiving the report of the death of the deceased she rushed to the scene of crime and there she saw the deceased lying dead with a wound on his body and the appellant standing nearby holding a blood-stained knife. Kwambuka said that she struggled with the appellant in an attempt to disarm him, but she failed and was wounded on her wrist during the encounter. The appellant also received an injury on his forehead during the struggle. When the struggle was over the appellant ran away, taking the spear with him. Another witness, Muraa (P.W. 5), also ran to the scene and near the dead body of the deceased she saw Kwambuka and the appellant struggling for a spear. She said that when the appellant (whom she identified in court) ran away with his spear she shouted "Okeyo has killed Mayaka." As a result of this alarm several people came to the scene. The evidence of Muraa was attacked by counsel for the appellant as being inconsistent in some material parts with her evidence before the committing magistrate. But on a careful examination of the record we find that her sworn evidence was consistent with her statement to the police and we think that the material difference between her testimony at the trial and at the preliminary inquiry was due, having regard to all the circumstances, to imperfect interpretation at the preliminary inquiry. According to the medical evidence of Dr. Johanna Grey, death was caused by loss of blood from damage to the vessels supplying the lung. In answer to a question from the trial judge the doctor said: "the deceased was probably sitting when the injury on his chest was inflicted. It was most likely that the injury was inflicted by a spear".

Accepting the evidence of Kwambuka, Muraa and Barnaba Omari, who said that the appellant told him soon after the killing that he had had a fight with the deceased, as well as the medical evidence, as indeed the learned judge and the assessors appeared to have done, we have come to the conclusion that there was circumstantial evidence to corroborate Magangi's evidence. We are therefore satisfied that no injustice has been done, and that this is a special case in which the proviso to r. 41 (1) of the East African Court of Appeal Rules, 1954, could be applied, despite the failure of the trial judge to give directions as to the necessity for corroboration.

The learned trial judge withdrew the question of provocation from the assessors as he might well have thought that there was not sufficient evidence to reduce the charge of murder to that of manslaughter. He dealt, however, with self-defence. The appellant himself did not rely on provocation as his defence.

It is now trite law that it is the duty of the trial judge to deal with such

alternative defences if they clearly emerge from the evidence as fit for consideration even though they are not put forward by the defence. As the Privy Council said in *Lee Chun-Chuen v. R.* (6) ([1963] A.C. at p. 229):

> "If there was some material on which a jury acting reasonably could have found manslaughter, it cannot be said with certainty that they would have found murder. It is not, of course, for the defence to make out a *prima facie* case of provocation. It is for the prosecution to prove that the killing was unprovoked. All that the defence need do is to point to material which could induce a reasonable doubt."

We think that the test to be applied when considering whether the issue of provocation should be left to the jury or assessors is that stated by Viscount Simons in *Holmes v. Director of Public Prosecutions* ([1946] A.C. at p. 597):

> "If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self control, to the degree and method and continuance of violence which produces the death it is the duty of the judge as matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (*a*) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (*b*) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict."

With this test in mind, we invited argument on that aspect of the evidence in which it was suggested that there had been a fight between the appellant and the deceased, and also that the appellant was alleged to have told one prosecution witness that he (appellant) had fought with the deceased. On behalf of the appellant, counsel argued generally that there was ample evidence on the record to justify the reduction of the charge to that of manslaughter. Respondent's counsel, on the other hand, submitted that the appellant did not raise a plea of self-defence and that the entire evidence negatives provocation. The mere fact that the appellant said he fought with his brother, counsel contended, did not raise the question of provocation.

In the trial judge's notes for the summing up there appears this sentence: "There is no suggestion of provocation". With respect to the learned trial judge we think that he erred in telling the assessors that there was no suggestion of provocation. But in our view the effect of this misdirection in withdrawing the issue of provocation from the assessors would be the same as if there had been no direction at all on that issue. There is indeed some evidence of provocation, however slight, if the suggestions made to the witnesses are believed, but whether this evidence is sufficient to amount to provocation in law is an entirely different matter. The appellant's defence amounted to saying that the evidence against him was untrue. Neither in his cautioned statement, nor in his statement to the court did the appellant say that he was provoked. There is, however, abundant evidence that the deceased who was unarmed never engaged the appellant in a fight. Moreover, the medical evidence confirms the evidence of the other witnesses that the deceased was sitting down when the appellant attacked him with the spear. The learned trial judge made no specific finding on the question of provocation in his judgment but after dealing with the evidence of the witness about the alleged struggle he said:

> "These witnesses have given evidence in a straightforward manner and I have found nothing which shows that their evidence is other than true."

On the basis that the appellant's story and suggestions of a fight were rejected by the trial court we think that there would be no adequate material to raise the issue of provocation. In *Mancini v. Director of Public Prosecutions* (8) Viscount Simon, L.C. said ([1942] A.C. at p. 12):

> "If the evidence before the jury at the end of the case does not contain material on which a reasonable man could find a verdict of manslaughter instead of murder, it is no defect in the summing-up that manslaughter is not dealt with."

Having regard to the whole evidence in this case we do not think that any court, acting reasonably, could properly have found the appellant guilty of manslaughter rather than murder.

In the result we are of the opinion that the failure of the learned judge to direct himself or the assessors specifically on corroboration, and provocation has occasioned no substantial miscarriage of justice. We would therefore dismiss this appeal accordingly.

Appeal dismissed.

For the appellant:
Zaher Ahmed
Zaher Ahmed & Co, Nairobi

For the respondent:
KC Brooks (Director of Public Prosecutions, Kenya)
The Attorney General, Kenya

Mdiu Mande alias Mnyambwa Mande v Republic
[1965] 1 EA 193 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	11 February 1965
Case Number:	126/1964
Before:	Newbold Ag V-P, Crabbe and Spry JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanganyika – Reide, J

[1] Criminal law – Evidence – Child – Unsworn evidence – Corroboration – Nature of corroboration required – Corroboration required is evidence of material particularly implicating accused with offence – Misdirections – Criminal Procedure Code (*Cap.* 20) *s.* 152 (3) (*T*).

[2] Criminal law – Evidence – Dying declaration – Corroboration – Identification of assailant in dispute – Misdirections.

Editor's Summary

The appellant was convicted of murder on the unsworn evidence of a child of tender age and a dying declaration made by the deceased. The attack on the deceased took place at night and the child testified that she recognised the appellant as the assailant by the light of a glowing piece of firewood which the appellant had plucked from the hearth and which he waived about in the room. Regarding the dying declaration the evidence was that the deceased had told a witness that it was the appellant who had wounded her; that the deceased had asked the appellant "why are you killing me?" and the appellant had denied the accusation; that the deceased had then said "If you did not kill me, let us shake hands" and the appellant shook hands; and that the deceased then said: "If you did not kill me, God knows" and died soon afterwards. On appeal the main ground of appeal was that the directions of the trial judge to the assessors as to the law relating to corroboration of the unsworn testimony of a child and as to the reliability of a dying declaration were defective. It was submitted that the

judge's notes for the summing-up disclosed the possibility that the summing-up was defective because it was inadequate and that the judge should have pointed out to the assessors that the corroboration required of the unsworn evidence of the child was evidence of a material particular implicating the appellant.

Held –

(i) the directions of the trial judge to the assessors fell short of a proper direction with regard to corroboration of the unsworn evidence of a child and the trial judge failed to explain to the assessors the need for "some other material evidence in support thereof" required by the proviso to s. 152 (3) of the Criminal Procedure Code.

(ii) to meet the requirements of s. 152 (3) ibid. it is not enough that the corroboration shows the witness to have told the truth in matters unconnected with the guilt of the accused but the corroboration should be sufficient to afford some sort of independent evidence to show that the child is speaking the truth with regard to the particular accused person whom he seeks to implicate.

(iii) a trial judge in his summing-up should tell the assessors that the corroboration required under s. 152 (3) ibid. is some "material evidence" to connect the accused with the offence charged and although the words "implicating him" are omitted from the proviso to s. 152 (3) it does not mean that the law as to corroboration in Tanganyika is different from those places where these words appear in the legislation. *Lenton Mkirila v. Republic* approved.

(iv) the trial judge failed to direct himself and the assessors on the nature of the dying declaration and having regard to the last words of the deceased the court could not exclude the possibility that up to the moment when the deceased died there was a certain amount of doubt still lingering in her mind about the identity of the appellant.

(v) the trial judge erred in accepting the evidence about the appellant's clothes and the wounds of the deceased as corroborating the unsworn evidence of the child because the corroborative evidence required is that which shows or tends to show that the story of the person whose evidence is to be corroborated is true, and that the accused committed the offence with which he is charged.

(vi) the charge was not proved with that degree of certainty required by the criminal law in a capital offence and accordingly the conviction of murder should be quashed and set aside.

Appeal allowed. Conviction quashed and sentence set aside.

Cases referred to in judgment

(1) *R. v. Sims*, [1946] 1 K.B. 531; [1946] 1 All E.R. 697.

(2) *R. v. Baskerville*, [1916] 2 K.B. 658; [1916] All E.R. Rep. 38.

(3) *Lenton Mkirila v. Republic*, [1963] E.A. 9 (T).

(4) *R. v. Goddard and Goddard* (1962), 46 Cr.App. R. 456; [1962] 3 All E.R. 582.

(5) *R. v. Mullins*, (1848), 3 Cox C.C. 526.

(6) *Washington Odindo v. R.*, (1954), 21 E.A.C.A. 392.

(7) *Mehar Singh Bansel v. R.*, [1959] E.A. 813 (C.A.).

(8) *Msaro Galime v. Republic*, [1964] E.A. 488 (C.A.).

Judgment

Crabbe JA: read the following judgment of the court:

On January 13, 1965, we allowed the appeal of the appellant, quashed his conviction for murder and set aside the sentence of death passed on him by the trial judge, and we now proceed to give our reasons.

The facts of this case are very simple, and the sole question in this appeal was whether the identity of the appellant as the assailant of the deceased was sufficiently established.

The deceased was brutally attacked at about midnight whilst she was asleep on her bed with her daughter, called Nyunge, aged about nine years, and a little baby. Nyunge was the only eye-witness of this ghastly incident, and at the trial she testified that before she and her mother retired to bed the outside door of the house had been securely closed. She said that shortly before midnight the baby woke up and asked the deceased for water, and that as the deceased was getting ready to fetch the water the assailant suddenly entered the room through a hole in the wall. The witness testified further that she recognised the appellant as the intruder by the light of a glowing piece of firewood which he plucked from the hearth, and which he waved about in the room. According to the witness, the appellant, whom she had known before, wore a black jacket, which he usually put on, and a pair of shorts. She was, however, unsure of the colour of the shorts. With the glowing piece of firewood in one hand, and a panga in the other, the appellant made a murderous attack on the deceased, and inflicted no less than eight wounds on her. The witness was horrified, and she ran out of the house and made a report to her father, who was sleeping in another house, a few yards away. There is no clear evidence of all that the witness said to her father, and at the trial she was closely cross-examined by counsel for the defence on this point. The questions and answers are as follows:

> "So before you went out the accused was seen by you to give your mother two blows only? – Yes.
>
> And when you ran out to wake up your father you told him that your mother was being cut? – Yes.
>
> That is what you exactly said, is it? – Yes.
>
> And of course then you returned with your father to see your mother? – Yes.
>
> And it is there that your mother told your father that he should listen to her carefully; she is going to tell him something? – Yes.
>
> And she mentioned the name of accused? – Yes.
>
> And somebody went to call the accused? – Yes."

It certainly did not emerge from the evidence that the witness mentioned the name of the appellant to her father. She said in her examination-in-chief, however, that she told her father "the whole story". On the arrival of the deceased's husband the deceased requested the presence of one Hamisi, an elder of the village. When Hamisi arrived, the deceased told him that it was the appellant who had wounded her. Hamisi immediately sent for the appellant. When the appellant arrived he was wearing a black jacket and the deceased was alleged to have said to him: "Why are you killing me?". The appellant denied the accusation. The deceased then said: "If you did not kill me, let us shake hands". The appellant shook hands with the deceased, and the deceased said: "If you did not kill me, God knows". The deceased soon died. There was evidence that among the Wanyaturu tribe, to which both the appellant and deceased belonged, a shaking of hands during a dispute has the force of an oath, and it is believed that the party who makes a false assertion dies. It would appear that before the arrival of the police no attempt was made by the people present to arrest the accused. However, when he was subsequently arrested and taken, together with the deceased's husband, Nyunge and the body of the deceased, to Singida Hospital, the police noticed that the black jacket which the appellant wore had what appeared to be blood stains on it. The learned judge did not attach any importance to this piece of evidence because on the way to the hospital the appellant helped to transfer the dead body from one

lorry to another; besides, there was also the possibility that the blood stains might have got on the appellant's jacket while he was talking to the dying woman. The prosecution also led evidence to show that the appellant had a motive for killing the deceased. The second witness for the prosecution (the husband of the deceased) said that about two years prior to this sad incident he had made a complaint before the local court that the appellant had said that the deceased had bewitched him. The court found that the allegation was untrue and imposed a fine on the appellant. The fifth prosecution witness, the village elder, also testified that about six months previously the deceased complained to him that the appellant had set fire to her house. He did not decide the dispute himself, but he transferred it to the local court. He had never been informed of the result.

The appellant, in his unsworn statement to the court, denied that his dispute with the deceased was only two years since; he said that on the contrary it was eight years since he had trouble with the deceased, but their quarrel had been settled and he was on amicable terms with the deceased. He bore no grudge against her. He said that whatever dispute he had with the deceased had been settled, and, finally, he denied killing the deceased, because he had no cause to.

With the leave of the court, counsel for the appellant argued only the three supplementary grounds of appeal which he had himself filed. These were in the following terms:

> "1. The direction as to the law relating to corroboration of the unsworn testimony of a child of tender years was defective.
>
> 2. The direction as to the law relating to the reliability of a dying declaration was defective.
>
> 3. The learned trial judge relied on certain evidence as corroborative of the testimony of the Nyunge Mundimi which in law was no corroboration at all."

The evidence of Nyunge was unsworn, and it has been laid down in s. 152 (3) of the Criminal Procedure Code of Tanganyika that the unsworn testimony of a child when adduced by the prosecution must be corroborated before an accused person is liable to conviction. The notes for the summing-up were, as is usual, rather sketchy, and read as follows:

> "Prosecution evidence: evidence of 1 P.W. explain need for corroboration of evidence of unsworn child – s. 152 of P.C. Need for corroboration not same as disbelief."

In arguing ground 1 of the grounds of appeal counsel for the appellant contended that these notes disclosed the possibility that the summing-up was defective because it was inadequate. Counsel submitted that the learned judge should have pointed out further to the assessors that the corroboration required was evidence of a material particular implicating the accused in the crime charged. In order to appreciate the force of counsel's criticism of what may have been stated in the summing-up, it is necessary, we think, to look at the following passage in the judgment:

> "Section 152 of the Criminal Procedure Code provides that an accused shall not be liable to be convicted upon the unsworn or unaffirmed evidence of a child of tender years unless such evidence is corroborated by other material evidence. I have been at pains to explain to the assessors that the lack of such corroboration is not the same as disbelief in the evidence so tendered: or, to put the matter another way, though a court may believe such evidence, yet because of the provisions of the section it may not convict upon it without the necessary corroboration. In this case I have no hesitation, nor had the assessors, in finding Nyunge to be a witness of truth and in accepting her evidence."

After considering the notes for summing-up, to which counsel drew attention, and the passage from the judgment which is quoted above, it appeared to us, with respect to the learned trial judge, that his directions to the assessors fell short of a proper direction with regard to corroboration of the unsworn evidence of a child. The statutory provision in the law of Tanganyika which requires corroboration of the unsworn evidence of children of tender years is found in s. 152 (3) of the Criminal Procedure Code, as amended in 1960. The section reads:

> "152 (3) Where in any criminal cause or matter any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received, though not given upon oath or affirmation, if in the opinion of the court, to be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth:
>
> Provided that where evidence received by virtue of this sub-section is given on behalf of the prosecution, the accused shall not be liable to be convicted unless such evidence is corroborated by some other material evidence in support thereof."

It is clear that the learned judge failed to explain to the assessors the meaning of the vital words "some other material evidence in support thereof" in the proviso. In our view it is not enough that the corroboration shows the witness to have told the truth in matters unconnected with the guilt of the accused. The "material evidence" required is that which is necessary to assist the prosecution to discharge the burden of proof. In *R. v. Sims* (1) Lord Goddard, C.J., said ([1946] 1 K.B. at p. 539):

> ". . . whenever there is a plea of not guilty, everything is in issue and the prosecution have to prove the whole of their case, including the identity of the accused, the nature of the act and the existence of any necessary knowledge or intent."

In our opinion, therefore, all that seems to be required under s. 152 (3) of the Criminal Procedure Code is that the corroboration should be sufficient to afford some sort of independent or unimpeachable evidence to show that the child is speaking the truth with regard to the particular accused person whom he seeks to implicate. The trial judge should tell the assessors that the corroboration required is some "material evidence" tending to connect the accused with the offence. We are aware that whereas some provisos in identical legislation in both England and other parts of East Africa – s. 38 (1) of the Children and Young Persons Act, 1933, of England, and s. 19 (1) of the Oaths and Statutory Declarations Act of Kenya – contain the words "some other material evidence in support thereof implicating him", in s. 53 (1) of the Tanganyika Criminal Procedure Code the words "implicating him" are omitted. But we think that this omission does not mean that the law as to corroboration in Tanganyika is different from those places where these words appear in the legislation. We are satisfied that in all those places where the provisos contain the words "some other material evidence in support thereof implicating him", the legislatures have merely embodied in their law the rule of practice at common law as to corroboration. For as Lord Reading, C.J., said in *R. v. Baskerville* (2) ([1916] 2 K.B. at p. 667):

> "The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute. The language of the statute, 'implicates the accused,' compendiously incorporates the test applicable at common law in the rule of practice."

We therefore find ourselves in entire agreement with the conclusions of Windham, C.J., in *Lenton Mkirila v. Republic* (3). In the present case the learned trial judge directed the assessors as to the necessity of corroboration and no more, and in our view, therefore, he erred by his failure to give the correct direction. The assessors were not lawyers, and it was, therefore, necessary to explain to them the nature of the corroborative evidence required. (See *R. v. Goddard and Goddard* (4)).

As to the second ground of appeal, the learned trial judge's notes for his summing-up to the assessors were as follows:

> "Explain law of dying declarations – exception to hearsay rule – why – nevertheless must be accepted with great caution – why was deceased in senses? Did she see assailant? Would she knowingly accuse wrong man at such a time?"

In arguing this ground of appeal counsel for the appellant submitted that though as a rule a dying declaration does not require corroboration, yet in the special circumstances of this case the learned trial judge ought to have directed the assessors on the necessity for corroboration before acting on the dying declaration by the deceased. He argued that the deceased never had any good opportunity of observing the face of her assailant due to insufficient light in the room. Counsel further contended that the nature of the declaration itself suggests that the deceased herself entertained some doubts about the identity of the appellant. We found ourselves in entire agreement with these submissions. The admissibility of a dying declaration in the Republic of Tanganyika still depends upon s. 32 (1) of the Indian Evidence Act, and a careful direction should be given by the judge as to the nature of the evidence contained in a dying declaration and as to the caution with which it should be received. With respect to the learned trial judge, it did not appear to us that he directed himself and the assessors on the nature of the dying declaration. However, the learned judge and the two assessors all thought that the dying declaration was true; but since evaluation of this evidence did not depend upon the credibility of witnesses who gave oral evidence at the trial, we thought that we were in as good a position as the learned trial judge to assess the value of the statement ourselves. It was difficult for us to discover the reasons that led the assessors to believe that the dying declaration was true, but we could find no reference in the judge's directions to the following vital part of the dying declaration: "If you did not kill me, God knows." After a very careful and anxious consideration of this sentence, we could not exclude the possibility that up to the moment when the deceased died there was a certain amount of doubt still lingering in her mind. It would also appear that those who were present and heard the dying declaration were not entirely convinced by it, because before the arrival of the police no-one made any attempt, as is usual in these circumstances, to arrest the appellant. So far as the learned judge was concerned, he expressed his unshakable belief in the truth of the dying declaration in the following passage:

> "I find it quite impossible to believe that a woman in extremis who had sustained such dreadful injuries at the hands of some person would name some other innocent person as her assailant because of some relatively minor grounds of dislike, and fail to name the real criminal."

We agree that normally the declaration of a person in extremis is entitled to great weight, but provided the evidence shows that he or she had ample opportunity to identify the assailant. In this connection we would refer to the following instructive passage from Taylor on Evidence (12th Edn.), Vol. I, pp. 462–463, para. 722:

> "Though these declarations, when deliberately made under a solemn sense of impending death, and concerning circumstances wherein the deceased is

> not likely to be mistaken, are entitled to great weight, if precisely identified, it should always be recollected that the accused has not the power of cross-examination, a power quite as essential to the eliciting of the truth as the obligation of an oath can be, and that, where a witness has not a deep sense of accountability to his Maker, feelings of anger or revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may affect the accuracy of his statements, and give a false colouring to the whole transaction. Moreover, the particulars of the violence to which the deceased has spoken are likely to have occurred in circumstances of confusion and surprise, calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of persons and to the omission of facts essentially important to the completeness and truth of the narrative (*R. v. Ashton* (1837) 2 Lewin C.C. 147. See also Mr. Evans's observations on the great caution to be observed in the use of this kind of evidence in 2 Poth. Obl. 255 (293), 2 St. Ev. 367, and 1 Ph. Ev. 292.)."

The attack in this case took place at night in a room lit by a feeble light, and in our view, where the identification of the assailant was a narrow issue between the prosecution and the appellant, a particular caution must be exercised and the evidence for the prosecution must be so cogent as to exclude any possibility of a doubt. With all due respect to the learned judge, we were unable to find in this case evidence of such cogency, and there is nothing in the summing-up as to the reliability of the dying declaration.

Counsel's argument on the third ground of appeal was a criticism of the following passage from the judgment:

> "The provisions of s. 152 do not, of course, require corroboration of every part of Nyunge's evidence, but only corroboration by 'some other material evidence' in support thereof. That corroboration is to be found in the evidence of other witnesses as to the clothes the accused was found wearing, the nature of the deceased's wounds, and in particular the deceased's dying declaration in which she named the accused as her slayer."

With respect to the learned judge, we were satisfied that he erred in accepting the evidence about the appellant's clothes and the wounds of the deceased as corroborating Nyunge's evidence. Corroboration does not mean that there should be merely independent evidence of that which the person whose evidence is to be corroborated relates. The corroborative evidence required is that which shows or tends to show that the story of the person whose evidence is to be corroborated is true, and that the accused committed the offence with which he is charged. (See *Lenton Mkirila v. Republic* (3), *R. v. Mullins* (5) ([1848] 3 Cox C.C. at p. 531); *R. v. Baskerville* (2) ([1916] 2 K.B. at pp. 665, 667.) There was no dispute that the appellant wore a black jacket; indeed, the evidence showed that he always wore a black jacket. Neither was there any dispute that the deceased was wounded. The real and only issue at the trial was the identity of the person who attacked the deceased, and the corroboration required was corroboration of the question in issue, that is, identification of the appellant. The only evidence in this case which could amount to corroboration was the dying declaration, but as we have already pointed out, that evidence was not quite satisfactory and required itself, as a matter of prudence, to be corroborated.

In our view, the evidence as a whole was unsatisfactory. It would appear that both Nyunge and her mother, the deceased, had very little opportunity to observe fully the assailant who entered their room at that very late hour of night. We also thought that the failure of Nyunge to mention the name of the appellant to her father detracted from her credibility. In our view, not only were there factors which made it unsafe to rely on the story of Nyunge, even

though corroborated, but there were also circumstances which made the dying declaration dangerous to rely on without corroboration.

There is another serious irregularity on which we must comment. The learned judge put four specific questions to the assessors: whether they thought Nyunge a truthful witness; whether they thought the deceased's husband a truthful witness; whether they thought the dying declaration true and whether they thought the accused guilty of murder or manslaughter.

In *Washington Odindo v. R.* (6) the judgment of this court ended with the following words:

> "It has also been laid down by this court that where the opinion of the assessors is taken in the form of answers to specific questions, they must also be asked to state their opinion on the case as a whole and on the general issue as to the guilt or innocence of the accused."

That ruling has been followed by this court in numerous cases, including *Mehar Singh Bansel v. R.* (7) and *Msaro Galime v. Republic* (8).

Furthermore, the requirement is now a statutory one, s. 283 (1) of the Criminal Procedure Code of Tanganyika (which relates to the giving of their opinions by the assessors) having been amended by the Criminal Procedure Code (Amendment) Ordinance (Cap. 24), 1960 to include the words "as to the case generally". In the present case, it would have been particularly valuable, assuming the assessors to be Wanyaturu, to know what significance they attached to the death bed interview between the deceased and the accused.

The failure to take the opinions of the assessors on the case generally is not necessarily fatal to a conviction, but can only be regarded as curable when the evidence is so strong that it is impossible to believe that a reasonable court properly advised could have reached any other decision.

In this appeal the court had the benefit of the assistance of the State Attorney who considered that he could not support the convictions, and we found ourselves in entire agreement with him.

In this case we were satisfied that the charge was not proved with that degree of certainty required by the criminal law in a capital offence, and it was for this reason that we allowed the appeal and quashed the conviction and set aside the sentence passed upon the appellant.

Appeal allowed. Conviction quashed and sentence set aside.

For the appellant:
SB Bali-Sharma
Bali-Sharma & Co, Nairobi

For the respondent:
MG Konstam (State Attorney, Tanganyika)
The Director of Public Prosecutions, Tanganyika

Rasikial Jamnadas Davda v Republic
[1965] 1 EA 201 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 11 February 1965

Case Number: 127/1965

Before: Newbold Ag V-P, Crabbe and Spry JJA

Sourced by: LawAfrica

Appeal from: High Court of Tanganyika – Weston, J

[1] Criminal law – Evidence – Accomplice – Corruption – Intermediary corruptly solicits for money for third party – Money paid by person solicited to third party – Both intermediary and third party charged – Whether person solicited an accomplice.

[2] Minimum Sentences Act, 1963 (*T*) *– Corporal punishment – Male persons above* 45 *years of age excused from corporal punishment – Whether court must hear evidence as to age before passing sentence.*

[3] Criminal law – Practice – Minimum Sentences Act, 1963 (*T*) *– Corporal punishment – Male persons above* 45 *years of age excused from corporal punishment – Whether court must hear evidence as to age before passing sentence.*

Editor's Summary

The appellant was tried jointly with one Chudasama, a Bankruptcy Officer in the Tanganyika Government, on five different counts of corrupt transactions with an agent contrary to s. 3 (1) of the Prevention of Corruption Ordinance (Cap. 400) (T). On two counts he was tried alone with corruptly soliciting certain sums of money as an inducement to Chudasama to show favour to one Fatehali, a bankrupt, in a bankruptcy cause, and on the third count he was charged jointly with Chudasama and one other person, with corruptly obtaining from the said Fatehali the sum of Shs. 1500/- for a similar purpose. On May 4, 1964, Ramadhan, the brother of Fatehali, received a call from the appellant and subsequently at a meeting on May 5, he advised Fatehali to see Chudasama after he had inquired whether he (Fatehali) had any books of account and received a negative reply. Immediately thereafter the appellant asked Fatehali whether he could afford to pay anything to which Fatehali replied "Don't worry, we will see". The appellant then put Fatehali in contact with Chudasama who interviewed him and took a statement relating to his affairs in bankruptcy. On the same afternoon the appellant took Fatehali for a ride in his car and asked him if he could pay Shs. 6,000/- and in answer to Fatehali's request for the lowest price, replied "2,000/-", but the appellant insisted on a cash payment. The following day Ramadhan consulted his advocate's clerk and got in touch with the Official Receiver, as a result of which a police trap was laid. On May 11, Ramadhan telephoned the appellant and made arrangements to meet him at his (appellant's) office where he was to meet Chudasama and make the payment of Shs. 2,000/-. Chudasama did not attend the meeting so the appellant suggested to the two brothers that they should come again the same afternoon and pay him the money and that he would then take them to Chudasama, but on the advice of the police it was decided that Fatehali should go direct to Chudasama and make payment to him. In pursuance of this arrangement, Fatehali went to Chudasama's office and after some conversation regarding the amount to be paid, made a payment of Shs. 1,500/- to him and promised to pay the balance later. A short while later Chudasama was arrested with Shs. 1,500/- in his sock. He explained that he had been given the Shs. 1,500/- by Fatehali which he had at first refused but later accepted with the intention

of taking Fatehali to the Official Receiver and reporting the whole matter. The case was first heard in the District Court of Dar-es-Salaam and the appellant was convicted on all

the three counts and sentenced to two years' imprisonment on each count together with 24 strokes of corporal punishment by virtue of the Minimum Sentences Act, 1963 (T). Chudasama who was also convicted and sentenced did not appeal but the appellant did and his appeal to the High Court was dismissed. He appealed to the Court of Appeal on three grounds, namely, that the courts below had erred (*a*) in holding that Fatehali was not an accomplice in relation to counts 1 and 2, (*b*) in holding that the appellant obtained any money as charged in count 3 and (*c*) that there was no evidence before the trial court nor any finding by it as to the age of the appellant. It was argued by the advocate for the appellant that the trial magistrate did not hear evidence of the appellant's age though it was not in dispute that in his address to the court at the trial the appellant's advocate stated in the presence of the appellant that his age was 43 years. At the hearing the following issue formed the first ground of appeal: "The first appellate court misdirected itself with regard to the true scope and nature of its functions, and failed to consider and make its findings upon a number of issues in the case". Counsel for the Republic raised a preliminary objection to the first ground of appeal because it did not state the particulars of the misdirection alleged.

Held –

(i) the first ground of appeal was too vague and the objection would be upheld;

(ii) there was ample evidence to support the finding of the trial magistrate that the person solicited and his brother were not accomplices;

(iii) it made no difference whether the money was paid to one accused rather than to the other in accordance with the pre-arranged plan, or whether the mode of payment was altered by the parties to the arrangement or by a third party; once it was proved that the appellant and Chudasama were acting in concert to take a bribe from Fatehali, the obtaining of the bribe by one of them in furtherance of the common design was an obtaining by the other;

(iv) the court was satisfied that the appellant by his conduct admitted the correctness of the statement as to his age made by his counsel at the trial and that there was no necessity for further proof though normally it was desirable that any such admission should be made by the accused himself.

Appeal dismissed.

Cases referred to in judgment

(1) *Davies v. Director of Public Prosecutions*, [1954] 2 W.L.R. 343; [1954] 1 All E.R. 507.

(2) *R. v. Lomas* (1913), 9 Cr.App. R. 220.

(3) *R. v. Charles* (1892), 17 Cox. C.C. 499.

(4) *R. v. Gooding* (1921), 16 Cr.App. R. 30.

(5) *R. v. Ashman* (1954), Crim. L.R. 382.

(6) *R. v. Gordon*, [1963] 3 All E.R. 175.

(7) *R. v. Recorder of Grimsby, Ex parte Purser*, [1951] 2 All E.R. 889.

Judgment

Crabbe JA: read the following judgment of the court:

This is a second appeal brought under the provisions of s. 8 (4) of the Appellate Jurisdiction Ordinance, 1961, of Tanganyika (Ordinance No. 55 of 1961) from a judgment of the High Court, which dismissed the appellant's appeal from his conviction by the Senior Resident Magistrate, sitting in the District Court of Dar-es-Salaam.

The appellant was tried jointly with one Karsan Sinh Pratapsinh Chudasama (hereinafter called Chudasama) on five different counts. The appellant alone was tried on counts 1 and 2, and jointly with Chudasama on count 3. Chudasama was alone tried on counts 4 and 5. The counts and their particulars that are relevant in this appeal – 1, 2 and 3 – were stated as follows:

"FIRST COUNT

Statement of Offence

Corrupt Transaction with an Agent, contrary to s. 3 (1) of the Prevention of Corruption Ordinance, Cap. 400.

Particulars of Offence

Rasiklal Jamnadas Davda, on or about the 5th day of May, 1964, in Dar-es-Salaam, corruptly solicited the sum of Shs. 6,000/- from one Fatehali Kurmally for one Karsansinh Pratapsinh Chudasama, a bankruptcy officer employed in the Administrator-General's Department of the Tanganyika Government and therefore an agent for the purposes of the Ordinance, as an inducement to the said Karsaninh Pratapsinh Chudasama to do something in relation to his principal's affairs or business, namely to show favour to the said Fatehali Kurmally in the matter of a bankruptcy cause.

SECOND COUNT

Statement of Offence

Corrupt Transaction with an Agent, contrary to s. 3 (1) of the Prevention of Corruption Ordinance, Cap. 400.

Particulars of Offence

Rasiklal Jamnadas Davda, on or about the 5th day of May, 1964, in Dar-es-Salaam, corruptly solicited the sum of Shs. 2,000/- from one Fatehali Kurmally for one Karsansinh Pratapsinh Chudasama, a bankruptcy officer employed in the Administrator-General's Department of the Tanganyika Government and therefore an agent for the purposes of the Ordinance, as an inducement to the said Karsansinh Pratapsinh Chudasama to do something in relation to his principal's affairs or business, namely to show favour to the said Fatehali Kurmally in the matter of a bankruptcy cause.

THIRD COUNT

Statement of Offence

Corrupt Transaction with an Agent, contrary to s. 3 (1) of the Prevention of Corruption Ordinance, Cap. 400.

Particulars of Offence

Karsansinh Pratapsinh Chudasama and Rasiklal Jamnadas Davda, on or about the 11th day of May, 1964, in Dar-es-Salaam, in conjunction with one another, corruptly obtained from one Fatehali Kurmally the sum of Shs. 1,500/- as an inducement to the said Karsansinh Pratapsinh Chudasama, a bankruptcy officer employed in the Administrator-General's Department of the Tanganyika Government and therefore an agent for the purposes of the Ordinance, to do something in relation to his principal's affairs or business, namely to show favour to the said Fatehali Kurmally in the matter of a bankruptcy cause."

The appellant was convicted on all the three counts and sentenced to two years' imprisonment on each count, the terms to run concurrently, which sentence carried with it 24 strokes of corporal punishment by virtue of the Minimum Sentences Act, 1963. Chudasama, who was also convicted and sentenced on the third count, has not appealed.

Chudasama was the Bankruptcy Officer in the Office of the Administrator-General's Department of the Tanganyika Government, and the appellant was at the material time a court broker in Dar-es-Salaam. The appellant's duties included getting in the assets and books of account of bankrupts, after Receiving Orders were made, upon instructions from the Official Receiver (the Administrator-General).

The principal prosecution witness was one Fatehali Kurmally, an Indian merchant (hereinafter referred to as Fatehali), who arrived in Dar-es-Salaam from the Congo, where he owed considerable sums of money to two oil companies. One of these companies, Ozo Limited, traced the appellant to Dar-es-Salaam and filed a petition for his bankruptcy. As a result, a Receiving Order in bankruptcy was made against him on April 8, 1964. In Dar-es-Salaam Fatehali lived with his brother, Ramadhan Kurmally, who was the second prosecution witness at the trial.

The case for the prosecution was supported by the following facts which are narrated in the judgment of the magistrate:

> "On 4/5/64 P.W. 2, the brother of the bankrupt, received a telephone call from a man calling himself Davda who made an appointment to see the bankrupt on 5/5/64 at 8.30 a.m. at the brother's office in Zanaki Road Dar-es-Salaam. This appointment was kept by Davda with the bankrupt and his brother. Davda told the bankrupt, Fatehali, that he should see Chudasama, after asking him if he had any books of account and receiving a negative reply. Fatehali replied that he did not know him. Davda said 'You don't have to worry'. Fatehali suggested that Davda telephone Chudasama. Davda then made a telephone call saying 'Mr. Patel has now arrived from his farm. He has no books of account with him. Whatever statement you wish to take from Mr. Patel, please take it rough'. Davda then left the office but after a moment returned and, taking Fatehali outside, said 'Can you afford to pay anything?' Fatehali replied 'Don't worry. We will see'. He asked for and obtained from Davda a chit addressed to Chudasama which he did not read. Thereafter Fatehali went to the Official Receiver's office and saw Chudasama, asking for him by name. He handed over Davda's chit which Chudasama read and put in the wastepaper basket. Chudasama asked him if he had any books of account and Fatehali told him 'No'. This conversation was in an office shared by Chudasama with three other men.
>
> Chudasama then led Fatehali to a room where they were alone. He said 'You don't have to worry. I will introduce you to my assistant'. Then he introduced Fatehali to one Samji, an assistant in the Bankruptcy Section. Chudasama then prepared a statement in the name of Fatehali as follows '. . . I have no business in my name in Tanganyika. I have no other assets, books of account or any business records'. He told Fatehali to sign it and Fatehali did so, knowing it was a false statement, as he owned shares in a Tanganyika Company called River Farm Limited. Then Fatehali returned to his brother's office. At about 2.45 p.m. Davda came back to the office and took Fatehali for a half hour ride in his car. During the drive Davda asked him how much he could afford, asked him 'Can you pay 6,000/-?', and in answer to Fatehali's request for the lowest price, replied '2,000/-'. Davda insisted on a cash payment. In re-examination, Fatehali told the court that during this interview Davda told him Chudasama was Official Receiver and his post was very high, and that Fatehali could get a quick discharge from bankruptcy. Davda returned Fatehali to his brother's office with an admonition to think the matter over and to consult his brother. Fatehali told his brother what happened but, apparently, at that stage he omitted mentioning the reduced price of Shs. 2,000/-. Fatehali then returned to the

farm he occupied near Dar-es-Salaam and thence the brother Ramadhan temporarily dominates the prosecution case. He says he thought the matter over and on 6/5/64 rang his advocate, Mr. Lockhart-Smith, who was not available. His clerk Mr. Kassamali who was called as a witness, was given the story and advised on it. A Mr. Armitage, a collector of Income Tax was also consulted by Ramadhan on 7/5/64 and he arranged a meeting between Ramadhan and Mr. Moore, the Official Receiver in Bankruptcy. On 7/5/64 a further meeting occurred with Mr. Moore at which Fatehali was present with Senior Superintendent Ijumba of the C.I.D. who had been informed of the allegations by Mr. Moore. It was about this time, Ramadhan says, that he first heard mention of a figure of Shs. 2,000/- from Fatehali. It was agreed that a trap be laid and to that end Ramadhan who had been negotiating with Davda in the meantime, rang Davda on 9/5/64 and promised to pay Shs. 2,000/-.

On 11/5/64 in the morning he again rang Davda and made an appointment at Davda's auction premises to meet Chudasama and to make the payment. The police trap was prepared, Mr. Ijumba supplied the Shs. 2000/- in Shs. 100/- notes, but it was not sprung because Chudasama did not keep the appointment. Instead at Davda's City Auction Mart Davda told Fatehali and Ramadhan that they were to come and pay the money to him in the afternoon and then he would introduce them to Chudasama. He added that Chudasama would not accept the money in their presence but he (Davda) would speak to Chudasama in such a way that he would know the money was paid. They left and returned to police headquarters where at Mr. Ijumba's suggestion it was agreed that Fatehali go direct to Chudasama and offer him the money. Ramadhan handed Fatehali the Shs. 2,000/- and advised him to bargain to reduce the price. Fatehali went to the Official Receiver's office at about 1.15 p.m. Ramadhan waited outside for him. Fatehali had Shs. 1,500/- in one pocket and Shs. 500/- in the other. He asked Chudasama to take his statement now as he lived far away. Chudasama, he said, appeared suspicious and made him sit down and wait 5–10 minutes, before calling for his file. Then he took him into a separate room where they were alone. Fatehali told him that Davda suggested he pay him Shs. 2,000/- and that he only had Shs. 1,500/-. Chudasama asked when the balance would be paid. Fatehali told him not to worry and that he would pay the balance in a month or two when his matter was finished. Chudasama said 'all right. Give me that money'. Fatehali pointed out that the door was open and that they were being watched. Chudasama told him to give it to him under the table and he did so. Chudasama apparently put the money in his sock. Then Chudasama observed that it was good that Fatehali had paid him direct because if Fatehali had paid it to Davda, he (Chudasama) would not have got even 50 per cent of it. He told Fatehali he should not go and see Davda that afternoon.

He commenced taking a statement from Fatehali and continued until about 2.15 p.m. During this time Chudasama left him once for 15 minutes and once for 10 minutes. At about 2.20 to 2.25 p.m. Chudasama told him he would recall him to finish his statement. Fatehali ran to a nearby restaurant and rang Mr. Ijumba at his office and Mr. Moore in his office to advise them of the payment.

Mr. Moore had seen Chudasama with Fatehali in the interviewing room through the half open door at 2.5 p.m. The office was due to close at 2.30 p.m. and at 2.29 p.m. he said Fatehali telephoned him and told him Chudasama had the money. Meanwhile Chudasama had collected his flask and lunch box, reminded his fellow officer, Mr. Mahajani, that it was closing time and accompanied him down the stairs leading out of the building. When

they were half way down, Mr. Moore opened his office door and called Chudasama back on the pretext of discussing some office problem. Mr. Mahajani waited outside and at this time the police party led by Mr. Ijumba and Mr. Liddle arrived at the office and arrested Mr. Mahajani by mistake. They took him into Mr. Moore's office. Mr. Ijumba saying he was a police officer and wished to search him. On hearing this Chudasama edged out of the room and ran down the stairs. The mistake was realised and Mr. Ijumba chased him and caught him when he fell on the stairs. Chudasama was brought back. Mr. Ijumba asked him if he had any money and Chudasama produced the Shs. 1,500/- from his sock. He said to Mr. Ijumba that he was about to tell his boss about 'that'. He was searched further as the police did not realise Shs. 500/- had been retained by Fatehali. He later phoned the police at Mr. Moore's office and said he still had the Shs. 500/-. The police had kept a list of serial numbers of the notes given to Ramadhan and the notes produced by Chudasama were among those on the list retained by the police.

Chudasama was taken by the police to the Central Police Station where he was cautioned and made a statement to Mr. Ijumba. He explained that he had been offered the Shs. 1,500/- by Fatehali, bad refused it, but because of his insistence finally accepted it with the intention of taking Fatehali to Mr. Moore and reporting the whole matter. He did not get the opportunity as Mr. Moore's door was closed and Fatehali had left. He began to go downstairs when Mr. Moore called him back and asked him about a company matter and he never got the opportunity to mention the matter before the police arrived. When the police came he had gone out to call the rest of the staff. The accused 2, Davda, was arrested on 9/6/64. He was cautioned and said he had nothing to say except that he was entirely innocent."

In this appeal counsel for the appellant, argued the following three grounds of appeal:

"2. The courts below erred in law in holding that Fatehali Kurmally was not an accomplice in relation to the offences which were the subject of counts 1 and 2 of the charge.

3. The courts below erred in law in holding that the appellant obtained any money as charged in count 3 or at all.

4. There was no evidence before the trial Court nor any finding by it as to the age of the appellant."

The grounds of appeal filed on behalf of the appellant originally contained one stated in these terms:

"1. The first appellate court misdirected itself with regard to the true scope and nature of its functions, and failed to consider and make its findings upon a number of issues in the case."

Counsel for the Republic raised at the outset a preliminary objection to this ground of appeal and argued that he had no idea what points counsel for the appellant wished to argue. He submitted that if the trial court erred on a particular point, that point must be specified, because he was entitled to know. Counsel for the appellant said that he accepted the duty to particularize the points he wished to urge on this ground of appeal, but he contended that there was no need for him to state his arguments in support of a ground of appeal. He submitted that this particular ground of appeal was sufficiently clear and that there was no difficulty in understanding it. With respect to counsel for the appellant we found this ground of appeal to have been drawn with such vagueness that we were impelled to uphold the objection taken by counsel for the Republic, and we subsequently refused an application for adjournment to

afford counsel an opportunity to redraft this ground of appeal. We would wish once again to draw attention to Practice Note No. 8 of 1955 which is reported in 22 E.A.C.A. at p. 544 and which reads as follows:

> "(8) *Eastern African Court of Appeal Rules*, 1954. – Rule 34 (2). Memoranda of appeal in criminal matters must particularize the matters complained of. Where an appellant is represented by counsel, he will not be allowed to argue any point under a mere general ground of appeal, such as, 'The conviction was bad in law' or 'The conviction was against the weight of evidence'. In particular, details must be given of any alleged misdirection."

This court has often emphasized that if misdirection is complained of, it must be stated whether the alleged misdirection is one of law or fact, and particulars of it must be set out. If the misdirection complained of is an omission, it must be clearly stated what is alleged to have been omitted. In each case full particulars must be given. It is asking too much to expect the court to search through the summing-up and the mass of evidence in order to discover what the misdirection really is. Counsel for the prosecution is entitled to know beforehand what case he is to meet. We hope that in the future Practice Note No. 8 of 1955 will be honoured more in the observance than in the breach.

Counsel for the appellants' main argument on the first ground was that Fatehali was an accomplice and that his evidence required corroboration. He submitted that there was no such corroborative evidence, with the result that the failure of the magistrate to warn himself of the danger of convicting the appellant on Fatehali's evidence was fatal to his conviction on counts 1 and 2. We think that the question whether Fatehali was an accomplice can shortly be determined by reference to the decision in the well-known case of *Davies v. D.P.P.* (1) which has been applied by this court in numerous cases ever since it was decided. In that case the House of Lords defined the word "accomplice", and in the opinion of Lord Simonds, L.C., the natural and primary meaning of the term covers witnesses called for the prosecution who are "participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies), or persons committing, procuring or aiding and abetting (in the case of misdemeanours)". To this category, the Lord Chancellor added two further categories, receivers giving evidence at the trial of those alleged to have stolen the goods received by them, and witnesses whose evidence is admitted to prove the commission by the accused of crimes of an identical type on other occasions.

Thus, to be an accomplice in the present case, Fatehali must be brought within the first category enumerated by Lord Simonds, i.e. he had to be an accomplice to the crime of soliciting, with which the appellant was charged.

Having defined the term "accomplice", the Lord Chancellor posed the question, who is to decide or how is it to be decided, whether a particular witness was "a particeps criminis"? He answered the question thus ([1954] 2 W.L.R. at p. 353):

> "In many or most cases this question answers itself, or, to be more exact is answered by the witness in question himself, by confessing to participation, by pleading guilty to it, or by being convicted of it. But it is indisputable that there are witnesses outside these straight-forward categories, in respect of whom the answer has to be sought elsewhere. The witnesses concerned may never have confessed, or may never have been arraigned or put on trial, in respect of the crime involved. Such cases fall into two classes."

It is plain that Fatehali is "outside these straightforward categories".

The Lord Chancellor continues:

“In the first, the judge can properly rule that there is no evidence that the witness was, what I will, for short, call a participant. The present case, in my

> view, happens to fall within this class, and can be decided on that narrow ground. But there are other cases within this field in which there is evidence on which a reasonable jury could find that a witness was a 'participant'. In such a case the issue of 'accomplice vel non' is for the jury's decision: and a judge should direct them that if they consider on the evidence that the witness was an accomplice, it is dangerous for them to act on his evidence unless corroborated: though it is competent for them to do so if, after that warning, they still think fit to do so."

It was conceded by counsel for the appellant that in this case there was evidence which if believed could justify the trial magistrate in holding that Fatehali was not an accomplice. His only complaint was that the learned trial magistrate made no such finding. Counsel for the appellant drew attention constantly to a passage in the judgment of the first appellate court in which the learned judge said:

> "The learned magistrate was satisfied that Fatehali at no time intended to be a party to a corrupt transaction by paying Davda anything . . ."

Counsel for the appellant contended that the learned magistrate made no such finding and submitted that that was a grave misdirection on the issue whether Fatehali was an accomplice on May 5, 1964. Another passage in the judge's judgment which appellant's counsel criticised was the one in which the judge said:

> "Certainly there was evidence – indeed, not a little evidence – on which such a finding could be made."

He submitted, in effect, that there was no justification for such an observation since it was based on a passage in the learned magistrate's judgment in which he was commenting on the relation of Fatehali and his brother to the events of May 11, 1964. With regard to the first passage, we think that counsel for the appellants' contention was right, but what the learned judge must have meant was that the learned magistrate was satisfied that Fatehali was never an accomplice on May 5, or at any subsequent date. Part of Fatehali's evidence which the learned magistrate believed was as follows: "From the beginning I had planned to implicate everyone". In his judgment the learned magistrate said:

> "I am persuaded by the authorities quoted by Mr. Troup that neither of the brothers be regarded as accomplices."

Though this finding is not as clear as one would wish, it cannot be said that the learned magistrate applied the authorities in vacuo. He must have applied them to the facts of the case, for earlier in his judgment he said:

> "Of prime consideration in this case, is whether the first witness Fatehali and his brother Ramadhan should be believed."

The learned magistrate accepted their evidence, and applying the law he came to the conclusion that they were not accomplices. The second passage to which counsel for the appellant drew our attention followed a quotation in which the learned magistrate said:

> "In these circumstances I cannot see that the brothers or either of them can be treated as accomplices so as to have their evidence viewed with that special suspicion reserved for witnesses of the accomplice calibre."

This quotation, when put in its proper context, expresses the conclusion arrived at by the learned magistrate after considering not only the events and conduct of Fatehali on May 5, but also his subsequent conduct after the offence of soliciting had been committed by the appellant. We agree with the learned judge that there was ample evidence to support his finding. It is clear that once it is established that there was some competent evidence to support a finding of

fact, it is not open to this court on a second appeal to go into the question of the sufficiency of that evidence or the reasonableness of the finding.

We were addressed at some length on the question whether the solicitee of the crime of corruption could be held to be an accomplice. Counsel for the appellant submitted that Fatehali was well aware of the purpose of the car ride with the appellant and was anxious to complete details of the bargain. Therefore, he submitted further, he was an accomplice. Counsel for the Republic also submitted that soliciting, being an invitation to partake in a crime, the person solicited cannot be a party to it because he would not know of it until the soliciting was made. By the time he is aware, the soliciting is made. We cannot subscribe to so wide a proposition. We think there may well be circumstances in which a person who has been solicited may be found to have been an accessory to the solicitation. But, in our view, a person is not an accomplice unless he was a participant in the crime. We think mere knowledge that the principal intends to commit crime does not constitute an accessory before the fact (*R. v. Lomas* (2)). The mind of the person aiding must be looked into in order to determine his purpose or motive for encouraging the crime. This is a question of fact for the trial court. In his evidence, Fatehali said:

> "I wanted to trap them so I gave a post-dated cheque for Shs. 200/- to Samji to trap Samji. It was never presented as date was not due. I did not report this transaction to Ijumba. From the very beginning I had planned to implicate everyone."

Fatehali also offered to pay the appellant a cheque for Shs. 1,000/-, but this was refused. The learned magistrate must have accepted Fatehali's evidence because he found him an "honest, truthful" witness. The judge of the first appellate court found that the learned magistrate drew the correct inference from the evidence that Fatehali was merely temporizing in order to get evidence to implicate the appellant. Counsel for the appellant contended that the magistrate made no such inference. In our view, in as much as the learned judge correctly directed himself on the point, and having done so, found on competent evidence that Fatehali was not an accomplice, it would not be right for this court to take a contrary view. The first ground accordingly fails.

In support of the second ground of appeal, counsel for the appellant argued that there was both in the District Court and the High Court a misconception of the liability of the appellant for acts done by Chudasama about which he had no knowledge and which he would have disapproved of. He submitted that the appellant was not a party to the obtaining, and that the event of May 5 was unrelated to that of May 11. It is true that Fatehali paid the bribe to Chudasama on the instructions of the police. There is also the clear evidence that the appellant had told Fatehali that the bribe was to be paid to him directly and not to Chudasama. But both the trial court and the first appellate court held that the appellant and Chudasama were united in one common design. In our opinion, it makes no difference whether the money was paid to one accused rather than the other in accordance with the prearranged plan, or whether the mode of payment was altered by the parties to the arrangement or by a third party. Once it is proved that the appellant and Chudasama were acting in concert for a combined purpose to take bribe from Fatehali, the obtaining of the bribe by one of them in furtherance of the common design was an obtaining by the other. It is irrelevant whether one confederate knew about the time or mode of payment; so long as the obtaining was within the scope of the concerted arrangement, his criminality would be no less than the party who actually obtained the bribe. (See *R. v. Charles* (3)). We think that the second ground of appeal also fails.

As regards the third ground of appeal, we think that there is no merit in it whatsoever. Under s. 4 of the Minimum Sentences Act, 1963, any person who

is convicted of an offence which is listed in the schedule to the act, shall be sentenced to imprisonment for a term specified in sub-s. 2 of that section. The relevant sub-sections of s. 5 of the act read as follows:

> "(1) Subject to the provisions of this section, where any person is convicted of a scheduled offence and sentenced to imprisonment he shall, unless the court orders him to undergo a greater number of strokes, undergo twenty-four strokes of corporal punishment.
>
> (2) In any case where a person is convicted of an offence contained in Part I of the Schedule hereto and:
>
> (*a*) the person so convicted is a first offender; and
>
> (*b*) either:
>
> (i) in cases where property has been obtained by the offender, or he has attempted to obtain property, in committing the offence, the value of the property so obtained or, in the case of an attempt, which would have been so obtained if the offence had been completed, does not-or would not, in the opinion of the court, exceed one hundred shillings; or
>
> (ii) in cases falling under subsection (2) of section 3 of the Prevention of Corruption Ordinance, the value of the consideration given, provided or offered does not, in the opinion of the court, exceed one hundred shillings; and
>
> (*c*) there are special circumstances in the case (which shall be recorded by the court), the court may order that, in lieu of the imprisonment and corporal punishment otherwise imposed by this Act, such person shall undergo either ten strokes of corporal punishment or such term of imprisonment as may appear to the court to meet the requirements of the case:
>
> Provided that where such person is over the age of forty-five years or is a female the court shall not order the imposition of corporal punishment but shall sentence such person to such term of imprisonment as may appear to the court to meet the requirements of the case."

The main question that we have to decide is whether, having regard to the proviso, the trial court, before sentencing an accused person to corporal punishment, must first hear evidence of his age. We can find nothing to that effect in the act. We think, however, that where the age of an accused is in doubt, due to illiteracy or for some other reason which the trial court considers sufficient, it is desirable that the age of the accused should be proved by evidence. In this case before the magistrate passed sentence on the appellant, his counsel addressed the court on sentence and said: "My client is 43 years of age . . .". This statement, in the particular circumstances, must have been made with the provisions of the Minimum Sentences Art, 1963, in view and was not denied by the accused, and it can safely be assumed that counsel got this information from the accused himself. When we asked counsel for the appellant in this appeal to tell us whether he had any evidence of the age of the appellant, his reply was: "I have no evidence available at this stage". Even at this late stage the appellant was unable to contradict his counsel's statement at the trial. We are satisfied that the appellant, by his conduct, admitted the correctness of the statement made by his counsel at the trial and that there was no necessity for proof of his age; though normally we think it desirable that any such admission should be made by the accused himself. There are circumstances in which facts which are admitted need not be proved, and in criminal cases proof is dispensed with in a plea of guilty, or an admission of previous convictions, or in appeals uncontested by the prosecution where the appellant seeks to adduce fresh evidence (*R. v. Gooding* (4); *R. v. Ashman* (5); *R. v. Gordon* (6). In *R. v. Recorder of Grimsby, Ex parte Purser* (7)), it was held that where an accused person

admitted his age and the court was satisfied that he was telling the truth, there was no necessity to hear formal evidence on the matter. Lord Goddard, C.J., said ([1951] 2 All E.R. at p. 891):

> "The first point made in this case was that the committal was bad because there had been no evidence before the justices of the age of the accused. The accused admitted that his age was seventeen. What is the necessity of proving that statement if the justices, having before them a person who appears to be about seventeen, hear him say that he is seventeen? He is admitting he is over sixteen and that he is under twenty-one. If in any case the justices were not satisfied, it would be right that they should hear evidence, but if, using ordinary observation and common sense, and having heard an accused person state his age, the justices come to the conclusion that he has told them the truth, I do not see the least necessity for evidence on the matter to be called. If an accused person can admit that he is guilty of the offence, I cannot see why he cannot admit that he is seventeen years of age."

In this case the magistrate, who saw the appellant, was satisfied, after hearing counsel for the appellant, that he was not a person over the age of 45 years, and in our view there is no substance in the argument in support of the third ground.

With regard to counsel for the appellant's complaint against the joint trial, we can only say, with respect, that we find very little merit in his argument.

For these reasons the appeal is accordingly dismissed.

Appeal dismissed.

For the appellant:
AR Kapila and *JL Shah*
SR Kapila and *Kapila*, Nairobi

For the respondent:
MG Konstam (State Attorney, Tanganyika)
The Director of Public Prosecutions, Tanganyika

WJ Lockhart-Smith v United Republic
[1965] 1 EA 211 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	1 December 1964
Case Number:	444/1964
Before:	Weston J
Sourced by:	LawAfrica

[1] Contempt of court – Words spoken by and conduct of advocate discourteous and disrespectful to court – Charge laid under s. 114 (1) (*a*) *of the Penal Code* (*T*) – *Whether mens rea an ingredient of the*

offence.

[2] Criminal law – Practice – Contempt of court – Rejection of defence evidence because prosecution case is believed – Failure to consider case for defence – Whether trial magistrate's approach is incurably wrong – Duty of court to consider evidence for defence.

Editor's Summary

The appellant was convicted in the District Court of Dar-es-Salaam on three counts of contempt of court each laid as contrary to s. 114 (1) (*a*) of the Penal Code, and was fined Shs. 105/- or one day's imprisonment in default on each count. The court also ordered that the speech and conduct of the appellant, an advocate, be referred to the Law Society of Tanganyika. The offence arose from certain remarks made by the appellant when representing his client in the District Court. The trial magistrate found that the words spoken by and the conduct of the accused were discourteous and disrespectful to the court and amounted to contempt of court and stated: "In the instant case, I believe the

evidence of the prosecution witnesses. I find corroboration in their testimonies. I also find that the accused uttered the words alleged and perpetrated the conduct alleged. I therefore reject the accused's statement." The appellant appealed and the main ground of appeal was that the trial magistrate had misdirected himself by failing to consider the appellant's defence. It was further contended that for the trial magistrate to reject the appellant's evidence because he believed that of the witnesses for the prosecution was a misdirection which vitiated the whole judgment. Another point raised on behalf of the appellant was that it was necessary for conviction on a count laid under s. 114 (1) ibid. that mens rea should be proved and that the only evidence as to this was the appellant's own statement that he had not intended any disrespect.

Held –

(i) the trial magistrate did not, as he should have done, take into consideration the evidence in defence; his reasoning underlying the rejection of the appellant's statement was incurably wrong and no conviction based on it could be sustained;

(ii) mens rea was not an ingredient of the offence created by s. 114 (1) (*a*) ibid. the gravamen of any such offence was the showing of disrespect, and once the conscious act of the accused was established, intention was irrelevant.

Appeal allowed.

Cases referred to in judgment

(1) *Izuora v. R.*, [1953] 1 All E.R. 827.

(2) *R. v. Frederick Marriott* (1924), 18 Cr. App. R. 74.

(3) *R. v. Laski and Shaw* (1959), Crim. L.R. 791.

(4) *R. v. Anthony David Forest and George Talbot Hale*, 48 Cr. App. R. 284

Judgment

Weston J: The appellant was convicted in the District Court of Dar-es-Salaam District at Dar-es-Salaam on three counts of contempt of court, each laid as contrary to s. 114 (1) (*a*) of the Penal Code. He was fined Shs. 105/- or one day's imprisonment in default on each count, and the court ordered that the appellant's speech and conduct be referred to the Law Society of Tanganyika. This is an appeal against both conviction and sentence.

The case which the prosecution sought to establish against the appellant appears from the particulars of offence averred to have been that he, on August 25 last – I quote from the charge sheet – (*a*) "within the precincts of the court room, while judicial proceeding was being taken showed disrespect in his speech with reference to the magistrate, Mr. Echetabu, before whom such proceeding was being taken, to wit: did say, 'I have been in the Bar before you were born and know the procedure better than you'" – first count; (*b*) "within the precincts of the court room, while judicial proceeding was being taken, showed disrespect in his speech with reference to the magistrate, Mr. Echetabu, before whom such proceeding was being taken after the magistrate had made his ruling which was unfavourable to him, did say 'If this is your attitude and ruling, I will no longer take part in this case'" – second count; and (*c*)

“within the precincts of the court room, while the judicial proceeding was being taken, showed disrespect by his manner with reference to the magistrate, Mr. Echetabu, before whom such proceeding was being taken after the Magistrate had made his ruling which was unfavourable to him, did ‘Pack his books and attempted to walk out of the court room without permission, as a demonstration of supporting his threat that he would no longer take part in the case because of the ruling of the magistrate on a matter before him’” – third count.

The court room referred to but not named, as it should have been, was that of the District Court of Dar-es-Salaam District at Dar-es-Salaam, and the judicial proceedings mentioned were the trial of Criminal Case No. 1886 of 1964 in which one Aloys Boto stood charged with obtaining money by false pretences or alternatively with stealing it. The appellant was present as counsel for the defence, and the case for the Republic was in the hands of Police Inspector Nasser, a public prosecutor with some nine months' experience in that office.

This officer and the magistrate before whom the case was being heard, Mr. Echetabu – he is so referred to in the charge sheet and it will I think make for clarity if I continue so to refer to him – were the principal witnesses for the prosecution at the trial of the appellant in the court below. The appellant elected to give his version of events on oath, and he was the principal witness in his own defence.

The learned magistrate's judgment – and to avoid confusion, by the words "learned magistrate" I mean and will hereinafter refer to the learned magistrate who conducted the appellant's trial – the learned magistrate's judgment, I say (save for a brief reference to the largely formal evidence of a third prosecution witness) consists of a statement of the learned magistrate's understanding of the evidence of Mr. Echetabu and Inspector Nasser, followed by that of the evidence of the appellant. The learned magistrate's finding and decision are then set out in the final paragraphs of the judgment, which read as follows:

> "In the instant case, I believe the evidence of the prosecution witnesses. I find corroboration in their testimonies. I also find that the accused uttered the words alleged and perpetrated the conduct alleged. I therefore reject the accused's statement.
>
> I consider that the words spoken by and the conduct of the accused (??) discourteous and disrespectful to the court and amount to contempt of court.
>
> In the result, I find the accused guilty as charged. I hereby convict the accused on each of the three counts of the charge".

For the appellant, counsel's main ground of appeal, based on the first paragraph of this passage from the learned magistrate's judgment, is that the court below misdirected itself by failing to consider the appellant's defence – a failure, in counsel's submission, that was fatal to his conviction on any count. Learned counsel further argued that for the learned magistrate to reject the appellant's evidence because he believed that of the witnesses for the prosecution – and counsel claimed that this was what the learned magistrate did do and in his judgment frankly says he did – for the magistrate so to treat the appellant's evidence was not only a misdirection which vitiated the whole judgment, but that examination of the evidence of the two principal witnesses for the prosecution would show that the reason given by the learned magistrate for believing that evidence in the first place, viz. that he found "corroboration in their testimonies", was without foundation.

Thus, and to begin at the beginning, in regard to the conduct of the appellant which was the fount and origin of the events with which we are concerned, Inspector Nasser testified that "While I was examining the Regional Education Officer, Mr. Kiwire, in chief, accused objected that a certain question was leading and he asked me to refrain from asking such a leading question". The words which the appellant addressed to the Inspector were, "Young man, this is leading". When Mr. Echetabu asked what was the matter, the Inspector further testified, he informed Mr. Echetabu that "accused had objected that a certain question was leading and that I should not pursue it". Mr. Echetabu's evidence, however, was that "defence counsel kept on interrupting the prosecutor and disturbed the proceedings". Here then, and at the outset, are diverse accounts of the not unimportant matter of how it all began, and I would find

it difficult to say that the Inspector's evidence "corroborates" Mr. Echetabu's story of persistent interference by the appellant with the prosecutor's conduct of his case.

Be this as it may, from this beginning until the point of time at which the appellant is alleged to have used the words charged in the first count, was a short period during which a great deal happened, but for reasons that will presently appear it will be convenient to defer consideration of it until later and I pass on to what occurred after the appellant is alleged to have told Mr. Echetabu that he had been at the Bar before Mr. Echetabu was born and that he knew the procedure better than he did.

Mr. Echetabu's account in chief is this:

> "He [the appellant] started packing his books to leave the court when I asked him he should not leave.
>
> At that stage I invited the attention of the pressmen, police and anybody who was in court. I made my formal ruling by recording it in case file and gave my reasons for such ruling.
>
> After I read out ruling in court, Mr. Lockhart-Smith said 'If this is your Ruling and attitude in this case, I would no longer take part in the proceedings'. After he said this he promptly packed his books and left the Bar, he moved about 3 to 6 feet. I called him back and told him he should not leave. He did not pay heed to this. Still holding his books, I told him it might be useful if I reminded him what his actions amounted to in law. I said to him that I still refused his permission to leave court. If he did move one inch I would charge him with contempt.
>
> Then he said your Honour I don't want to be charged and sat down".

In cross-examination Mr. Echetabu said this:

> "Mr. Lockhart-Smith did not apply to withdraw from case before I wrote my ruling.
>
> Mr. Lockhart-Smith did not re-apply to withdraw from case immediately I gave my Ruling. He did so at a later stage".

Inspector Nasser testified:

> "I heard accused apply for leave to withdraw. I can remember part of words accused used (this when a statement was read to witness); they were 'it seems nothing I do in this court is correct'. I don't remember accused said to magistrate 'in view of your attitude I am afraid I can be of no help to my client'.
>
> I remember accused said 'I therefore respectfully ask for permission to withdraw'.
>
> The learned Resident Magistrate said he would make a note in court file of the application to withdraw and that he would give his ruling. Mr. Lockhart-Smith then sat down. Then the Ruling was delivered. After the ruling accused re-applied for leave to withdraw. I think he said 'may I respectfully renew my application to withdraw from case'. The learned Resident Magistrate said 'I have not permitted you to leave. If you continue to leave I shall have you arrested for contempt of court.' Mr. Lockhart-Smith was about four or five feet from the Bar when Mr. Echetabu spoke the last words to him. Mr. Lockart-Smith was in motion to go away immediately after the learned Resident Magistrate spoke.
>
> Mr. Lockhart-Smith then came back and sat down. He then said, 'Your Honour, what am I supposed to do there'. Mr. Echetabu said, 'I don't know'.
>
> Then I was allowed to continue my examination in chief I asked two or three more questions, then the case was adjourned.

> Mr. Lockhart-Smith said when he returned to the Bar 'Your Honour, I don't want to be arrested'. These words were not addressed to the court.
>
> Mr. Lockhart-Smith obeyed the directions the Resident Magistrate gave on all these occasions of wanting to leave the court.
>
> Throughout the proceedings Mr. Lockhart-Smith obeyed the directions given to him by the learned Resident Magistrate, Mr. Echetabu".

Again, I find it difficult to see how the two versions can be reconciled. On the contrary, the Inspector's account supports rather that sworn to by the appellant. Learned Senior State Attorney indeed, conceded that in the light of the Inspector's evidence it was not possible for him to support the appellant's conviction on the second and third counts. I think this was a most proper attitude for Mr. Campbell to take. So much then for these counts, save for two matters arising out of them which seem to me to call for comment. In the first place, whatever may be the position as between advocate and client, a court has no authority of which I am aware to prevent an advocate from withdrawing from a case if for any reason he feels he is unable to continue to serve his client's best interests. It is of course the practice for the advocate to ask leave to withdraw and it surely hardly needs saying that the request, as all other prayers to any court, must be made in suitable terms. But in the final analysis, the advocate is asking for that which cannot be refused. Here, according to the evidence for the prosecution, the appellant respectfully asked leave to withdraw twice and the court's action in ordering him to remain under threat of arrest if he left is conduct which must be condemned as unjustified and highhanded.

Secondly, the extraordinary conduct of the court in summoning the press and the police and inviting the attention of "anybody who was in court" was deplorable. It would have been agreeable not to advert to it, but I do so lest it be thought by anyone that by passing such conduct over in silence this court condones, much less approves, behaviour of this sort in the subordinate courts or indeed in any court of this country.

There is now left for consideration only the appellant's conviction on the first count. It will be remembered that Mr. Echetabu noticed the appellant talking to the prosecutor and asked what was the matter. Inspector Nasser replied in the words I have already mentioned. Mr. Echetabu then apparently ruled orally that the appellant was to address any objections to questions by the prosecutor on the ground that they were leading, to the Bench and not to the prosecutor. In my view the appellant's conduct in speaking to Inspector Nasser in connection with the phrasing of a single question and with a view to avoiding the making of a formal objection to the Bench was in no way improper or objectionable, and the appellant's remark – "Young man, this is leading" – addressed as it was to a young prosecutor by a much older senior member of the Bar, was kindly and in the best tradition. On the other hand, it was neither wrong nor improper for Mr. Echetabu to request the appellant to address all objections of this nature to him rather than to the prosecutor if, as appears to have been the case, any such communication between advocate and prosecutor distracted him from performing his duty as magistrate. There the matter should have ended. Unfortunately it did not.

Mr. Echetabu testified that in answer to his oral ruling "Mr. Lockhart-Smith replied that he was not going to do that [i.e. address objections to the Bench] and said 'I was in the Bar before you were born and I know the procedure better than you' ". Inspector Nasser in his evidence confirms Mr. Echetabu's testimony on this point. This witness said:

> "The learned Resident Magistrate then said that objections should be made to the court. Accused said he would not do so. The learned Resident

> Magistrate said his ruling still stands that objections should be made to the court. Accused said he would not do so. The learned Resident Magistrate said his ruling still stands that objections should be made.
>
> In consequence of this accused spoke the words alleged in count 1".

The appellant's account on oath of what he said is this:

> "I then said to him [i.e. to Mr. Echetabu] to the best of my recollection, 'Sir, I have been connected with practice of the law for over 40 years. Perhaps even since before your Honour was born'. I may have added 'I have been at the Bar a long time'. I concluded by saying 'I would be sorry if you think at this stage of my practice I would not know how to conduct myself in a court' ".

Here then, was conflict clear and unavoidable. How did the court deal with it? As I have said, the learned magistrate believed the evidence of the two main prosecution witnesses and rejected that of the appellant, and the point is now reached where Mr. Roden's main ground of complaint must be considered. But before doing this it would be as well if I disposed of what I think I can fairly refer to as two subsidiary submissions made by learned counsel.

The first was based on a dictum of Lord Tucker in the Privy Council case of *Izuora v. R.*, ([1953] 1 All E.R. at p. 830). This reads:

> "It is not every act of discourtesy to the court by counsel that amounts to contempt, nor is conduct which involves a breach by counsel of his duty to his client necessarily in this category".

Counsel for the appellant argued that the words charged in the first count–"I have been in the Bar before you were born and know the procedure better than you" – were discourteous only and not in contempt of the court. With respect, I find myself unable to agree. Certainly there may be words spoken which it might be a nice question to say whether they fell on one side or the other of the dividing line separating discourtesy from contempt, but as regards the words alleged to have been spoken by the appellant I am not in any doubt that they fall far beyond any line that could reasonably be drawn. Had the words "I have been [at] the Bar before you were born" only been alleged, such a nice question as I have mentioned might perhaps have arisen. But the addition of the words "and know the procedure better than you" in my view makes the whole phrase clearly contemptuous. In this connection it may perhaps be relevant to recall the exchange between Bench and Bar in the well known case of the Dean of St. Asaph, in the course of which counsel, the great Erskine, said, among other things – "I know my duty as well as your Lordship knows yours". Yet Lord Campbell later described Erskine's as a "noble stand for the independence of the Bar" which "would of itself have entitled Erskine to the statue which the profession affectionately erected to his memory in Lincoln's Inn Hall". What Erskine did not say, be it noted, was that he knew his duty *better* than the judge knew his.

Counsel for the appellant's second contention was that it was necessary for conviction on a count laid under s. 114 (1) (*a*) of the Penal Code that mens rea should be proved and that the only evidence as to this was the appellant's own statement that he had not intended any disrespect. I would have said that, in accordance with well established rules, inferences drawn from the appellant's speech and conduct would have been evidence of his state of mind, but in any case mens rea is not, in my opinion, an ingredient of the offence created by the paragraph. The gravamen of any such offence is the showing of disrespect. Certainly there must be the conscious act of the accused, but this having been established, intention, in my view, is irrelevant. The test is objective. Nor am I able to read into the terms of para. (i) of s. 114, as learned counsel would have me do, any qualification of the meaning of the plain language of para. (*a*).

Learned counsel's main ground of complaint, however, to which I now finally return, is in my view valid. The reasoning:

> "I disbelieve the defence because I believe the prosecution"

and I agree with counsel for the appellant that the learned magistrate's words "I therefore reject the accused's statement" in their context can mean only that this was the court's approach to the problem before it – this reasoning is incurably wrong, and no conviction based on it can be sustained. It has repeatedly been laid down by this court that such an approach is bad in law. Speaking generally – for there are exceptional cases, not here relevant, in which the principle does not apply – it is not for an accused to establish his innocence. It is for the prosecution to prove its case beyond reasonable doubt. It cannot do this unless the evidence given by or on behalf of the accused is put into the balance and weighed against that adduced by the prosecution. The question is whether anything the accused has said or which has been said on his behalf introduces that reasonable doubt which entitles him to his acquittal.

The principle is elementary, but fundamental none the less, and authority, if authority be needed for the proposition that failure to take into account any defence put up by the accused will vitiate conviction, is not hard to find. Thus, for example, in *R. v. Frederick Marriott* (2) the Court of Criminal Appeal quashed the conviction of the appellant in that case on the ground – I quote from the headnote – that:

> "A judge in summing up is bound to put defendant's case to the jury. A mere expression of the view of the judge is not sufficient to dispense with the duty of putting the case for the defence to the jury".

So important indeed is it that the judge of fact, as the learned magistrate was here, should keep the defence continuously in mind, that in *R. v. Laski and Shaw* (3) where a jury after proper direction had retired and then had returned to ask for guidance on the law and the court had addressed them for ten minutes but had not again referred to the accused's defence, the Court of Criminal Appeal found it necessary to say:

> "He [the Commissioner] did not repeat the defences as some judges would have done; but it would be unreal to conclude that the jury had forgotten the defences".

Even where there is no defence other than a statement by the accused from the dock – I quote the words of Parker, L.C.J. in *R. v. Anthony David Frost and George Talbot Hale* (4), (48 Cr. App. R. at p. 291):

> ". . . it is quite clear to-day that it has become the practice and the proper practice for a judge not necessarily to read out to the jury the statement made by the prisoner from the dock, but to remind them of it, to tell them that it is not sworn evidence which can be cross-examined to, but that nevertheless they can attach to it such weight as they think fit, and should take it into consideration in deciding whether the prosecution have made out their case so that they feel sure that the prisoner is guilty".

The learned magistrate in this case, in my view, did not, as he should have done, take into consideration the evidence in defence, and for this reason the conviction on the first count cannot be allowed to stand.

Accordingly, this appeal is allowed in its entirety. The appellant's conviction on all three counts is quashed and the sentences imposed in respect of it are set aside. The fines paid will be refunded to the appellant.

This concludes this appeal, but there is a matter to which I should refer before leaving it. The offences alleged against the appellant were committed on August 25 last. Complaint was made to a magistrate two days later by a police officer. There was a prayer for a warrant of arrest to issue against the

appellant, which was granted, and the appellant was in fact arrested in pursuance of it. It does not appear whether the complaint was sworn or not. If it was not, then clearly the warrant should not have been issued in the first instance see the proviso to s. 90 of the Criminal Procedure Code. But even if it was, it is not immediately apparent what considerations moved the magistrate to whom complaint was made to exercise the discretion vested in him by the section in favour of a warrant of arrest rather than a summons. The offences concerned were misdemeanours only, punishable with a maximum of six months' imprisonment or a fine not exceeding Shs. 500/-, and there is no record of any representation made that the appellant would not be likely to appear in answer to a summons. In these circumstances I feel bound to say that if the appellant's arrest was not arbitrary, it does not manifestly appear not to have been that. No citizen of this country – indeed, no man living under the peace of the Republic of Tanzania – whoever he may be and whatever he may be, is to be subjected to the indignity of arrest except by due process of law, and it is matter for regret that in this case it does not more plainly appear that the indignity suffered by the appellant was by due process of law.

Appeal allowed.

For the appellant:
A Roden
A Roden, Dar-es-Salaam

For the respondent:
Campbell, State Attorney
The Director of Public Prosecutions

EL Hoare and others v Eric Jessop
[1965] 1 EA 218 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	30 November 1964
Case Number:	31/1963
Before:	Sir Samuel Quashie-Idun P, Newbold and Crabbe JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Madan, J

[1] Defamation – Libel – Circular to shareholders – Qualified privilege – Fair comment – Duty of court to consider whether alleged libel constitutes self-defence – Joint tortfeasors – Whether malice of one can be imputed to the other.

Editor's Summary

The respondent, J., had been managing director of F.B. Co. of which the appellants and one E. were directors. After a dispute between J. on the one side and the appellants and E. on the other J. was dismissed in 1959 but remained a shareholder. Later J. issued circulars to the shareholders making allegations against the management of F.B. Co. and requesting support. To these circulars the board replied, and their final reply was a circular to the shareholders dated July 14, 1961 ("the libel letter") signed by the appellants in respect of which J. brought these proceedings for damages for libel. In their defence the appellants relied on fair comment, justification and qualified privilege. In his reply J. pleaded express malice. At the trial the judge found malice proved against each of the appellants and gave judgment for the respondent for £4,750 and costs. The appellants appealed on the grounds (*inter alia*) that the judge was wrong in finding that they were actuated by malice in publishing the libel letter and wrong in finding that their plea of justification had not been proved.

Held –

(i) the appellate court is under a duty to evaluate the evidence itself where it can be shown: – that the advantage of a trial judge in seeing and hearing

the witnesses would not be sufficient to explain his conclusions; or that the trial judge misdirected himself on fact in a number of cases, which misdirections must have contributed to his comments on credibility and to his conclusions; or that the trial judge has drawn incorrect inferences of fact, which contributed to his conclusions:

(ii) on the evidence, the libel letter was prompted by J.'s own circulars and the appellants were not actuated by any hatred or dislike of J., but by a desire to put their side of the dispute:

(iii) the court should examine the whole evidence and the circumstances to determine whether the appellants' attack was fairly relevant or whether it went beyond the exigency of the occasion; in this case the language used was neither unnecessarily violent nor disproportionate to the exigency of the occasion and the appellants had not abused their privilege:

(iv) in an action for a joint libel in which the defendants rely upon qualified privilege, proof that one or more of them were actuated by express malice will not render liable the defendants against whom such malice is not proved (*Egger v. Viscount Chelmsford approved*):

(v) on the evidence the defence of justification should have succeeded and it was irrelevant whether the defendants were actuated by indirect or improper motives:

(vi) as to fair comment, the correct test on the facts was that suggested by Lord Porter in *Kemsley v. Foot* (1952) A.C. 345 at pp. 356, 357 and that defence should also have succeeded.

Appeal allowed.

Cases referred to in judgment

(1) *Turner v. M.G.M. Pictures Ltd.*, [1957] 1 All E.R. 449.

(2) *Price v. Kelsall*, [1957] E.A. 752 (C.A.).

(3) *Peters v. Sunday Post Ltd.*, [1958] E.A. 424 (C.A.).

(4) *Watt v. Longsdon*, [1930] 1 K.B. 130; [1929] 1 All E.R. Rep. 284.

(5) *Adam v. Ward*, [1917] A.C. 309; [1917] All E.R. Rep. 157.

(6) *Loughton v. Bishop of Sodor and Man* (1872), L.R. 4 P.C. 495.

(7) *Spill v. Maule* (1869), L.R. 4 Ex. 232.

(8) *Neville v. Fine Arts General Insurance Co. Ltd.*, [1895] 2 Q.B. 156.

(9) *Egger v. Viscount Chelmsford*, [1895] 2 Q.B. 156; [1964] 3 All E.R. 406.

(10) *London-Griffiths v. Smith*, [1950] 2 All E.R. 662.

(11) *Meekins v. Henson*, [1962] 1 All E.R. 899.

(12) *Hunt v. Star Newspaper Co. Ltd.*, [1908] 2 K.B. 309.

(13) *McPherson v. Daniels* (1829), 10 B. & C. 236.

(14) *Kemsley v. Foot*, [1952] A.C. 345; [1952] 1 All E.R. 501.

(15) *Dakhyl v. Labouchere* [1908] 2 K.B. 325.

November 30. The following judgments were read:

Judgment

Crabbe JA: This is an appeal from a judgment of the Supreme Court of Kenya at Nairobi whereby a judgment was entered for the respondent for £4,750 against the appellants jointly and severally with costs on the higher scale to be taxed and certified by the Taxing Master. The action was for damages for a libel contained in a circular letter dated July 14, 1961 (hereinafter referred to as "the libel letter") published by the defendants to about 230 shareholders of Messrs. Fitzgerald Baynes & Company Limited. The words complained of by the plaintiff are set out in para. 6 of his plaint as follows:

> ". . . Mr. Jessop's claim that his holding has cost him approximately £22,000 is overstated by several thousand of pounds and you will appreciate that a large part of this holding was in fact acquired during his very lucrative tenure of office with the company."
>
> "It is perhaps not known by shareholders that following his removal and contrary to the terms of his service agreement with the company, Mr. Jessop became, and still is, a Director and Manager of a Nairobi business which is in direct competition with your own company and which appears to have indulged in a deliberate campaign of removing your company's containers from the market and substituting them with their own products. Furthermore, at the commencement of his present occupation Mr. Jessop persuaded several of the company's employees, including senior salesmen, to join him, though it is interesting to note that the majority of them have recently re-offered their services to your company. We find these actions very difficult to reconcile with his claim that he now considers he has a duty to the many shareholders who invested in the company during the period of his Management."
>
> ". . . After his failure to gain any important measure of support at previous shareholders' meetings, we are extremely concerned as to what Mr. Jessop's real motives are in once again trying to create a division among the shareholders. We are positive that his intervention in the company's affairs can bring it no advantage . . . This position (meaning the position of the company) can be safeguarded only by your concerted support of the body of persons who have the real interests of the company at heart, that is, the properly constituted Board of Directors. If you are unable to attend the Annual General Meeting in person and may perhaps have felt persuaded to lend your support to Mr. Jessop may we earnestly request you to reconsider your decision and to sign instead the form of proxy circulated with the Report and Accounts."

By their defence the appellants admitted the publication of "the libel letter" complained of but denied that the words were defamatory.

They pleaded that insofar as the said words consisted of comment the same were fair and bona fide comment made without malice upon a matter of common interest and importance to the recipients as shareholders of Messrs. Fitzgerald Baynes & Co. Ltd. As a separate defence, it was also pleaded that the words complained of were in their natural and ordinary meaning true in substance and in fact.

At the trial it was agreed that the publication of "the libel letter" was an occasion of qualified privilege. The plaintiff therefore assumed the burden of establishing not only the existence of actual or express malice, but also of proving that the publication of "the libel letter" was inspired by such malice.

[*His Lordship set out the points upon which the plaintiff relied as showing actual malice, and continued*]: . . .

In considering the issue of malice it is legitimate, I think, to infer spite from the relationship between the parties, and any ill-feeling on the part of the defendant, whether it be recent or long-standing, whether shown before or after the commencement of the action, whether displayed in connection with the alleged libel itself or with any other matter, is a relevant matter to take into consideration. If I may quote the words of Lord Porter when dealing with the question of qualified privilege in *Turner v. M.G.M. Pictures Ltd*. (1) [1950] 1 All E.R. at pp. 454, 455):

> "It is common ground, as I have indicated, that qualified privilege is rightly claimed by the respondents, but, it is said that any reliance on it is ruled out by the existence of express malice on their part. Where such an allegation

> is made it is the duty of the plaintiff to establish the existence of malice and, unless he does so, the defendant succeeds. If, however, the plaintiff can show any example of spite or indirect motive, whether before or after the publication, he would establish his case provided that the examples given are so connected with the state of mind of the defendant as to lead to the conclusion that he was malicious at the date when the libel was published. No doubt, the evidence must be more consistent with malice than with an honest mind, but this does not mean that all the evidence adduced of malice towards the plaintiff on the part of the defendant must be set against such evidence of a favourable attitude towards him as has been given and the question left to, or withdrawn from, the jury by ascertaining which way the scale is tipped when they are weighed in the balance one against the other. On the contrary, each piece of evidence must be regarded separately, and, even if there are a number of instances where a favourable attitude is shown, one case tending to establish malice would be sufficient evidence on which a jury could find for the plaintiff. Nevertheless, each particular instance of alleged malice must be carefully analysed, and, if the result is to leave the mind in doubt, then that piece of evidence is valueless as an instance of malice whether it stands alone or is combined with a number of similar instances. Maule, J., delivering the judgment of the court in *Somerville v. Hawkins* (1851), 10 C.B. 583; 20 L.J.C.P. 131; 16 L.T. O.S. 283; 32 Digest 112, 1437, and referring to the facts in that case, said ([1851] 10 C.B. at p. 590):
>
> '. . . the facts proved are *consistent* with the presence of malice, as well as with its absence. But this is not sufficient to entitle the plaintiff to have the question of malice left to the jury . . . It is certainly not necessary, in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence.' "

In order to appreciate the determination of the issues that arise in this case it is necessary to outline the facts at some length and subsequently to go more fully into the facts relating to certain specific incidents which culminated in "the libel letter".

[*His Lordship then set out the facts and continued*]:

The trial judge, in a lengthy judgment, arrived at a finding that the plaintiff had succeeded in establishing malice on the part of all three defendants and that the words were defamatory of the plaintiff in their natural and ordinary meaning and he gave judgment for the plaintiff and awarded him damages of £4,750 together with costs. From that judgment the defendants appealed on four grounds, one of which was withdrawn during the hearing. The three remaining grounds are, first, that the trial judge erred in holding, and there was no evidence to support his finding, that the defendants, or any of them, in publishing the words were actuated by malice; secondly that the trial judge was wrong in finding that the plea of justification had not been proved; and, thirdly, that the damages given by the trial judge were excessive.

At the hearing of the appeal there was little or no argument on the law. It was agreed, as it had been agreed before the trial judge, that the occasion of the publication was one of qualified privilege. It was also agreed that even if the defendants, or any of them, had ill-will or resentment towards, or dislike of, the plaintiff at the time of publication, nevertheless this would not of itself entitle the plaintiff to succeed as he had to prove that the publication of the words was actuated by malice.

The first issue which arises falls into two parts; the first, whether there was any evidence on which the trial judge could come to a conclusion that the defendants in publishing the words were actuated by malice, is a matter of law which I think can conveniently be dealt with after consideration of the second part, which is a matter of fact, as to whether the judge erred in holding that the defendants, or any of them, were actuated by malice in publishing the words complained of. There can be no doubt that the onus upon the defendants in asking this court to reverse a finding of malice made by the judge, who has seen and heard the witnesses and has commented upon their credibility, is a very heavy onus indeed.

It is, however, an onus which can be discharged if the defendants can show from the record that, in arriving at his findings, the advantage of the trial judge in seeing and hearing the witnesses would not be sufficient to explain his conclusions; that the trial judge misdirected himself on fact in a number of cases, which misdirections must have contributed to his comments on credibility and to his conclusions; and that the trial judge has drawn incorrect inferences of fact, which inferences have contributed to his conclusions. Where these matters can be shown by an appellant, then this court is under a duty to evaluate the evidence itself (see *Price v. Kelsall* (2), *Peters v. Sunday Post Ltd*. (3)).

The trial judge considered a number of separate incidents spread over a period of about two years and in respect of each he arrived at a conclusion, which was a matter of inference, that the incident did or did not disclose malice on the part of one or all of the defendants. I have not, in some cases, been able to appreciate with certainty the precise matter which led the trial judge to infer malice, but I think it a fair summary of his findings on the separate incidents to say that there was scarcely an incident from which malice on the part of all the defendants was not inferred. Having considered these incidents and his inferences therefrom the trial judge arrived at the finding "that the plaintiff has succeeded in establishing malice on the part of all three defendants". The trial judge presumably meant by this that the publication of the defamatory words were motivated by malice.

If, however, he meant that at the time of the publication the defendants bore ill-will for the plaintiff, that would not be sufficient to enable the plaintiff to succeed though the existence of such ill-will would be a material factor to consider in determining whether the publication of the words was actuated by malice.

The separate incidents considered by the trial judge, and in respect of which he inferred malice on the part of one or more of the defendants, may conveniently be divided into two groups: those around the time of the dismissal of the plaintiff and connected with such dismissal; and those around the time of the publication of the defamatory words and connected with such publication.

[*His Lordship then considered certain of the separate incidents and the findings of the trial judge in relation to them and continued*]:

The learned judge also found malice from the demeanour of the third defendant. He said:

> "I would accept that a defendant is entitled to defend himself as effectively as possible, but the demeanour of the third defendant in court and his evidence that he accused the plaintiff of having indirect motives and that he had no faith in the plaintiff's honesty and integrity which is not the opinion of the other two defendants or Edwards also provides some evidence of malice."

The learned judge has not made it clear whether malice in the third defendant in this particular matter destroyed the privilege of the other defendants; but be that as it may, there is nothing on record to assist this court in determining how the learned judge came to infer malice from the conduct of the third

defendant. It would appear, however, that the learned judge came to his conclusion merely on the ground that the other defendants and Edwards did not share the opinion which the third defendant expressed about the plaintiff in the witness-box. But, if I may use the words of Lord Porter in *Turner v. M.G.M. Pictures, Ltd*. (1) ([1950] 1 All E.R. at p. 460):

> "This is a dangerous line of argument. Except for two instances which, to my mind, are both neutral and unsubstantial, there is no indication in the evidence that the attitude of the respondents' witnesses was deserving of any criticism. Some more solid ground is required on which to base the existence of a hostile demeanour. If it were not so, every finding of malice by a jury where the defendants called witnesses might be supported on the sole ground that those witnesses might have exhibited malice by their demeanour in the box."

Lord Greene in the same case also deprecated the drawing of an inference of malice from the demeanour of witnesses. He said ([1956] 1 All E.R. at p. 469):

> "In the present case, the appellant endeavours to fall back on the view that the finding of malice by the jury ought to be supported on the basis that the jury may have disliked the demeanour of the witnesses, and come to the conclusion that they were telling lies. A more dangerous doctrine to be applied in a libel action I find it difficult to imagine. If it were accepted, it would be possible to argue that a finding of malice could always be successfully supported on the ground that, although there was no substantive evidence to go to the jury, the jury may have thought that the defendant's witnesses were lying in the witness box."

It is to be observed that although the learned judge quoted the words of Lord Porter and warned himself of the danger of inferring malice from the demeanour of witnesses he proceeded to do exactly the opposite. This, in my judgment, affords support for counsel for the appellants criticism that even though the learned judge's citations from the authorities were accurate yet in some instances he misapplied the principles in those citations.

[*His Lordship then dealt with an aspect of the evidence relating to malice and, after expressing his disagreement with the learned judge's finding, continued*]:

In my judgment, apart from the evidence of the "shamba boy" remark, which I shall deal with in a moment, none of the particular instances of ill-will or spite on which the plaintiff relied provide a foundation for a finding of malice against the three defendants.

As regards the "shamba boy" remark the learned judge found as a fact that that remark was made by the first defendant at Naivasha, and I cannot help but agree entirely with the learned judge when he said: "To compare a Managing Director with a shamba boy is humiliating in any event but to do so when he is being dismissed and asks for reasons for his dismissal is to add injury to insult which connotes only a malicious state of mind and I so find".

This single and legitimate finding of malice would be sufficient to entitle the plaintiff to succeed, at least against the first defendant, provided that it was proved the "shamba boy" remark was so connected with the state of mind of the first defendant as to lead to the conclusion that he was malicious at the date of the publication of the libel. As Greer, L.J. pointed out in *Watt v. Longsdon* (4) ([1930] 1 K.B. at pp. 154, 155):

> "(A man's) motive for publishing a libel on a privileged occasion may be an improper one, even though he believes the statement to be true. He may be moved by hatred or dislike, or a desire to injure the subject of the libel, and may be using the occasion for that purpose, and if he is doing so the publication will be maliciously made, even though he may believe the defamatory statements to be true."

The question, therefore, is whether the publication of "the libel letter" on July 14, 1961, was for the gratification of a malicious desire on the part of all the defendants, or was in furtherance of a duty which the defendants owed to the shareholders of the company. On a careful consideration of the evidence and all the circumstances of this case I am impelled to the conclusion that "the libel letter" was prompted by the plaintiff's circulars of May 25, 1961, June 2, 1961 and June 12, 1961, and that the defendants were not actuated by any hatred or dislike for the plaintiff, but rather from a desire to put their side of the dispute before the shareholders. I think the evidence as a whole falls far short of establishing that the defendants abused the privileged occasion by making it the opportunity of indulging in some private spite. It follows therefore in my view that the finding of malice from the "shamba boy" remark does not avail the plaintiff.

After considering the evidence relating to the events preceding the publication of "the libel letter" the learned judge went on to examine the language used in the said letter. He appears to have inferred malice from almost every sentence in "the libel letter". In making his findings, however, the learned judge does not seem to have overlooked the events that culminated into the publication of "the libel letter", for in the course of his judgment he made the following observations:

> "The plaintiff's efforts to dislodge the defendants and Edwards as directors were a legitimate exercise of his rights as a shareholder. It is a game not unknown in the commercial field. The tussle for power is not an unusual feature among company directors and the plaintiff was doing no more than to get where the defendants were determined to remain."

Later, the learned judge said:

> "I would accept that a defendant is entitled to defend himself as effectively as possible, but, the demeanour of the third defendant in court and his evidence that he accused the plaintiff of having indirect motives and that he had no faith in the plaintiff's honesty and integrity which is not the opinion of the other two defendants or Edwards also provides some evidence of malice."

Having recognised the defendants' right to defend themselves in the passage just quoted the learned judge then went on to support his finding of malice from the demeanour of the third defendant. With all due respect to the learned judge I think he erred at this point of his judgment, for having appreciated that the question of self-defence might fairly arise from the facts he should then have proceeded to consider whether the statements contained in "the libel letter" were necessary for the vindication of the defendants, or mere offensive recriminations. In Gately on Libel and Slander (5th Edn.), at p. 255, para. 433, it is stated as follows:

> ". . . a person whose character or conduct has been attacked is entitled to answer such attack, and any defamatory statements he may make about the person who attacked him will be privileged, provided they are published bona fide and are fairly relevant to the accusations made. 'The law justifies a man in repelling a libellous charge by a denial or an explanation. He has a qualified privilege to answer the charge; and if he does so in good faith, and what he publishes is fairly an answer, and is published for the purpose of repelling the charge, and not with malice, it is privileged, though it be false.' "

There can be no doubt that after the removal of the plaintiff as managing director he did everything possible to discredit the defendants through his circulars of May 25, June 2, and June 12, 1961, to the shareholders.

[*His Lordship then set out portions of the defendant's evidence showing their main reasons for publishing "the libel letter" and continued*]:

It is highly essential that in considering this counter-attack by the defendants the court should examine the whole evidence and the circumstances in order to determine whether the defendants' attack was fairly relevant or whether it went beyond the exigency of the occasion. With respect, I think the learned judge made a wrong approach to the question by examining each allegation and making a finding on it without first considering whether the letter of July 14 constituted self defence. After analysing "the libel letter" the learned judge found that the allegation about the costs of the plaintiff's shares had been exaggerated by the defendants, and in respect of some parts of the letter he either found that the defendants had in effect imputed sordid motives to the plaintiff, or that the allegations were true and therefore well-founded. But in the words of Lord Dunedin in *Adam v. Ward* (5) ([1917] A.C. at p. 330):

> ". . . when considering whether the actual expression used can be held as evidence of express malice no nice scales should be used."

The principles which ought to be borne in mind when the issue of self-defence arises in an action for libel have been considered in a number of cases. In *Laughton v. Bishop of Sodor and Man* (6) ([1872] L.R. 4 P.C. at p. 508) it was said:

> "Some expressions here used undoubtedly go beyond what was necessary for self-defence, but if does not, therefore, follow that they afford evidence of malice for a jury. To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications."

In *Adam v. Ward* (5), Lord Atkinson, after an examination of a number of authorities, including *Spill v. Maule* (7), *Laughton v. Bishop of Sodor and Man* (6) and *Neville v. Fine Arts and General Insurance Co. Ltd*. (8) stated ([1917] A.C. at p. 339):

> "These authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege; but that, on the contrary, he will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what the wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so."

A recent statement of the principle is the famous dictum of Lord Oaksey in *Turner v. M.G.M. Pictures, Ltd*. (1) ([1950] 1 All E.R. at pp. 470, 471):

> "There is, it seems to me, an analogy between the criminal law of self defence and a man's right to defend himself against written or verbal attacks. In both cases he is entitled, if he can, to defend himself effectively, and he only loses the protection of the law if he goes beyond defence and proceeds to offence. That is to say, the circumstances in which he defends himself, either by acts or by words, negative the malice which the law draws from violent acts or defamatory words. If you are attacked with a deadly weapon you can defend yourself with a deadly weapon or with any other weapon which may protect your life. The law does not concern itself with nicities in such matters. If you are attacked by a prize fighter you are not bound to adhere to the Queensberry rules in your defence."

In their defence to the action the defendants gave particulars of the facts upon which the statements contained in "the libel letter" were based. Most of these

facts were either admitted to be true or proved true, and in view of the plaintiff's circulars of May 25, June 2, and June 12, 1961, there can be no room for any doubt that "the libel letter" was written in vindication of the defendants, and in answer to the accusations made against them by the plaintiff in his circulars to the shareholders. It was, therefore, pre-eminently essential that the learned judge should have first directed his mind to a consideration of whether in all the circumstances the terms of "the libel letter" were warranted. If they were, then the publication would be protected. I am afraid that in this case it does not appear that such consideration was given to the facts. Happily, a Court of Appeal is not debarred from forming its own impression from the evidence. The law allows a person who is put on his defence, some latitude in his endeavour to repel an attack made upon him, and in this case, after considering the history of the events and the whole evidence, I have come to the conclusion that the language of "the libel letter" is neither unnecessarily violent nor disproportionate to the exigency of the occasion.

Before leaving this question of the inference of malice from proved facts, I wish to advert to what I consider an unsatisfactory feature of the trial. It is clear that throughout his judgment the learned judge regarded the three defendants as joint-tortfeasors, and imputed the malice of one defendant to another. In some instances the malice of Edwards, who was not even a party at the trial, was imputed to the three defendants. In view of certain dicta found in some of the authorities no blame whatsoever could be attached to the learned trial judge in treating the three defendants who signed "the libel letter" as joint-tortfeasors. It has since been held in *Egger v. Viscount Chelmsford & Others* (9) that in an action for damages for a joint libel, in which the defendants rely upon qualified privilege, proof that one or more of them were actuated by express malice, will not render liable the defendants against whom such malice was not proved. (See also *Longdon Griffiths v. Smith* (10); *Meekins v. Henson* (11)).

Having arrived at the conclusion that the plaintiff failed to prove express malice, I think that would be sufficient to dispose of this appeal; but out of sheer respect for the arguments of counsel, it is necessary in my view to demonstrate further that the plaintiff's action could not succeed in any event.

The defence to the action was fair comment and justification. In their statement of defence the defendants gave particulars of facts which they alleged were true in substance, and with regard to the costs of plaintiff's holdings of shares and there was an annexure showing his holdings in the company from 1950 to 1961.

It is not clear how the learned judge dealt with the defence, because he appears, with respect, to be preoccupied throughout his judgment more with the issue of malice, than with any other issue in the case. However that may be, I do not think this court is now prevented from considering the evidence in support of the defence, and if I may quote a passage from the judgment of Cozens-Hardy, M.R. in *Hunt v. Star Newspaper Co. Ltd*. (12) ([1908] 2 K.B. at p. 317):

> "The defence of fair comment only arises in the event of the plea of justification failing, but the plea of justification may fail by reason of the facts stated not being substantially true. But there still remains the question whether, if, and only if, the facts are substantially true, the comment made by the defendants, based upon those true facts, was fair and such as might, in the opinion of the jury, be reasonably made. I cannot do better than adopt the language of Kennedy, J. in *Joynt v. Cycle Trade Publishing Co*. (1904) 2 K.B. 292 'The comment must . . . not mistate facts, because a comment cannot be fair which is built upon facts which are not truly stated, and, further, it must not convey imputations of an evil sort, except so far as the facts, truly stated, warrant the imputation.' "

In considering the defence of justification in relation to the allegations contained in the first paragraph of that portion of "the libel letter" complained of, it is necessary to sever the two questions (1) the costs of the plaintiff's shares and (2) whether the shares were purchased during his "lucrative" employment. With regard to the first question, the evidence is clear beyond peradventure that the plaintiff paid only £17,500 and that he overstated this figure in order to include interest which he paid on monies he borrowed to enable him to purchase his shares. I think it is important that I should quote from the record of the evidence the plaintiff's own words:

> "Q. As far as this investment was concerned, as a simple financial transaction, the cost to you of this investment and what you paid for the shares was £17,500? A. I paid £17,500.
>
> Q. And you incurred £8,000 in interest on the monies you borrowed for the purchase of these shares. Against that you received £10,000 in dividend?
>
> A. Yes."

The learned judge appears to have accepted the defendants' point of view when he said:

> "Of course, the defendants could have legitimately stated that according to the company's books the cost of the plaintiff's shares was a figure different from the one stated by him."

If it was legitimate for the defendants to state that the plaintiff had overstated the costs of his shares, then I find it difficult to understand how later in his judgment the learned judge could say that the statement was an "unjustifiable assumption in the libel letter". On the plea of justification it is not necessary to prove that the statement is literally true; it is sufficient if, as in this case, it is true in substance, and there is no attempt at gross exaggeration. The plaintiff himself admitted that he overstated the costs of his shares by above twenty-five per cent.

On the second question the learned judge found that in the context in which the word "lucrative" was used, it had a sinister sound in its ordinary meaning. Then he said:

> "Surely, the defendants could not have honestly believed that the plaintiff was telling an untruth when he said he had put the whole of his life's savings in the company. The defendants had no evidence to the contrary. But even if they believed their statement may be true which I consider unreasonable to hold in the circumstances, I feel no doubt in saying that they used the occasion to label the plaintiff as a liar, that is they used the occasion for an indirect and wrong motive."

The learned judge then expressed the opinion that an ordinary person reading the statement would think that the plaintiff was not straightforward, and that he had acquired his large holding through dishonest means during his term of office. In the first place, the evidence clearly shows that for each of the three financial years ending January, 1958, the cost of the plaintiff to the company was in excess of £10,000 a year. I do not think that anyone will doubt for one moment that the plaintiff's appointment was lucrative or well-paid. The plaintiff did not like the use of the word "lucrative" because according to him it had a sordid connotation, and when the learned judge interposed and said "A well-paid appointment?", the plaintiff agreed. According to the Shorter Oxford English Dictionary, Vol. I, p. 1175, the word "lucrative" may mean "Yielding gain or profit; gainful"; other meanings are given, but I do not think that these have any base connotation. Indeed, the appointment which the plaintiff held in the company yielded enormous gains to him; it was a well-paid appointment as the learned judge himself put it. The plaintiff admitted under cross-examination that he bought the majority of his shares whilst he was the managing

director, and this gives the lie to his statement to the shareholders that he had put the whole of his life's savings in the company. On the evidence the defendants must have been perfectly justified if they had been understood to mean that the plaintiff was a liar. "For the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess": *per* Littledale, J. in *McPherson v. Daniels* (13) ((1829) 10 B. & C. at p. 272).

The second paragraph of "the libel letter" can be divided into four parts:

(i) an allegation that the plaintiff was conducting another business in competition with Fitzgerald Baynes & Co., Ltd. contrary to cl. 15 of his terms of service;

(ii) the plaintiff had indulged in a deliberate campaign of removing the company's containers and substituting them with their own containers;

(iii) the plaintiff enticed the company's employees;

(iv) a comment by the defendants that they found it difficult to reconcile the plaintiff's actions in (i), (ii) and (iii) with his professed duty to the shareholders of the company.

The learned judge made findings on (i), (ii) and (iii) to the effect that these allegations were true in substance, except that in (ii) he thought the statement "substituting the company's products with the Seven-Up products" might be interpreted to mean that the plaintiff was filling the company's bottles with his own products. With respect to the learned judge, his interpretation is not right, for as it was explained by learned counsel for the appellants – and learned counsel for the respondent appeared to have agreed – the campaign consisted in taking away from the company's customers empty Pepsi-Cola and Canada Dry bottles, and crediting the customers with their value in respect of Seven-Up products supplied to them. In spite of the learned judge's findings that the statements in para. 2 of the portion of "the libel letter" complained of were true in substance and therefore amounting in law to justification, he nevertheless said later in his judgment as follows:

> "In my opinion the accusation which is an express accusation and it is not confined to being an inference only is that the plaintiff is not a reliable person, that he would not hesitate to act in breach of a contract and he is lying when he says he has a duty to the many shareholders who invested in the company during his tenure of management. It is easy to see here the defendants were moved by dislike as well as a desire to injure the plaintiff."

Further, the learned judge made the following observations with regard to the allegation in (iii):

> "In my opinion there is a clear indication the use of these words was not bona fide. They were unnecessary and the object could only be, as an ordinary and reasonable reader must hold from reading them, that the plaintiff was an unsatisfactory and unreliable employer as already stated."

It seems to me, with respect, that the learned judge is mixing up malice with the defence of justification and fair comment in these two passages which I have quoted from his judgment. Having found that the allegations in (i), (ii) and (iii) were true, the learned judge should have held that the defence of justification had been established on those issues and it was irrelevant whether the defendants were actuated by indirect or improper motives.

> "No action will lie for the publication of a defamatory statement if the defendant pleads and proves that it is true. 'For the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess.' *McPherson v. Daniels* (1829) 10 B. & C. 263

> at p. 272, *per* Littledale, J. This is so even though the defendant is proved to have been actuated by malicious and improper motives. In this part of the law the interest in free speech prevails completely over the interest in security of reputation.": Salmond on Torts (13th Edn.), pp. 356–357, section 104.

I propose now to deal with question (iv), together with another matter which also raises the question of fair comment. The plaintiff complained of a statement in "the libel letter" that the defendants were extremely concerned as to what the plaintiff's real motives were in once again trying to create a division among the shareholders.

[*His Lordship then referred to the submissions of counsel on the meaning of the words "real motive" and, after setting out a portion of the defendants' evidence continued*]:

The learned judge's views on this question of "real motive" are expressed in the following passage of the judgment:

> "By stating that the defendants were extremely concerned as to what the plaintiff's real motives were in once again trying to create a division among the shareholders the defendants were clearly imputing that his real motives were not the ones which he had stated, that he had some ulterior dishonest or concealed motives which he was trying to gain by dishonestly pretending to be acting in the interests of the shareholders. I have already set out the evidence on this point and I will now content myself by stating that in my opinion these words are defamatory per se. Again the imputation is that the plaintiff is a liar inasmuch as he is not stating his real motives and he is trying to gain his real motives by dishonest and indirect methods."

With all due respect to the learned judge, I do not think that when considering the defence of fair comment he directed his mind at all to the correct test that should be applied to the facts. If the facts are true and the comments thereon, which are honestly believed to be true, impute corrupt or dishonest motives, the defendant must succeed if the imputation is warranted by the facts. The proper test to apply is – "Is there sufficient material fact stated in the impugned letter upon which to make comment and whether the facts or the subject-matter on which comment is made are indicated with sufficient clarity to justify the comment?". This was the test suggested in *Kemsley v. Foot* (14) ([1952] A.C. at pp. 356, 357) where Lord Porter, in approving a passage from Odgers on Libel and Slander (6th Edn.), at p. 166 said:

> "The question, therefore, in all cases is whether there is a sufficient sub-stratum of fact stated or indicated in the words which are the subject-matter of the action, and I find my view well expressed in the remarks contained in Odgers on Libel and Slander (6th Edn.), at p. 166. 'Sometimes, however, he says, 'it is difficult to distinguish an allegation of fact from an expression of opinion. It often depends on what is stated in the rest of the article. If the defendant accurately states what some public man has really done, and then asserts that "such conduct is disgraceful," this is merely the expression of his opinion, his comment on the plaintiff's conduct. So, if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case, the defendant enables his readers to judge for themselves how far his opinion is well founded; and, therefore, what would otherwise have been an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege or truth. The same considerations apply where a defendant has drawn from certain facts an inference derogatory to the plaintiff. If he states the bare inference without the facts on which it is based, such

> inference will be treated as an allegation of fact. But if he sets out the facts correctly, and then gives his inference, stating it as his inference from those facts, such inference will, as a rule, be deemed a comment. But even in this case the writer must be careful to state the inference as an inference, and not to assert it as a new and independent act: otherwise, his inference will become something more than a comment, and he may be driven to justify it as an allegation of fact.'
>
> But the question whether an inference is a bare inference in this sense must depend upon all the circumstances. Indeed, it was ultimately admitted on behalf of the appellant that the facts necessary to justify comment might be implied from the terms of the impugned article and therefore the inquiry ceases to be – Can the defendant point to definite assertions of fact in the alleged libel upon which the comment is made? and becomes – Is there subject-matter indicated with sufficient clarity to justify comment being made? and was the comment actually made such as an honest, though prejudiced, man might make?"

Lord Porter continues (ibid. at p. 358):

> "The criticism is that that press is a low one. As I hold, any facts sufficient to justify that statement would entitle the defendants to succeed in a plea of fair comment. Twenty facts might be given in the particulars and only one justified, yet if that one fact were sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not of necessity defeat the defendants' plea. The protection of the plaintiff in such a case would, in my opinion, be, as it often is in cases of the like kind, the effect which an allegation of a number of facts which cannot be substantiated would have upon the minds of a jury who would be unlikely to believe that the comment was made upon the one fact or was honestly founded upon it and accordingly would find it unfair. It is true that Kennedy, J. in *Joynt v. Cycle Trade Publishing Co.* [1904] 2 K.B. at pp. 292, 294, says that 'a comment cannot be fair which is built up on facts which are not truly stated,' and in the same case Vaughan Williams, L.J., ibid. at p. 298, quotes the language of Crompton, J. in *Campbell v. Spottiswoode* (1863) 3 B. & S. 769; 32 L.J.: 'If he (the critic) . . . imputes to the person whom he is criticizing base and sordid motives which are not warranted by the facts, I cannot think for a moment that because he bona fide believes that he is publishing what is true, that is any defence in point of law.' But in each of these cases the court was dealing with the lack of any basis of fact sufficient to warrant the comment made and, in any case, what is fair or unfair comment and what amounts to an imputation of base and sordid motives are matters for the jury and not a subject for your Lordships' decision."

Apply the first principle in *Kemsley v. Foot* (14), the first question is whether there are sufficient facts in "the libel letter" on which the comments are based. I have not the slightest doubt that there are. These are that the plaintiff joined a company that was in competition with Fitzgerald Baynes & Co. Ltd.; that the plaintiff had indulged in a campaign of removing the containers of Fitzgerald Baynes & Co. Ltd. from the soft-drink market and substituting bottles of the new company which he had joined; that the plaintiff was enticing the employees of Fitzgerald Baynes & Co. Ltd. to join his new company. The learned judge found all these facts proved. These actions which the plaintiff took were obviously calculated to damage Fitzgerald Baynes & Co. Ltd. The defendants' reaction, as shown by their evidence, was one of complete bewilderment. Surely, anyone who knew that the plaintiff owned the largest number of shares in Fitzgerald Baynes & Co. Ltd., however prejudiced he would be, might find it difficult to reconcile the plaintiff's actions with his duty to the other share-holders. On the evidence I do not think that anyone can blame the defendants

for expressing doubts about the plaintiff's motives in his dealings with the company. It may well be that the learned judge was right in holding that the defendants' statements about the plaintiff's real motives amounted to an imputation of dishonesty or mendacity, but as Lord Atkinson observed in *Dakhyl v. Labouchere* (15) ([1908] 2 K.B. at p. 329):

> "A personal attack may form part of a fair comment upon given facts truly stated if it be warranted by those facts – in other words . . . if it be a reasonable inference from those facts."

In *Hunt v. Star Newspapers Co. Ltd.* (12) ([1908] 2 K.B. at p. 323), Buckley, L.J. said:

> "Comment which tends to prejudice may still be fair; it may convey imputations of bad motive so far as the facts truly stated justify such an imputation . . . The defence of fair comment extends to the imputation of motives."

In dealing with the last statement in the words complained of in "the libel letter", the learned judge said:

> "In my opinion there are three irresistible inferences to be drawn from the foregoing passage which become emphasised when read in the influence of the other contents of the libel letter. First that it is not the plaintiff who has the real interests of the company at heart. He is an unreliable person, incompetent and unfit to safeguard the interests of the company. Secondly, it is possible the plaintiff may have wrongly succeeded in persuading the share-holders to lend their support to him. He is undeserving of the support of the shareholders who are requested to reconsider their decision. Thirdly, if a proxy has been given to the plaintiff it should be withdrawn; instead the proxy circulated should be utilised. The plaintiff is unfit to be entrusted with the shareholders proxy."

The learned judge then stated his conclusions as follows:

> "In my opinion these three inferences are defamatory individually as well as in their cumulative effect which is that the plaintiff is an unreliable person, dishonest, incompetent of handling affairs of importance and responsibility and unworthy of the trust of the shareholders. The power voted to him may be mis-used as in fact he has not the real interests of the company at heart."

It seems to me that the learned judge overlooked the fact that "the libel letter" was part of what counsel for the appellants rightly described as an "electioneering campaign", and in my view it would be a sad day for freedom of speech if the defendants, in support of their appeal to the shareholders for votes, were unable to say that they could handle the affairs of the company much better than the plaintiff, and in all respects more deserving of the shareholders' votes. In view of the plaintiff's conduct in establishing a rival company, of starting a case-war, enticing the company's employees and jeopardizing the continuation of the franchise enjoyed by the company in Pepsi-Cola, I think the defendants were clearly justified in telling the shareholders that the plaintiff had no genuine interest in the company and that the shareholders would be misplacing their confidence if they voted for him. I can find nothing violent or offensive in the last statement in the words of "the libel letter".

For these reasons I think the appeal should be allowed with costs and a certificate for two counsel and that the judgment and decree of the trial judge should be set aside and that there should be substituted therefor a decree dismissing the plaint with costs on the higher scale for two counsel.

Newbold JA: I have had the advantage of reading in draft the judgment of Crabbe, J.A. and I agree that the appeal should be allowed and that the orders proposed by him be made.

I have no doubt that there was little love lost between the plaintiff and any of the three defendants; but that does not mean that it has been proved that the libel letter was actuated by malice. I accept the judge's finding that the shamba boy remark was made by the first defendant and this manifestly showed a malicious state of mind on his part at that time. It was undoubtedly a factor to be considered in determining whether the libel letter was published with malice on the part of the first defendant; it was not, however, a factor to be considered in determining whether the letter was published with malice on the part of the other defendants. Taking the evidence as a whole I am satisfied that the judge did not take proper advantage of hearing and seeing the witnesses and that he arrived at a wholly erroneous conclusion in holding that the defendants jointly and severally were actuated by malice in publishing the libel letter. The plaintiff had consistently issued circular letters to shareholders which, apart from casting doubt upon the ability of the defendants to manage the affairs of the company, must have done damage to the company. The defendants, being convinced that the plaintiff's actions were damaging the company, were under a duty as directors, and had a mutual interest as shareholders, to place before the other shareholders facts and comments which would better enable the other shareholders to arrive at an informed decision. I am satisfied that this is what actuated the issue of the libel letter. I am also satisfied that the judge misdirected himself on the facts in a number of instances.

So far as the defences of justification and fair comment are concerned the judge does not appear to have dealt with these directly, though indirectly his findings of fact virtually determine the issues raised by the defence of justification in favour of the defendants. I am satisfied that, in so far as the defamatory statements consist of statements of fact, they have been proved to be substantially true, and, in so far as they consist of comment, the comment was a fair inference from the facts stated.

Sir Samuel Quashie-Idun P: I have read the judgments of Crabbe and Newbold, JJ.A. and I also agree that the appeal should be allowed for the reasons stated in both judgments. The appeal is allowed with costs for the appellants in this court for two counsel; the judgment and decree of the learned trial judge are set aside accordingly and a decree dismissing the plaint with costs for two counsel on a higher scale is substituted therefor.

Appeal allowed.

For the appellants:
JA Mackie-Robertson QC and *WS Deverell*
Kaplan & Stratton, Nairobi

For the respondent:
J Gledhill and *RR Shah*
Lawrence Long & Co Nairobi

Jubilee Insurance Co Ltd v John Sematengo
[1965] 1 EA 233 (HCU)

Division: High Court of Uganda at Kampala

Date of judgment: 3 March 1965

Case Number: 277/1964

Before: Sir Udo Udoma CJ

Sourced by: LawAfrica

[1] Insurance – Motor insurance – Action for declaration that insurance company entitled to avoid policy – Allegation of non-disclosure and misrepresentation by insured – No pending action or unsatisfied judgment against insured – Whether action for declaration maintainable – Traffic Ordinance 1951 *s.* 104 (4) (*U*).

Editor's Summary

The plaintiff an insurance company, filed a suit against the defendant insured for a declaration that the company was entitled to avoid a motor insurance policy issued to him on the grounds that the same was obtained by nondisclosure of material facts and by misrepresentations of facts which were false in some material particular. It was common ground that there was no action commenced and pending or a judgment obtained against the defendant. For the defendant it was submitted that having regard to the provisions of s. 104 (4) of the Traffic Ordinance, 1951, the action was not maintainable in law because no action had been taken nor judgment obtained against the defendant against which the defendant could claim to be indemnified by the plaintiff company. The judge found that the insurance policy was obtained by the nondisclosure of a material fact and by a representation of fact which was false in some particular.

Held –

(i) the purpose and intent of the provisions of s. 104 (4) of the Traffic Ordinance, 1951 is to enable an insurance company to avoid an insurance policy on the ground of nondisclosure of a material fact or misrepresentation of fact which is false in some material particular, regardless of any provisions in the insurance policy;

(ii) it is not necessary that before an action for declaration can be maintained in law, an action must have been commenced and pending or a judgment obtained against the insured and accordingly the action was maintainable in law.

Declaration as prayed.

Cases referred to in judgment

(1) *The Motor Union Insurance Co. Ltd. v. A. K. Ddamba*, [1963] E.A. 271 (U).

(2) *Joel v. Law Union & Crown Insurance Co.*, [1908] 2 K.B. 863.

(3) *MacDonald v. The Law Union Fire & Life Insurance Co.*, [1879] K.B. 328.

(4) *Thompson v. Weems*, [1889] A.C. 671.

(5) *Condogianis v. Guardian Assurance Co. Ltd.*, [1921] 2 A.C. 125.

(6) *Biggar v. Rock Life Assurance Co.*, [1902] K.B. 516.

Judgment

Sir Udo Udoma CJ: This is a claim by the plaintiff for a declaration that it is and was at all material times entitled to avoid the policy of insurance, No. UCV/7457, dated June 10, 1963, apart from any provisions contained therein, on the ground that the said policy was obtained (by the defendant) by the nondisclosure of material facts or by misrepresentation of facts which were false in some material particular or by both ways.

The material facts alleged to have been misrepresented or not to have been disclosed (or both) are pleaded in para. 4 of the plaint filed in the following terms:

"4. The said proposal form and the said declaration contained (*inter alia*) the following questions to and answers by the defendant:

Question No. 16. Is the vehicle at present in a thorough state of repair?

Answer: Yes.

Question No. 19. Give record of accident and/or loss during the past five years in connection with any motor vehicle owned or driven by you, whether insured including any claim outstanding.

Answer: None."

The allegation of the plaintiff company is that the proposal form and the declaration contained therein formed the basis of the policy of insurance and were incorporated in the said policy. The plaintiff company now complains that the answers to questions Nos. 16 and 19 set out above were false in material particulars in that, as regards the answer to question No. 16, the motor lorry, No. UFY 420, had, at the material time, broken down on the Kampala-Jinja road owing to a major mechanical defect, and was not therefore then in a thorough state of repair; and, in respect of the answer to question No. 19, the motor lorry aforesaid had been involved in a collision in the night of April 24, 1963, and was then lying on the Kampala-Jinja road; both which material facts the defendant had not only failed to disclose to the plaintiff company at the material time, but had also misrepresented.

In his written statement of defence the defendant denies that:

(1) the answers to the questions set out in para. 4 of the plaint were material "in or about the making of the said policy";

(2) he obtained the said policy by nondisclosure by misrepresentation of material facts as alleged or at all; or both and

(3) whatever facts were within his knowledge regarding his said motor lorry were disclosed for (sic) the plaintiff's servant or agent when he wrote down the answers on the said piece of paper.

The defendant therefore "contends that the plaintiff is not entitled to avoid the said policy either by reason of the provisions of sub-s. 4 of s. 4 of the Traffic Ordinance of (sic) otherwise".

At the hearing, the defendant neither gave nor called any evidence in support of any of the averments contained in his statement of defence. The only evidence before the court was given by the plaintiff and its witnesses.

On the evidence, which has not been contradicted and which I accept, I think it has been established that the defendant is the registered owner of the motor lorry, No. UFY 420, which had previously been insured with the plaintiff company and the policy of which insurance expired on March, 4 1963, without any renewal.

On April 24, 1963, in the night, the motor lorry No. UFY 420 was involved in a collision with a Peugeot estate car No. USB 683 at mile 8 on the Kampala -Jinja road. At about 9.30 p.m. that night Cpl. James Ahenda, No. 7494, visited the locus in quo. He found both the lorry, No. UFY 420, and the Peugeot estate car, No. USB 683, lying in line on the road. He inspected both vehicles and took measurements and drew a sketch plan of the scene.

Between 8.30 a.m. and 9 a.m. on April 25, 1963, the defendant went to the plaintiff company. He applied for the renewal of his previous policy. He was informed that the policy could not be renewed owing to effluxion of time. The defendant thereupon applied for a new third party insurance policy as

prescribed under the Traffic Ordinance, 1951, to cover his said motor lorry for

only a period of three months. He explained that he could not afford to insure the said motor lorry for a longer period. On enquiry, he also explained that he had brought his lorry No. UFY 420 with him to Kampala, and that it was then stationary at the Nakivubo motor park, Kampala, loaded with matoke.

At his request the proposal form, Ex. A, was supplied to him for completion. As the defendant does not understand English, at his request, and on his instructions and on his behalf the proposal form, Ex. A, was completed by Charles Kulabiwo Serumaga (P.W. 1), a clerk employed by the plaintiff company, to whom the defendant spoke in Luganda the answers required for completing the form Ex. A; which answers Charles Kulabiwo Serumaga (P.W. 1) duly and correctly translated into English from Luganda and recorded on the said form. The completed form, Ex. A, was then read over and again translated from English into Luganda for the benefit of the defendant, who, thereupon on being satisfied, signed the declaration of warranty on the reverse side of the form aforesaid, thereby signifying that his answers had been correctly and faithfully recorded thereon.

The form, Ex. A, thus completed was submitted to the plaintiff company's representative, Sadrudin Jamal (P.W. 7), who, after having examined it and being satisfied with the answers given thereon, immediately the same day and in consideration of the payment of the premium of the sum of Shs. 26/- by the defendant, issued to the defendant the cover note, Exhibit B. Thereafter Sadrudin Jamal (P.W. 7) issued to the defendant a policy of insurance, and pursuant the provisions of s. 101 of the Traffic Ordinance, 1951, also a certificate of insurance; copies of both which documents are in these proceedings exhibited and marked Exhibits E and F respectively.

The defendant later the same day at about 11 a.m. went to Yokana Muwange (P.W. 5), a motor mechanic, at his workshop situate at some 2½ miles on the Gayaza-Kampala road. He reported to him that his lorry was lying on the Kampala-Jinja road in a bad state of repairs, the same having broken down. He requested the latter to accompany him to the site on the road where the lorry was lying in order to effect repairs. Yokana Muwange (P.W. 5) went with him. He found the motor lorry on the road. The bearings of the near wheel of the motor lorry were broken and the wheel itself rendered immobile. It was stiff. The defendant requested Yokana Muwange (P.W. 5) to repair the said lorry for him.

Yokana Muwange (P.W. 5) set at once to work on the lorry, having first obtained the requisite spare parts from Kampala. The work of repairing the motor lorry continued late into the night, and a hurricane lantern had to be placed on the top of the lorry. While the lorry was stationary on the Kampala -Jinja road undergoing repairs, a Fiat motorcar ran into and collided with it from behind, that night.

In June, 1963, it came to the knowledge of the plaintiff company that the motor lorry, No. UFY 420, property of the defendant insured with it had been involved in a collision with another vehicle on April 25, 1963. The plaintiff company was thereupon put on an enquiry. As a result it was further discovered that on April 24, 1963, that is, the day before the defendant insured the motor lorry with the plaintiff company, the motor lorry, No. UFY 420, had also been involved in a collision with a Peugeot estate car No. USB 683, in consequence of which the motor lorry, No. UFY 420, was lying immobile with a major mechanical defect on the Kampala-Jinja road.

After due enquiry, the plaintiff company on January 16, 1964, addressed the letter, Ex. D, in these proceedings to the defendant repudiating the policy of insurance, and subsequently filed this suit seeking the declaration hereinbefore mentioned.

Counsel for the defendant, has submitted that having regard to the provisions of s. 104 (4) of the Traffic Ordinance, 1951, this action is not maintainable in law. Counsel contended that before an action for a declaration of the plaintiff's right to avoid the defendant's insurance policy can be maintained there ought to be either an action commenced and pending, or a judgment obtained against the defendant in respect of the accident; and since there is no such action or judgment in this case this action cannot be maintained in law.

Counsel referred the court to the case of *The Motor Union Insurance Co. Ltd. v. A. K. Ddamba* (1) and contended that the decision therein did not deal with the question as to whether or not that action was maintainable in law pursuant the provisions of s. 104 (4) of the Traffic Ordinance.

For the plaintiff company, counsel submitted that the plaintiff company is entitled to judgment both on the evidence and in law; and that under the provisions of s. 104 (4) of the ordinance the plaintiff company is entitled to the declaration sought regardless of the fact that there is pending neither suit nor any unsatisfied judgment recovered against the defendant. In support of this submission counsel cited and relied on *The Motor Union Insurance Co. Ltd. v. A. K. Ddamba* (1).

Now the provisions of s. 104 (4) of the Traffic Ordinance, 1951, without its proviso, which I consider irrelevant to the issue in controversy in the instant case, are as follows:

> "No sum shall be payable by an insurer under the foregoing provisions of this section, if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provisions contained in the policy, he is entitled to avoid it on the ground that it was obtained by the nondisclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it."

The contention of counsel for the defendant is that by reason of the above provisions the present action is not maintainable in law because no action has been taken nor judgment obtained against the defendant against which the defendant can claim to be indemnified by the plaintiff company. In the absence of such action or judgment there can be no question of the plaintiff company being called upon to make payment to anyone. In other words, it is only when anyone who has obtained judgment against the defendant seeks to enforce such a judgment against the plaintiff company, contended counsel, that the latter can come to the court and ask for a declaration. Counsel's submission therefore resolves itself to the construction of the provisions of s. 104 (4) of the Traffic Ordinance, 1951.

It is of interest to note that the provisions of s. 104 (4) of the Uganda Traffic Ordinance, 1951, are taken verbatim from the provisions of s. 10 (3) of the English Road Traffic Act, 1934. The point raised in the instant case would appear not to have been raised in the English Courts, which of course is not surprising as the provisions of the Act appear very clear and are devoid of any ambiguity.

Commenting on the provisions of s. 10 (3) of the Traffic Act 1934, C. N. Shawcross in his book The Law of Motor Insurance (1936 Edn.) at p. 404 said:

> "Unless the policy has been cancelled before liability to a third party is incurred and the certificate of insurance has been surrendered by the assured, insurers are not entitled to rely upon nondisclosure or misrepresentation by

> the assured as a ground upon which to avoid liability to that third party who has obtained judgment against the assured in respect of death or bodily injury arising out of the use of the assured's motor vehicle on the road. In order to avoid such liability to a third party the insurer must go further and commence proceedings, within a specified time, for a declaration that he is or was entitled to avoid the assured's policy upon the ground of non-disclosure or misrepresentation of a material fact, apart from the terms of the policy."

It would appear that the purpose and intent of the provisions of s. 104 (4) of the Traffic Ordinance was to enable an insurance company to seek a declaration from the court that it is entitled to avoid an insurance policy on the ground of nondisclosure of a material fact or misrepresentation of fact which is false in some material particular, regardless of any provisions in the insurance policy contained. Where an insurer has obtained such a declaration either before or three months after the commencement of proceedings by a third party in which the party had obtained judgment against the assured, the insurer cannot be called upon to satisfy such a judgment.

In my view the effect of these provisions, on a true construction, like the effect of the provisions of the corresponding English Act, is to prevent an insurer without resort to the court from relying solely upon nondisclosure or misrepresentation by the assured as the ground upon which to avoid his liability to a third party who has already obtained judgment against the assured. There is nothing in the provisions of the Ordinance to support counsel for the defendants submission that before an action for a declaration can be maintained in law, a judgment must have been obtained against an insured. The submission is unconvincing. It is misconceived and must be over-ruled. In my opinion this action is maintainable in law and has been properly brought before this court.

I think counsel was in error in his contention that the decision of the court in *The Motor Union Insurance Co. Ltd. v. A. K. Ddamba* (1) did not deal specifically with the question as to whether or not that action was maintainable in law. It is of course true that the learned trial Judge used the word "competent" instead of maintainable. I am satisfied that the point was indeed one of the main issues decided in that case. In dealing with that point Jeffreys Jones, J. had said:

> "This Section, i.e. 104 (4) of the Traffic Ordinance was designed to protect the insurance company if they bring an action either (*a*) before an action is started against the insured, or (*b*) within three months after it has been commenced for a declaration that they are entitled to avoid the contract subsisting between them as there has been nondisclosure of a material fact or that there has been a representation of fact which was false in some material particular. Once the insurance company has obtained such a declaration, they can produce such a declaration in any subsequent action taken under the policy against the insured and deny liability therefor."

With the above quoted passage of the learned judge's judgment I respectfully agree.

Accepting the evidence of the plaintiff company and its witnesses as I do, the question must be, is the plaintiff company entitled to the declaration which it seeks on the grounds that the insurance policy, Ex. E, was obtained by the nondisclosure of a material fact, or by a misrepresentation of fact which was false in some material particular, or both? I think so.

The representative of the plaintiff company, Sadrudin Jamal (P.W. 7) has sworn that if at the time the form, Ex. A, was submitted to him it had been disclosed that the motor lorry, No. UFY 420, had been involved in an accident

the previous day he would not have issued the defendant with the cover note, Ex. B, or agreed to have the motor lorry insured at all, and that he relied entirely on Ex. A in accepting to insure the motor lorry. He said further that even in August 1963 during an interview, the defendant only admitted the accident which had occurred on April 25, 1963 but not that of April 24, 1963.

It is well established that a contract of insurance is uberrimae fidei and therefore requires the utmost good faith from both parties during the making of it. Nondisclosure of a material fact or a representation of fact false in some material particular renders the contract voidable. Nondisclosure of a material fact as such may not by itself be a ground for damages, the only remedy available would appear to be the avoidance of the contract. The contract being uberrimae fidei the insurer is entitled to be put in possession of all material information possessed by the insured.

As was said in *Joel v. Law Union & Crown Insurance Co*. (2) ([1908] 2 K.B. at p. 883) by Fletcher Moulton, L.J.:

> "The contract of life insurance is one uberrimae fidei. The insurer is entitled to be put in possession of all material information possessed by the insured. This is authoritatively laid down in the clearest language by Lord Blackburn in *Brownlee v. Campbell* 5 A.C. 925 at p. 954:
>
> > 'In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is uberrimae fidei, that, if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, you will state what you know. There is an obligation there to disclose what you know, and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy.'
>
> There is, therefore, something more than an obligation to treat the insurer honestly and frankly, and freely to tell him what the applicant thinks it is material he should know."

In *Macdonald v. The Law Union Fire & Life Insurance Co*. (3) the plaintiff therein effected a policy of insurance with the defendants therein on the life of a K. M. Taylor, which was under the seal of the defendants, but the plaintiff was not made a party to the policy. In it there was the proviso "that if the declaration under the hand of the plaintiff delivered at the defendants' office as the basis of the insurance is not in every respect true – then the insurance shall be void."

On proposing the insurance, the plaintiff had answered in writing certain questions; and at the foot he had signed, as the person proposing the insurance, a declaration in the following terms:–

> "I declare that the above particulars are truly set forth".

It was held that the proviso in the policy, by the terms of which the plaintiff having accepted it was bound, avoided the insurance if the particulars in the declaration were untrue in fact, on a material matter, although not untrue to the plaintiff's knowledge.

In *Thompson v. Weems* (4), William Weems applied to an insurance office to effect a policy on his life. He received a printed form of proposal containing certain questions. Among the questions there were the following:

"Question 7 (*a*) Are you temperate in your habits?
(*b*) and have you always been strictly so?
Answer to (*a*) "Temperate"; and
(*b*) "Yes".

Subjointed to the printed questions, there was a declaration which was signed by Weems to the effect that the foregoing statements were true and that the assured agreed that this declaration should be the basis of the contract; and that if any untrue averment etc. was made the policy was to be absolutely void and all moneys received as premium forfeited. The policy recited the above declaration as the basis of the contact.

After Weems' death the insurance company refused payment of the sum of £1,500, being the amount due on the policy on the ground that the answers given by Weems on the proposal form were false in fact. In an action to recover the amount of the policy, it was held by the House of Lords, reversing the decision of the court below, that the declaration of Weems taken, in connection with the policy, constituted an express warranty that the answer to question 7 was true in fact; and that as the evidence clearly proved that Weems' averment as to his temperance was untrue, the policy was absolutely null and void.

In the instant case, I find as a fact on the evidence that the answer given by the defendant to question No. 16 was false in material fact; and false within the knowledge of the defendant as it is highly probable that at the material time when the defendant applied on April 25, 1963 to have his motor vehicle, No. UFY 420, insured and in pursuance thereof had completed the proposal form, Ex. A, he knew that the said motor vehicle had broken down and was immobile on the Kampala-Jinja road, owing to a major mechanical defect; and that the same was therefore not in a thorough state of repair. I think that the answer, "yes", given by the defendant constitutes a representation of facts false in some material particular.

The fact that the defendant told a false tale when in reply to enquiries he had said to Charles Kulabiwo Serumaga (P.W. 1) that the said motor lorry was loaded that morning with matoke and was then at the Nakivubo motor park, whereas in fact the said lorry was at the time on the Kampala-Jinja road; the fact also that the defendant went that same morning to Yokana Muwange (P.W. 5) and took him to the Kampala-Jinja road for the express purpose of repairing the said motor lorry; the fact that the previous policy had expired on March 4, 1964 and no attempt had been made to renew it until the morning on April 25, 1963, that is to say, the morning after the accident resulting in the breakdown of the motor vehicle, No. UFY, 420 on the road; all these facts must lead irresistibly to the inference that the defendant knew full well before his visit to the office of the plaintiff company's representative, of the accident of the night of April 24, 1963, and that the said motor vehicle was then immobile on the Kampala-Jinja road.

From the evidence as a whole and the above findings, I also draw the inference that the defendant deliberately left question No. 19 unanswered even though he well knew that the motor lorry aforesaid had been involved in an accident on April 24, 1963. It follows I think that by deliberately refusing to give any answer to question No. 19 the defendant had failed to disclose to the plaintiff company the record of accident involving the motor lorry No. UFY 420. Thus the defendant had obtained the policy, Ex. E, and the certificate, Ex. F, by the nondisclosure of a material fact and by a representation of fact false in some material particular.

This action is technically founded on the provisions of s. 104 (4) of the Traffic Ordinance, that is to say, quite independently of the terms contained in the policy, Ex. A. It has been brought pursuant those provisions. Whether or not the declaration of warranty contained in the proposal form, Ex. A, forms the basis of the contract and is incorporated therein seems to me of little moment.

The right of action provided for under s. 104 (4) of the Ordinance is entirely separate, distinct and

independent of any provision contained in the policy,

Ex. E, and would appear to be narrower than any right of action which might accrue under the contract of insurance as such. In an action brought pursuant these provisions the nondisclosure must be of a material fact and the misrepresentation false in some material particular. In the case of an action founded upon the terms of the policy as a contract it seems to me that a misrepresentation need not necessarily be material so long as it forms the basis of the contract of insurance.

In the Australian case of *Condogianis v. Guardian Assurance Co. Ltd*. (5) the appellant sued the respondent upon a policy issued by them insuring certain laundry premises against fire. A proposal form filled up by the appellant when applying for the policy contained the following questions:

> "Has the proponent ever been a claimant on a fire insurance company in respect of the property now proposed, or any other property?
>
> If so, state when and name of company."

The appellant's answer to the question was "Yes. 1917. 'Ocean'." The answer was literally true as in 1917 he had claimed against Ocean Insurance Co. in respect of the burning of a motorcar; but in 1912 he had made a claim against another company in respect of a similar loss. The proposal form stated that it was the basis of the policy and that the particulars given by the appellant were to be express warranties. The policy contained a condition that if there was any misrepresentation as to any fact material to be known in estimating the risk, the respondents were not to be liable upon the policy.

It was held by the Privy Council that the answer was untrue since the question could not reasonably be read as being intended to have the limited scope which would render the answer true; that there was a breach of warranty whether or not the misrepresentation was as to a material fact; and that the appellant could not recover.

Although in para. 9 of his statement of defence, the defendant had averred that the plaintiff company's servant or agent had not read over his answers to him before he, the defendant, signed Ex. A, no evidence was called in substantiation of that averment; nor was any argument addressed to the court on the issue. In order, however, that there should be no doubt as to the view of the court on the issue, suffice it to say that I am satisfied on the evidence that the defendant's answers were not only read over but were interpreted to the defendant, who clearly understood them before he signed Ex. A.

It was the defendant's duty to insist that his answers be read and interpreted to him before signing Ex. A; and if he had failed in that duty, which on my findings is not the case, he must be taken to have had the answers read and interpreted to him. For the servant or agent of the plaintiff company, in filling the answers on the proposal form, Ex. A, was not at the material time the agent of the plaintiff company but of the defendant for the purposes of the proposal form, Ex. A. (See *Biggar v. Rock Life Assurance Co*. (6)).

In my judgment the plaintiff company is entitled to the declaration sought because it has satisfactorily discharged the onus which is upon it of establishing by preponderance of evidence that the insurance policy, Ex. E, and the certificate, Ex. F, were obtained by the defendant by the nondisclosure of a material fact and/or by a representation of fact which was false in some particular. I accordingly enter judgment for the plaintiff and grant it the declaration asked for in terms of the plaint filed in this action, with costs.

Declaration as prayed.

For the plaintiff:

I Ishani
Ishani & Ishani, Kampala

For the defendant:
SH Dalal
Dalal & Singh, Kampala

Jama Noor Ishakiya v Hassanali Ahmed Jusub

[1965] 1 EA 241 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	18 January 1965
Case Number:	149/1962
Before:	Fuad J
Sourced by:	LawAfrica

[1] Landlord and tenant – Tenancy agreement – Standard rent to be charged according to tenancy agreement – At relevant time Rent Control Board had no jurisdiction – Rent subsequently agreed orally – Whether tenancy agreement required to be registered – Whether subsequent parol agreement admissible in evidence.

*[2] Evidence – Admissibility – Tenancy agreement – Standard rent to be charged according to tenancy agreement – Rent subsequently agreed orally – Whether tenancy agreement required to be registered – Whether subsequent parol agreement admissible in evidence – Evidence Ordinance, s.*91, *proviso* 4 (*a*) (*U*).

[3] Practice – Trial – Advocate representing defendant without his client – Non-participation when leave to withdraw and adjournment refused – Duty to the court and to his client.

Editor's Summary

The plaintiff sued for unpaid rent. He relied on a written agreement dated March 29, 1955 insofar as the letting was concerned and pleaded a subsequent oral agreement as regards the amount of rent to be paid. The defendant set up the written agreement stipulating that the rent should be the "standard rent" as assessed by the Rent Control Board. He alleged the plaintiff had misrepresented to him that the Rent Control Board had assessed the standard rent for the premises at Shs. 575/- per month and that he had thereby been induced to pay rent at this rate. He counterclaimed for the difference between this figure and the amount of Shs. 350/- per month which he alleged would be the standard rent. In reply the plaintiff stated that the rent charged was that orally agreed between the parties on May 7, 1955 since at the relevant time the Board had no jurisdiction to assess rent in respect of the premises. The agreement was entitled "Main Terms of Tenancy Agreement Entered Into . . ." and while it provided that the rental was to be the standard rent as assessed by the Rent Control Board it contained no words of demise of the premises. At the trial the plaintiff led evidence of the parol agreement. Counsel for the defendant

objected on the ground that as the agreement in question was required by law to be in writing it was ineffectual to pass any estate or interest by virtue of s. 51 of the Registration of Titles Ordinance (Cap. 123) (U) and relying on s. 91 of the Evidence Ordinance (U) argued that the subsequent oral agreement could not be proved.

Held –

(i) an agreement for lease need not by law be in writing for the purposes of proviso 4 to s. 91 of the Evidence Ordinance.

(ii) the tenancy agreement was an agreement for lease and in the circumstances there was nothing in law to prevent the parties, before rent was paid, from agreeing by another agreement that the rent should be a fixed sum.

(iii) evidence of the subsequent parol agreement was admissible.

(iv) the defendant had entered into possession of the premises in question by virtue of an agreement for lease and had paid rent in accordance with a later parol agreement.

(v) an advocate may not withdraw from a hearing without leave of the court given for sufficient reason; accordingly the plaintiffs evidence was substantially

uncontradicted and the court was deprived of the defence submissions, the hearing having continued inter partes.

Judgment for the plaintiff.

[**Editorial Note:** *Din Mohamed v. Lalji Visram & Co*. (1937), 4 E.A.C.A. 1, not cited.]

Judgment

Fuad J: This suit, claiming principally unpaid rent for premises at No. 21 Nakivubo Road, was commenced by a plaint filed as long ago as March 1962 and has met with many vicissitudes. The defendant entered conditional appearance and applied to the court for a stay of proceedings, relying on a clause in the tenancy agreement, so that the matters in dispute could be referred to an arbitrator. The application for a stay was granted by Lewis, J. in January, 1963.

Later that month the plaintiff gave notice of appeal against the order of Lewis, J., and in June 1963 the Court of Appeal allowed the appeal, setting aside the order made and substituting for that order, an order dismissing the application for a stay of proceedings.

The suit then proceeded and the defendant filed a defence with a counterclaim at the end of June 1963. The pleadings closed with a reply and a defence to the counterclaim filed early in July 1963.

The suit was then set down for hearing on November 8, 1963, and came before the learned Chief Justice. At the hearing the defendant applied, *inter alia*, for certain portions of the reply to be struck out since there had been a "departure" and a contravention of the provisions of O. 6, r. 6 of the Civil Procedure Rules. In a considered ruling delivered on November 20, 1963, the Chief Justice, though expressing the view that there had been a "departure", held that he could not entertain the application to strike out since the proper procedure had not been followed.

After various other adjournments, on May 13, 1964, a similar application came before me by way of a chamber summons taken out by the defendant under O. 6, r. 17. I dismissed the application on the grounds of delay alone, since the pleadings had closed and the action had already been set down for hearing. My "Ruling" (it should have been entitled an "Order") is dated May 16, 1964. An application for leave to appeal against my Order to the Court of Appeal was dismissed by me on that day, and was pursued no further.

Eventually, on November 13, 1964, the hearing of the suit commenced before me and at the conclusion of the day's hearing (the plaintiff's case having been completed) it was adjourned to January 13, 1965, being the next available date. This long adjournment was most unsatisfactory, but my other commitments, together with those of counsel did not admit of an earlier date. The hearing was concluded on January 13, 1965, in somewhat unusual circumstances.

Paragraph 3 of the plaint was as follows:

> "3. By a written agreement made at Kampala on the 29th day of March, 1955, plaintiff let on hire and defendant took on hire the plaintiff's premises at Nakivubo known as Plot No. 21 (now Plot 23) for the period of 7 years as terminating on the 31st March, 1962, at a monthly rental of Shs. 575/-."

and the plaintiff claimed unpaid rent for the last two months of 1961 and the first three months of 1962, amounting to Shs. 2,875/-, and various smaller amounts in respect of municipal and improvement taxes and water rates.

Inter alia, in his statement of defence, the defendant pleaded that the agreement in question stipulated that the rent should be the "standard rent" as assessed by the Rent Control Board, and that in the event the Board had never assessed the standard rent of the premises in question.

It was also averred that under the agreement the rent for the month of March 1962, was not in arrears when the suit was filed, and therefore the claim for that month was premature. The amounts claimed, other than in respect of rent, were disputed.

The defendant also pleaded that on a date in July 1955 the plaintiff had falsely represented to him that the Rent Control Board had in fact assessed the standard rent for the premises at Shs. 575/- per month and that believing this misrepresentation he had thus been induced to pay rent for 79 months at that rate, until October 31, 1961. It was averred that the plaintiff's deception had only been discovered in January 1962, and that the Board would have assessed the rent in the region of Shs. 350/- per month had the matter been referred to it. The defendants claim in the counterclaim was expressed as follows:

> "10. And by way of counterclaim the defendant repeats paragraphs 1 to 9 inclusive of the defence and says that he is entitled to claim from the plaintiff the sum of Shs. 17,775/- being the overpayment made by him to the plaintiff at the rate of Shs. 225/- per month for 79 months, i.e. from 1.4.1955 to 31.10.1961 both inclusive, being the difference between Shs. 575/- and Shs. 350/- or such sum as this honourable court may arrive at after deciding what should be the reasonable rent in absence of the standard rent, and that he is also entitled to refund of site rates paid during that period to the plaintiff and excess payment made for improvement tax and water charges."

A copy of the agreement was annexed to the defence, and was later produced at the hearing. I think it necessary to set it out in full:

> "Main Terms of Tenancy Agreement Entered Into Between JAMA NOOR ISHAKIA – *Arab Merchant of P.O. Box 203, Kampala*, and HASSANALI AHMED JUSUB, *of P.O. Box 383, Kampala*.
>
> 1. *Landlord*: JAMA NOOR ISHAKIA, of P.O. Box 203, Kampala.
> 2. *Tenant*: HASSANALI AHMED JUSUB, of P.O. Box 383, Kampala.
> 3. *Subject Matter*: Business premises comprised in Plot No. 21 Nakivubo Place, Kampala, consisting of one big hall, a room behind it and a lavatory.
> 4. Rental as assessed by the Rent Control Board namely the Standard Rent.
> 5. Possession of the lease premises to be given on the 1st day of April 1955.
> 6. *Duration of the Tenancy*: Seven years from the 1st day of April 1955.
> 7. Rental to be paid on or before the 5th of every month in arrear.
> 8. Municipal site and improvement tax shall be borne by the tenant.
> 9. The tenant not to assign, sublet part of the possession of leased premises without the consent of the landlord which shall not unreasonably be withheld.
> 10. The agreement shall comprise such other terms and conditions as normally obtain in the agreement of this nature.
> 11. Water charges, electricity charges shall be borne by the tenant.
> 12. Lease may be drawn up either in the name of the tenant or his form or company, majority of whom shall be the members of the tenant's family.
> 13. All fittings and alterations to suit the business convenience of the tenant shall be installed at the expense of the tenant but at the determination of the tenancy if the landlord so wishes, the tenant at his own expense shall restore the premises to the original state.

14. All expenses and disbursements incidental to the preparation of these presents and the preparation of formal lease shall be borne by the tenant.

15. All matters arising out of these presents if not mutually agreed between the parties hereto shall be referred to Mr. B. K. S. Verjee of Messrs. Verjee & Verjee and his decision shall be final.

Dated this 29th Day of March 1955.

WE CONFIRM THE ABOVE TERMS:

Sd. Hassanali Ahmed
Tenant

Sd.– J. Noor
Landlord

Witness:

Sd.–Bahadurali K. Verjee
Advocate
Kampala.

Bahadurali K. Verjee,
Advocate,
Kampala.

Advocate,
P.O. Box 50,
Kampala.

”

By way of reply the plaintiff admitted that no standard rent was assessed by the Rent Control Board, averring that at the relevant time the Board had no jurisdiction to assess rent in respect of the premises in question. It was further pleaded that on May 7, 1955, the parties had, *inter alia*, mutually agreed that the rent for the premises should be Shs. 575/- per month, and the making of any representation, false or otherwise, was denied. It was, however, admitted that the rent for March 1962 did not fall due until after action brought.

I am of the opinion that since I dismissed an application to strike out a part of the plaintiff’s reply for a breach of the provisions of O. 6, r. 6, I am able to decide the case on any ground that is open for decision on the pleadings as they stand as a whole; though it would not, of course, have been so had the attack made under O. 6, r. 17 succeeded. As I see it the position is no different from that which would have obtained had the relevant pleadings not been attacked at all. No submission to the contrary was made.

Before evidence was called counsel for the plaintiff submitted that the defendant should begin. Counsel for the defendant submitted it was for the plaintiff to begin. I ruled that the plaintiff must begin and I now give my reasons. As I understood the position this was, in the event, a claim for rent based on an oral agreement to pay rent at a certain rate. In so far as the claim was concerned I was of the opinion that it was for the plaintiff to establish that this agreement had taken place since it was denied by the defendant. Bearing in mind, therefore, the provisions of O. 16, r. 1,I decided that the plaintiff had the “right to begin”. It is to be noted that there was no claim for compensation based on “use and occupation”.

The plaintiff gave evidence. He produced the instrument which has been set out above, and testified that he had later agreed, verbally, with the defendant that the rent should be Shs. 575/- per month. Counsel for the defendant objected to the admissibility of this evidence and his objection was overruled.

I will refer to this matter again presently. The plaintiff stated that the verbal agreement regarding rent was made at his house on May 7, 1955, and his clerk, Daudi Mukasa (who was later called as witness) was present. He had asked the defendant to come with him to the Rent Control Board but he had refused saying that he wanted to pay the rent that they had agreed.

In cross-examination the plaintiff maintained that the defendant had come to see him at his house, of his own accord, on May 7, 1955. He came to ask how much rent should be paid. After a certain amount of bargaining the sum

of Shs. 575/- per month was arrived at and agreed to. He stated that it was the defendant himself who had suggested that they should not go to the Rent Control Board. He had never applied to the Board to assess the rent – it was for the defendant to do so. At the end of April, 1955 after the defendant had already been in occupation, he had demanded rent from him and the defendant had said that he was coming to pay it. He had no particular reason for remembering the date on which the rent was agreed, but he did remember it. He could not recall the dates of other conversations they had had previously.

When an affidavit which he had sworn on April 19, 1962, in connection with an earlier application in the suit, was put to him in which the following passage occurs–

> ". . . that in April 1955 the defendant came to me of his own accord and said 'As the rent restriction is coming to an end let us agree to a reasonable rent amongst ourselves.' He proposed Shs. 575/-, and I agreed to this",

he explained the discrepancy by stating that they had had discussions about the matter in April, but had agreed in May and he denied a suggestion that he was changing his evidence.

He firmly denied that he had ever told the defendant that the Rent Control Board had fixed the rent at Shs. 575/- per month. It was not as a result of this representation that the defendant had paid Shs. 2,175/- for three months rent in July 1955, which was the first payment of rent that he had received. He later stated that the defendant had said that he (the defendant) was very busy and it was "not necessary to go to the Board".

Daudi Mukasa, the plaintiff's clerk, concluded the case for the plaintiff. He had been working for the plaintiff since 1953 and was, at the time of the hearing, still in his employment. He produced the plaintiff's "Rent Book". He recalled being present when the parties had discussed the rent, and particularly remembered a Saturday between May 5 and 8, 1957 (this was in fact May 7), when he had heard them discussing rent and finally agreeing on a figure of Shs. 575/- per month.

When it was suggested to him in cross-examination that it was remarkable how he was able to remember the date after nine years, he did not agree. He had never spoken with the plaintiff about the matter. He did not learn, and had no idea before he came to court, what would be asked of him.

I must now deal with the reasons why I overruled counsel for the defendant's submission that evidence of the parol agreement was inadmissible. If I understand his argument correctly, it was that the agreement in question was required by law to be in writing (it was a sub-lease and unless it was registered in the manner provided by the Registration of Titles Ordinance (Cap. 123) (U) it was ineffectual to pass any estate or interest (s. 51 of the Ordinance) and the subsequent agreement could not be proved since it was not in writing. He relied on s. 91 of the Evidence Ordinance (U). Proviso (4) to that section is in the following terms:

> "Proviso 4. – The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing or has been registered according to the law in force for the time being as to the registration of documents."

Counsel for the defendant agreed that the instrument was not in statutory form (it could not therefore have been registered) but whatever may have been the position it was not in fact registered so the only matter left for consideration in so far as the proviso was concerned was whether or not the agreement was

required by law to be in writing. I was not persuaded that an agreement for a lease must, by law, be in writing within the meaning of those words in the relevant proviso. I am of the opinion that when the "tenancy agreement" is referred to as a whole it is clear that it was not a lease. No words of present demise were used – the rent was not fixed and was to be subsequently ascertained – the drawing up of a formal lease was envisaged. It seems to me that it was a contract between the parties that the intending lessor would grant a lease and the intending lessee would accept a lease and in the circumstances there was nothing in law to prevent the parties before rent was paid, in agreeing by means of another distinct agreement, that the rent should be a fixed sum.

In the event no evidence was called for the defendant. I gave my reasons why I refused an application on January 13, 1965, for an adjournment, and I need not repeat them. I note, however, that the application was oddly reminiscent of one made before the Chief Justice on June 5, 1964 (which succeeded) in respect of which the following is recorded:

> "Mr. Ishani for the defendant says he is applying for an adjournment – says his client is ill. Received telegram yesterday. Medical Certificate to be posted. Telegram from Kenya."

This is precisely what happened before me.

When I had given my decision on the question of an adjournment defendant's counsel applied for leave to withdraw. The telegram was all that counsel had to base his application upon. Could it be said that he had no instructions to do anything more than to apply for an adjournment? I think not. I mean no disrespect to counsel for the defendant, but surely it was his duty to his client (though he did not see it that way) and to the court, to continue to represent the defendant even in the difficult situation he found himself in. I know of no authority on this question, but it seems to be the generally accepted practice that counsel may not withdraw from a hearing without the leave of the court, granted for sufficient reason. I was not able to accept that the mere fact of my refusal to grant an adjournment was sufficient reason of itself to grant counsel for the defendant's request.

Counsel had the courtesy to accept my decision with good grace, if I may say so, but felt unable (though invited to do so) to address me on the facts of the case or on the relevant law. I have therefore been deprived of such assistance as counsel's submissions would have afforded me in reaching my conclusions.

The evidence of the plaintiff and his witness, though challenged in cross-examination, stands uncontradicted. The defendant had, in fact, paid what the plaintiff says was the agreed rent for no less than 79 months. I have some reservations about their testimony as a whole, but I do not think I would be justified in rejecting it out of hand. It has not demonstrably been shown to be false. Applying the standard of proof required in a civil case I am satisfied that the plaintiff has discharged the burden of establishing a *prima facie* case on the evidence before me. I find the defendant entered into possession of the premises in question by virtue of an agreement for a lease and paid rent in accordance with a later parol agreement. He failed to pay rent at the rate of Shs. 575/- per month for the months of November and December 1961, and for the months of January and February 1962, as he was bound to pay under the agreement. Counsel for the plaintiff has conceded that the rent claimed in the plaint for March 1962 was not due when the action was filed. The plaintiff therefore is entitled to Shs. 2,300/- in respect of rent.

With regard to the other items claimed in the badly drawn plaint I find there is insufficient evidence before me to make any adjudication. Counsel for the plaintiff has stated (and counsel for the defendant has agreed) that the parties

intended to come to some agreement about the individual items. In the event, an agreement has not been possible. I feel that the plaintiff took a risk in not proving his claim with regard to these matters, precisely, and I am not prepared to re-open the matter at this stage.

There will be judgment, therefore, for the plaintiff for Shs. 2,300/-, with costs. The counterclaim is dismissed with costs.

Judgment for the plaintiff.

For the plaintiff:
PJ Wilkinson QC
Wilkinson & Hunt, Kampala

For the defendant:
A Ishani
A Ishani, Kampala

Re The Estate of the Late Suleman Kusundwa
[1965] 1 EA 247 (HCT)

Division:	High Court of Tanzania
Date of judgment:	6 August 1964
Case Number:	115/1961
Before:	Sir Ralph Windham CJ
Sourced by:	LawAfrica

[1] Probate and Administration – Deceased an African Muslim – Grant of Letters of Administration made to Administrator-General – Omission of one of four widows in list of beneficiaries – Application by widow to be included in such list – Limitation – Whether original grant required to be revoked – Whether Muslim law or deceased's customary law applicable – Administrator-General's Ordinance (*Cap.* 27), *s.* 17 (*T*) – *Probate and Administration Ordinance*, 1961, *s.* 49 (1) (*T*).

Editor's Summary

On October 10, 1961 the Administrator-General, the first respondent was granted letters of administration of the estate of the deceased, an African Muslim, with the will annexed, but the name of the applicant, who was one of four widows of the deceased, was not included in the list of beneficiaries of the estate because at the time of the grant the Administrator-General was not aware that she was one of the widows. The widow was not served with a citation, nor did she give her consent to the grant as required by s. 5 (2) of the Administrator-General's Ordinance (Cap. 27) (T). On May 4, 1964, she applied

for either the revocation of that grant or alternatively, for an order that her name be included in the list of beneficiaries. It was contended by her counsel that the application was made under s. 49 (1) of the Probate and Administration Ordinance 1961, (T), but it was argued for the first respondent that it was in reality being made under s. 17 of the Administrator-General's Ordinance. The effect of this is that under the latter section the application would be time-barred not being made within six months of the grant whereas under the former section the period of limitation is six years. The first respondent argued that the law applicable was the tribal customary law of the deceased who was a member of the Mnyamwezi tribe but had married the applicant according to Muslim ceremonies and law. The second respondent, a nephew of the deceased, appeared in person.

Held –

(i) s. 17 ibid. was inapplicable to the present case as the applicant was not seeking to revoke the grant to the Administrator-General in order that a grant might be made to herself instead. She was seeking a declaration qualifying the existing grant;

(ii) the period of limitation laid down in s. 17 ibid. was inapplicable to the present application but the residuary period of limitation laid down in art. 120 of the Schedule to the Indian Limitation Act 1908, did apply to applications for revocation of a grant to the Administrator-General which did not fall within s. 17 ibid.; therefore, the present application was not timebarred;

(iii) the provisions of the will in which the deceased purported to leave the whole of his property to his nephew, was to be given effect to only in respect of such portion of the property as he was entitled to dispose of by will under the applicable law of inheritance;

(iv) the law to be applied in the present case in the distribution of the deceased's estate was the Mohammedan law, no order or direction having been made under s. 17 ibid.; effect was to be given to the dispositions of the deceased's will only subject to that law: *Hussein Mbwana v. Amiri Chongwe*, Tanganyika High Court, Civil Appeal No. 1 of 1963 (unreported) followed.

Declaration accordingly.

Cases referred to in judgment

(1) *Mtoro bin Mwamba v. A.-G.* of Tanganyika (1953), 20 E.A.C.A. 108.

(2) *Hussein Mbwana v. Amiri Chongwe*, Tanganyika High Court Civil Appeal No. 1 of 1963 (unreported).

Judgment

Sir Ralph Windham CJ: In this application one of the widows of a deceased African Muslim, who died on March 10, 1960, and letters of administration of whose estate, with the will annexed, were on October 10, 1961, granted to the first respondent (the Administrator-General), applies for either the revocation of that grant or, alternatively, for an order that her name be included in the list of beneficiaries in his estate. The name of the applicant, who is one of four widows left by the deceased at his death, was not so included because at the time of the grant the first respondent was not aware that she was one of the widows. She was thus not served with notice of the citation, nor did she give her consent to the grant, as required by s. 5 (2) of the Administrator-General's Ordinance (Cap. 27) (T).

The first question to dispose of is one of limitation. This application purports to be made, and learned counsel for the applicant submits that it is in fact being made, under s. 49 (1) of the Probate and Administration Ordinance, 1961. No specific period of limitation is anywhere prescribed for the making of such an application, and I therefore agree that the period of limitation applicable would be the residual period of six years laid down in art. 120 of the Schedule to the Indian Limitation Act, 1908. The present application was lodged on May 4, 1964, about two and a half years after the grant, and was thus well within that period. It is contended for the respondent, however, that the application is in reality being made under s. 17 of the Administrator-General's Ordinance (Cap. 27) (T), whereunder a next-of-kin of a deceased in respect of whose estate a grant has been made to the Administrator-General may, if he or she has not been served with a citation or had actual notice of it, apply for revocation of the grant if he or she "establishes to the satisfaction of the court a claim to probate of a will or to letters of administration in preference to the Administrator-General". By the proviso to that section such letters of administration "shall not be revoked for the cause aforesaid" unless the next-of-kin applies within six months of the grant, which the present applicant certainly did not. In my view,

however, s. 17 of the Administrator-General's Ordinance is inapplicable to the present case. For the words "for the cause aforesaid" in the proviso relate back to the wording of the main part of the section, which clearly assume that the next-of-kin is applying because he or she has a better claim to probate or to letters of administration than the Administrator-General has. But such is not the position here.

The applicant is not seeking to revoke the grant to the Administrator-General in order that a grant may be made to herself instead, nor does anything in her application suggest that she has a better claim to such a grant. She is merely asking to have the grant revoked because it was irregularly obtained or was too wide in its scope, with a view to a fresh and appropriate grant being regularly made in his favour; or in the alternative, for a qualification of the existing grant by a declaration that the dispositions in the annexed will, in which she is not named as a beneficiary, are not good in respect of the whole of the deceased's estate but are subject to her inalienable rights of inheritance, as a widow, under the Muslim law. I therefore hold that the period of limitation laid down in s. 17 is inapplicable to the present application. Nor do I find anything in the Administrator-General's Ordinance, or in the safeguarding provision of s. 144 of the Probate and Administration Ordinance, 1961, to suggest that, in applications for the revocation of a grant to the Administrator-General which do not fall within s. 17, the residuary period of limitation laid down in art. 120 of the Schedule to the Indian Limitation Act, 1908, should not apply. I hold that it does apply, and that accordingly the present application is not out of time. I will now consider the application on its merits.

In deciding upon the most appropriate relief, if any, to be granted to the applicant, I take note of, and I again record, the assurance given by the Administrator-General himself, at the hearing of this application, that whether the law to be applied in the distribution of the deceased's estate is the Mohammedan law or is the tribal law of the deceased and the applicant, a point which I will presently decide, he will certainly let her have any share to which she is entitled under the appropriate law. Having in mind this assurance I turn to s. 49 (1) of the Probate and Administration Ordinance, 1961, under which this application is made, to see first whether any of the grounds therein set out are applicable, upon proof of which letters of administration "may be revoked"; and secondly, whether, even if such grounds are present, it would serve any useful purpose, or confer any additional benefit upon the applicant, if I were to revoke the grant rather than simply make the declaration for which she prays in the alternative. The only one of the several grounds set out in s. 49 (1) which can, I think, be said to be applicable to the present case is that set out in para. (*a*) thereof, namely that "the proceedings to obtain the grant were defective in substance". The proceedings were defective because the applicant widow was not cited, nor her written consent to the grant obtained, as required by s. 5 (2) of the Administrator-General's Ordinance. But she does not seek a grant of administration to herself in preference to the Administrator-General; indeed if she were to do this she would, as we have seen, bring herself within s. 17 of the Administrator-General's Ordinance and thereby defeat her own ends by putting her application out of time. This court is therefore not obliged to revoke the existing grant, and should only exercise its discretion to do so if any useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded. In the present case such rights of inheritance as the applicant possesses, outside the will, are sufficiently safeguarded by the assurance given by the Administrator-General to which I have earlier referred, and by the declaration that I am about to make. I therefore decline to revoke the existing grant, a revocation which would entail needless expense; but I qualify it by declaring that the provisions of the annexed will, in which he

purported to leave the whole of his property to his nephew, the second respondent, shall be given effect to only in respect of such portion of the deceased's property as he was entitled to dispose of by will under the applicable law of inheritance. If that law is the Mohammedan law, then it has been conceded on behalf of the Administrator-General that that portion is one-third of his property only.

And that brings me to the last question for decision, namely whether the law to be applied is the Mohammedan law or the tribal customary law of the deceased, who was a member of the Mnyamwezi tribe. Now the estate of the deceased was such as would have constituted a "deceased native's estate" and have been subject to the provisions of the Administration (Small Estates) Ordinance (Cap. 30) (T), and in particular the provisions of s. 19 (1) (*a*) thereof, if the provisions of that Ordinance had been applied to it either as one of a class by order of the Governor-in-Council, or as a particular estate by direction of the district court, under s. 17 of that Ordinance. If the Ordinance had ever been so applied to it, then without doubt the customary law of the tribe would have been the law applicable in its administration; for that is what s. 19 (1) (*a*) provides, unless the deceased has indicated by his "written or oral declarations" or his "acts or manner of life" that he intended it to be administered, wholly or in part, according to Mohamedan law; and there is in this case no evidence that the deceased ever gave such an indication. An amendment to the Administration (Small Estates) Ordinance (Cap. 30) has been effected by the Second Schedule to the Probate and Administration Ordinance, 1961, by the repeal of (*inter alia*) s. 17 and by the replacement, in s. 19, of the words – "This Ordinance applies by virtue of an order or direction under s. 17 of this Ordinance" by the words – "The Probate and Administration Ordinance, 1961, applies by virtue of an order or direction under Part IX thereof". But the position is not altered. For the relevant section in Part IX of the latter Ordinance is s. 88 (1), which substantially reproduces the repealed s. 17 of the earlier Ordinance; and no "order or direction" has been made under s. 88 (1) in respect of the present estate such as would have the effect of applying the provisions of s. 19 (1) (*a*) of the earlier Ordinance to it so as to import the tribal law. Nor is there anything in the Administrator-General's Ordinance itself (Cap. 27) which imports the tribal law.

The question whether the law of the deceased's religion or the customary law of his tribe should (in case of conflict) be applied in the administration of his estate is thus unresolved in the present case by statutory provision; and we must therefore turn to judicial decision, if any.

I have been referred by the learned Administrator-General, in support of his contention that the tribal law applies, to a decision of the Court of Appeal for Eastern Africa, *Mtoro bin Mwamba v. A.-G. of Tanganyika* (1) 108, in which a passage from the judgment of Worley, V.-P., which reads as follows (1953) 20 E.A.C.A. at p. 117):

> "The fact that a tribe may have been converted to Islam does not unnecessarily mean that its customs, particularly those relating to land tenure, are thereby changed. Mr. Morrison conceded, and I think advisedly conceded, that Mohammedan law, if applied to a tribe which only recognized communal ownership, would be modified by the custom of the tribe. In *Abdulrasool v. Muluwa* (1915) 6 R.A.L.R. 31, Bonham-Carter, J., (with whose judgment Eberhardt, J., concurred), said in the Court of Appeal, at p. 32, 'The Sheria in countries obtained otherwise than by conquest respects the local law, and even if the Sheria does apply it would not enable a man to convey what he has not got'. Mohammedan jurists have also laid down that the Moslem law may be modified or supplemented by local custom: see Principles of Mohammedan Law by Faiz Badrudin Tyabji, (2nd Ed.) at p. 23 and Abdur

> Rahim's Principles of Mohammedan Jurisprudence, at p. 55, and see also *Zanzibar High Court Civil Case No.* 37 *of* 1950, where Gray, C.J., Zanzibar, held that, although s. 7 of the Courts Decree of Zanzibar declares that the law of Islam is the fundamental law of the Protectorate, that fundamental law itself recognizes custom and usage as being a source of law. It is, I think, a matter of undisputed historical record that the first Arab settlement at the place which is now called Dar-es-Salaam was effected about the year 1860 by peaceful means with the consent of the local native inhabitants and not by conquest: see Coupland's the Exploitation of East Africa at pp. 36–37, and Tanganyika Notes and Records, No. 3, April, 1947, at pp. 118–119. If that is so, then, although there may be a presumption that the Muslim Arab settler observed the Sheria in dealing among themselves, there can be no presumption that they imposed their law on the indigenous inhabitants but, indeed, the presumption would be that they did not interfere with the laws and customs already in force, even though the natives were converts to Islam."

Now if I thought that in the above passage it was being authoritatively laid down that, where an African Muslim has (as here) married according to Muslim ceremonies and law, his widow's rights of inheritance in his estate shall be determined in accordance with the custom of his tribe and not in accordance with Muslim law, then I would hold myself bound by the passage. But that is not the position as I see it. Not only is the passage in very general terms, laying down no more than presumptions; but that case was concerned not with any question of marital relationships or rights but with land tenure and the acquisition of title by adverse possession. Where the law or custom regulating personal relationships is concerned, the question whether the Muslim or the tribal law should be applied (in case of conflict) was dealt with more recently and more specifically by Spry, J., in *Hussein Mbwana v. Amiri Chongwe* (2). The subject-matter of that case was marriage, and in particular the question of what relative's consent was necessary to the marriage of the daughter of a deceased Muslim, and questions of dowry and brideprice. It was held that the first two questions, since they are covered by the Muslim law, should be decided in accordance with that law, while the question of brideprice, which is not covered by Muslim law, being neither recognized nor forbidden by it, should be decided in accordance with the appropriate local customary law. Spry, J., made the following pertinent observations in that case and arrived at the following conclusions:

> "It has sometimes been argued that Islamic law is to be regarded as applying to Africans as part of their customary law. In my view this is not a sound proposition. Customary law is the body of customs which by usage has acquired the force of law. As such it is constantly changing with changing ways of life. It cannot, therefore, in my view, include a complete and fully developed system of religious law. Some elements of religious law may, of course, be absorbed into the customary law but they are then to be judged and are subject to change as part of the customary law and they lose the attributes of the religious law from which they were derived. I hold, therefore, that there are two systems of law which may apply in an African Muslim community, religious law in matters peculiarly personal, such as marriage, and customary law which may apply in all spheres of life."

With the above observations and conclusions I am in entire and respectful agreement. It has been urged, however, that whereas matrimony is a matter "peculiarly personal", inheritance is not. But this contention cannot prevail. It cannot be held that, while the rights of an African Muslim wife at and during her marriage are to be governed by Muslim law, her rights of inheritance upon her husband's death are to be governed by her tribal custom, which may give her no such rights. The status and rights of a wife after her husband's death must be governed by the same corpus of law as governed them before his death.

Her rights of inheritance are bound up with her rights, or the comparative lack of them, during matrimony, and are in the nature of a counter-balance or safeguard to her when she loses her protector. The one is as much a matter of personal law as the other, and the two must stand or fall together.

I accordingly hold that the law to be applied in the present case in the distribution of the deceased's estate is the Muslim law, and that effect shall be given to the dispositions of his will only subject to that law.

Declaration accordingly.

For the applicant:
MJ Raithatha
MJ Raithatha, Dar-es-Salaam

For the first respondent:
IG Peera
The Administrator-General, Tanganyika

The second respondent in person.

Executors of the Estate of Sheikh Fazal Ilahi v Commissioner for Income Tax
[1965] 1 EA 252 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	9 March 1965
Case Number:	70/1962
Before:	Sir Samuel Quashie-Idun P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Meyers, J

[1] Income tax – Assessment excessive – Omission from return of income – Failure to make a return – Whether due to gross or wilful neglect – Whether additional tax can be reduced by the court – Income tax Ordinance Cap. 254 (1948) *s.* 28 (1) (*b*) *and s.* 28 (2) (*K*).

[2] Income tax – Assessment excessive – Assessment to the best of the Commissioner's judgment – Whether arrived at by a process wholly capricious or perverse – Whether Commissioner acted reasonably – Wilful default defined – Onus of proving an assessment excessive – East African Income Tax (*Management*) *Act,* 1952, *ss.* 40 (1) (*a*) *and* 40 (2), 71 (3), 72 (*a*) *and* 78 (5).

Editor's Summary

The taxpayer was engaged in the business of buying and selling land on a substantial scale. His executors, the appellants, disputed assessments raised in January 1955 based on profits, actual or estimated, from specific sales of property in various years of income going back to 1940. The Commissioner included in the assessment additional tax at twice, and where possible, treble the sum properly chargeable, because the taxpayer had defaulted or was grossly negligent in making tax returns relating to the sales. It was conceded without deciding that the court had power to mitigate additional tax. The appellants contended at the trial and on appeal that the sales were capital transactions: plots 719 and 491/2 having been part of a scheme of exchange and reinvestment: plot 201/216 having been transferred to a trust created by the taxpayer: plot 188/1 having been sold to reduce his overdraft. The trial judge held and it was not disputed on appeal that the sale of plot 188/1 was not a revenue transaction. A blind assessment for 1953 was challenged as excessive on the ground that no sales had taken place. A clerk of the taxpayer gave evidence that he could find no record of any sale and the taxpayer's son, who managed his father's affairs in Kenya for seven months in 1953, said he knew of no sale. The taxpayer was himself absent and in poor health. No account or documentary evidence was produced. The court held that the appellants had not discharged the onus of

proof that this assessment was excessive. The trial judge held that consistent withholding of information requested by the Commissioner and delay enabled him to raise additional assessments on the taxpayer for 1949, 1951, 1952 and 1953. The trial judge rejected assessments for 1940, 1942, 1944 and 1945 as being out of time. The Commissioner cross-appealed on the ground that a policy of obstruction within the period of limitation amounted to wilful default. To discharge the onus imposed on a taxpayer by s. 78 (5) of the East African Income Tax (Management) Act, 1952 of showing that an assessment is excessive the trial judge held that the appellants must prove what was in fact the total income and that that sum is less than the sum assessed; it not being sufficient to prove that an element of the income assessed was not income at all for there might be undisclosed sources of income. The appellants' arguments on this the first ground of appeal were (1) that where the Commissioner has no information and makes a blind assessment the taxpayer must, as held by the trial judge, prove his total income is less than the assessment: (2) that where a return has been made either ignoring certain sources or categories of income or which is unacceptable to the Commissioner as rendered, then only the income from the sources in dispute need be proved: (3) that where the Commissioner raises an assessment on a profit on a specific transaction then the taxpayer can prove the assessment is excessive for the purposes of s. 78 (5) if he satisfies the court that the Commissioner is wrong in law in his interpretation of the particular transaction. The respondent argued that there are in law only two classes of case: (1) where an assessment is based on a return accepted as correct then the onus on the taxpayer merely involves reinterpretation of the transaction: (2) where there is an arbitrary assessment not necessarily referring to particular transactions or giving reasons, (though as a matter of practice and courtesy these are given) then the court may, if it has reason to suspect that there are other sources of income, put the taxpayer to proof of his whole income.

Held –

(i) the onus of proof on the appellants that an assessment is excessive depends on the particular facts in each case. A suspicion of the court or of the Commissioner of undisclosed sources of income, not being in issue, cannot be taken into account when the taxpayer is seeking to prove an assessment based on specific transaction is excessive. The appellants' classifications may be a convenient method of approach;

(ii) the appellants had not discharged the onus on them nor had they shown that all the sales were capital transactions. The court should consider each year on its merits;

(iii) when a taxpayer is engaged in a business of buying and selling certain properties, a scheme of reinvestment by sale of those properties will not rebut a presumption that any reinvestment in land would be a revenue transaction. The length of time a property is retained is a factor to be taken into account in deciding whether a profitable sale is a revenue transaction. Retention of plot 201/216 for fourteen and a half years did not displace the presumption that its sale was a revenue transaction;

(iv) wilful default in s. 72 (*a*) meant "intentional abstention from doing something in relation to income tax which the abstainer knows he is under a legal obligation to do". Such default must be proved by the Commissioner in relation to each year of assessment and to have occurred during the limitation period. Because the additional assessments had been paid there was no loss to be made good;

(v) it is wrong to refuse to remit additional tax for one year because of fraud or wilful default in

another;

(vi) in deciding whether there has been fraud or wilful neglect the court would take into account an honest belief that certain profits are not taxable. Such a

belief may also be a proper factor in mitigation of the assessment. Equally a policy of evasion or delay would be a ground for imposing the maximum penalty.

Appeal in part allowed. Cross-appeal dismissed.

Cases referred to in judgment

(1) *Ratan Singh v. Income Tax Comr.* E.A.C.A. Civil Appeal No. 17 of 1962 (unreported).

(2) *X. v. Income Tax Comr.* 2 E.A.T.C. 39.

(3) *Trustees of the Sheikh Fazal Ilahi Sons Trust v. Income Tax Comr.*, [1961] E.A. 594 (C.A.).

(4) *Trustees of the Sheikh Fazal Ilahi Noordin Charitable Trust v. Income Tax Comr.*, 2 E.A.T.C. 275.

March 9. The following judgments were read:

Judgment

Spry JA: This is an appeal from a judgment and decree of the Supreme Court of Kenya dismissing six out of eleven consolidated appeals against assessments to income tax, and there is a cross-appeal in respect of five appeals that were allowed. The appeals relate to the following years:

S.C. Appeal No.	59	year of assessment	1946
”	60	”	1940
”	61	”	1942
”	62	”	1943
”	63	”	1944
”	64	”	1945
”	65	”	1949
”	66	”	1951
”	67	year of income	1951
”	68	”	1952
”	69	”	1953

This appeal relates to appeals 59, 65, 66, 67, 68 and 69 and the cross-appeal to appeals 60, 61, 62, 63 and 64.

The assessments in issue were all raised on January 31, 1955, against the late Sheikh Fazal Ilahi, who died on or about March 22, 1955, and the appeals were prosecuted by his executors.

The assessments were all based on profits, actual or estimated, from the sale of immovable property, and in some cases also on income from rents. So far as they were based on income from rents, they are not disputed.

The assessments for the years of assessment between 1940 and 1949 inclusive included additional tax charged under s. 28 (1) (*b*) of the Income Tax Ordinance (Cap. 254 of the 1948 Edn. of the Revised Laws of Kenya, since repealed), equal to twice the difference between the tax alleged to be properly chargeable and that calculated on the income returned by the deceased. The assessments for the years of income 1952 and 1953 included additional tax charged under s. 40 (1) (*a*) of the East African Income Tax (Management) Act (No. 8 of 1952 of the High Commission Acts, also since repealed), treble the amount of the tax for which the deceased was liable.

The appeal primarily concerns the four assessments for the years of assessment 1946 and 1949 and for the years of income 1952 and 1953, since the appeals

against the assessments for the year of assessment 1951 and the year of income 1951 were not pursued, except so far as they included additional tax.

The assessment for 1946 was an additional assessment, based on the profit derived from the sale of two pieces of land, plot 719, in the Indian Bazaar, (profit, Shs. 93,500/-) and plot 491/2, River Road, Nairobi, (profit, Shs. 65,817/-) and on a sum alleged to have been received by way of rents (Shs. 35,540/-). It may be noted that according to the respondent's statement of facts, an additional assessment was first raised in respect of this year on an income of Shs. 335,540/-, of which Shs. 35,540/- was attributable to rents and Shs. 300,000/- to trades etc., including income from the sale of property." The deceased asked that this assessment be reviewed, and eventually an amended assessment was issued to which this appeal relates.

The assessment for 1949 was also an additional assessment, based on the profits derived from the sales of two pieces of land, plot 201/216, Eastleigh (profit, Shs. 15,730/-) and plot 188/1, Forest Road (profit, Shs. 21,000/-).

The assessment for 1952 was based on the profit derived from the sale of plot 1546/9, Sclaters Road, (profit, 147,500/-) and a sum alleged to have been received by way of rents (Shs. 40,000/-).

The assessment for 1953 was based on estimated profits from dealing in land (Shs. 200,000/-) and estimated receipts by way of rents (Shs. 40,000/-).

The case for the appellants was that the sales of land were all capital transactions, those of plots 719 and 491/2 having been part of a scheme of re-investment, plot 201/216 having been transferred to a trust created by the deceased, plot 188/1 having been sold because it was intended for his daughter's residence but vacant possession could not be obtained, and plot 1546/9 having been sold under pressure from the deceased's bankers, to reduce his overdraft. The appellants did not dispute the assessments so far as they were based on rents, actual or estimated.

The learned judge found as a fact that the deceased "engaged in the business of buying and selling land upon a substantial scale" and against that finding there had been no appeal. It followed, of course, that there was a heavy onus on the appellants to prove that any particular transactions in land were outside that business.

Of the properties mentioned above, the learned judge only made a specific finding in relation to one, plot 188/1, the sale of which he found not to have been a revenue transaction. Against that finding there has been no appeal.

The learned judge certainly doubted the reliability of the witnesses for the appellants but he did not consider it necessary to make specific findings regarding each of the properties sold, because he did not consider that even if the particular transactions in dispute were shown to be capital and not revenue transactions, that would suffice to discharge the onus of proving that the assessment was excessive. He remarked:

> "Logically it seems to me that where the burden of proving that an assessment is excessive rests upon the taxpayer it is not necessarily sufficient to discharge this burden for him to prove that some element in the income upon which he is purported to have been assessed is not income at all in as much as he may have had other sources of income . . . in my view to establish that an assessment to income tax is excessive the appellant must prove what was in fact his total income and that sum must in fact be less than the sum upon which he was assessed."

The first ground of appeal is against that statement of law. Counsel for the appellants submitted that a case may fall into any one of three categories. First, there are the cases where the Commissioner, having no information, makes a

completely blind assessment, as he is entitled to do. In such a case, counsel conceded that the assessment can only successfully be challenged if the taxpayer can satisfy the court as to his total income and if the tax on that income is less than the amount of the assessment. Counsel's second category comprised those cases where the taxpayer has rendered a return in respect of certain sources of income and has either ignored other sources or made a return in respect of them which the Commissioner does not accept. In such a case, counsel submitted, the taxpayer would only have to prove what was his income from the sources in dispute. Finally, there is the case where the Commissioner raises an assessment on a specific transaction, the profit on which he regards as income. In that case, counsel submitted, the taxpayer will have discharged the burden of proving the assessment wrong if he can satisfy the court that the Commissioner was wrong in law in his interpretation of the particular transaction.

We are obliged to counsel for the respondent for drawing our attention to a dictum of Sir Trevor Gould, Ag.-P. as he then was, in Civil Appeal No. 17 of 1962, *Rattan Singh v. Income Tax Comr*., (1), when he said, in somewhat similar circumstances:

> "The learned judge took into account the possibility that the appellant had other undisclosed sources of income. No authority was quoted to the court and I know of none, but, in my opinion this was a misdirection, and the judge should have made a reduction where he considered an addition excessive."

Counsel for the respondent submitted that it was open to the court to review that dictum, since the question had not been argued or at least not fully argued. He submitted that in law there are only two classes of case, the one where an assessment is based on a return accepted as correct and the other where it is based on an estimate. Where the Commissioner makes an arbitrary assessment, there is no requirement of law that he should disclose his reasons to the taxpayer. As a matter of practice and courtesy only, he refers the taxpayer to particular transactions, where the assessment is based on them.

Counsel for the respondent was prepared to concede, if I understood him correctly, that the passage I quoted above from the judgment of the learned trial judge was too wide, but he submitted that in any case, other than one where the assessment was based on a return accepted as correct, the court may, if it has reason to suspect that there may have been other sources of income, take that fact into account, provided there is some foundation for that suspicion, and he argued that there were good reasons for suspicion in the present case.

It seems to me that where any proceeding has been argued entirely on particular issues, it is wrong in principle for the court to base its decision on matters that have not been in issue. In the present case, it has never been disputed that the assessments for 1946, 1949 and 1952 were based on specific transactions. Indeed in relation to 1946, there is the contrast between the original assessment, with its "blind" estimate of income from the sale of property, and the revised assessment, which included a precise figure based on two specific transactions. The statements of facts, both of the appellants and of the respondent, seem to me to make it clear that so far as the basic liability to tax was concerned, it was only the particular transactions that were in issue. The respondent's statements of facts brought the deceased's interests generally into issue but only, as I read them, in relation to the assessments to additional tax.

I think the Commissioner has two courses open to him when he believes that an item of income has either not been declared or has been declared incorrectly. If he is satisfied that the return made by the taxpayer is otherwise correct, he may raise an assessment or additional assessment based on that particular item and an appeal can then be contested on that specific issue. If, however, he suspects that the omission or false declaration is to be regarded as an indication

that the return as a whole is not to be relied on, he may raise an estimated assessment not expressly related to any particular transaction, relying on the particular matter merely as evidence that the return is untrue or incomplete. In that event, the whole of the taxpayer's income will be in issue on an appeal.

In my opinion, therefore, the learned judge was wrong in not reducing the assessment for 1949 by the amount of the profit on the sale of plot 188/1, which he had expressly found to be a capital transaction, and in not considering on their merits the other sales of property included in the assessments for 1946, 1949 and 1952.

I may say here that I do not think any useful purpose would be served by remitting the proceedings to the Supreme Court for express findings where none have been made, as the learned judge's assessment of the evidence appears clearly and this court is in an equally good position to draw conclusions from it.

I pass then to the second paragraph of the memorandum of appeal and the additional ground which the appellants were permitted to add. These relate to the specific transactions and are, first, that the learned judge "erred in law in not treating all the properties sold or exchanged to finance the purchase of "*Armstrong House*" on the same basis, that is to say as a change of investment . . ." and, secondly, that "the learned judge's finding that the burden of proving that a particular transaction in land was a capital transaction had not been discharged except in respect of the plot purchased as a residence for the appellant's sister and those given in part exchange for "*Armstrong House*" is against the weight of evidence."

These grounds of appeal relate mainly to the sales of plots 719 and 491/2 (year of assessment 1946). The case for the appellants is that the deceased, who owned a number of properties, some of them small, and with, in the aggregate, a large number of tenants, decided, in view of advancing age and poor health, to dispose of them and acquire instead a small number of larger properties with fewer but more substantial tenants. This, he thought, would involve less work of rent-collecting, fewer repairs to be carried out and less dealing with the complaints and requests of tenants.

Part of the implementation of this policy was the acquisition, late in 1942, of a property known as "*Armstrong House*". This was bought for Shs. 500,000/-, towards which the vendor accepted two of the deceased's properties (plots 138/22 and 525/2 River Road, valued for this purpose at Shs. 90,000/- each) in part exchange. To enable him to pay the balance, the deceased obtained overdraft facilities from his bankers, and according to the appellants it was part of the arrangement that the deceased would sell some of his smaller properties and apply the proceeds in reduction of the overdraft. It was for this purpose, according to the appellants, that plots 719 and 491/2 were sold.

The grounds of appeal in relation to these two plots are two. First, it is argued that since the learned judge held that the disposal of the plots given in part exchange for "*Armstrong House*" was not a revenue transaction, he should, logically, have held that the sale of plots 719 and 491/2 to pay off the overdraft which represented the balance of the purchase price of "*Armstrong House*" fell into the same category. Secondly, it is argued that the sale of those plots should in any case be regarded as part of a general scheme of re-arrangement of investments and hence as a capital transaction.

The first argument cannot, in my opinion, be sustained. It is true that the learned judge said that "it would appear" that the properties given in part exchange "could not properly be regarded as having been sold for revenue purposes" but the deceased had not been assessed on profits attributed to the disposal of those properties and it was never in issue whether those profits were

taxable. The learned judge's observations were therefore obiter dicta, and incidentally, he himself expressed a considerable doubt on the question.

As regards the more general submission, there was no evidence before the court of the deceased's intentions at the time when he acquired plots 719 and 491/2 and since it is not now in dispute that the deceased engaged in the business of buying and selling land, the presumption must be that those plots were acquired in the course of the business. Plot 491/2 was bought in 1938 and plot 719 in 1941, both at times when the deceased seems to have been dealing actively in land. Furthermore, there is no evidence of any change of intention in relation to those plots, that is to say, of any intention to hold those plots as investments. It seems to me that, even if the evidence given on behalf of the appellants be accepted, the sale of the plots in question must be regarded as one of the closing transactions of the business of buying and selling, rather than one of the opening transactions of the policy of investment.

The additional ground of appeal relates also to the sale of plot 201/216 (year of assessment 1949) and the sale of plot 1546/9 (year of income 1952).

As regards the former, it was argued for the appellants that the transaction was a transfer to a trust created by the deceased and should not be regarded as a sale in the ordinary course of the deceased's business. In addition, learned counsel stressed the length of time, fourteen and half years, that the property was retained by the deceased, and the fact that it was revenue-producing.

The transfer to the trust apparently took the form of a sale, the purchase price being credited to the deceased in the books of the trust. It may be noted also that the transaction is shown as a sale in the ledgers of the deceased. If the transaction was a sale, and the appellants have not argued that it was not, I am unable to see how the identity of the purchaser could have affected the liability to tax of the deceased. To put the matter in the simplest terms, it amounts, in my view, to this: the deceased had a business of buying and selling immovable property; in the course of that business, he bought plot 201/216; subsequently he sold it at a profit; therefore his estate is liable for income tax on that profit.

The length of time a property is retained is undoubtedly a factor to be taken into account in deciding whether profit made on the sale of that property is to be regarded as annual income or capital accretion but it is a factor which has to be weighed in all the circumstances. Here, it must be considered in relation to the express finding that the deceased engaged in the buying and selling of immovable property "upon a substantial scale". Such a dealer would not necessarily intend the early re-sale of every property he bought. He would, no doubt, intend to sell when he could realise what he regarded as a satisfactory profit or when he required money for some other transaction. If, however, he anticipated a further rise in the value of the property and particularly if it were yielding a good return, he might postpone selling for an indefinite period. The mere fact that he retained the property even for a very long time, in the meanwhile enjoying income from it, would not of itself mean that an eventual sale should not properly be regarded as having been made in the course of his business of buying and selling.

In my view, the appellants failed to discharge the onus of showing that this transaction was not a revenue transaction. This applies also to the sale of plot 1546/9, where the only argument advanced by learned counsel was the length of time, ten years, that the property was retained.

The third ground of appeal contained in the memorandum was that the learned judge had erred in law in regard to the assessment for 1953 "by failing to consider this estimated assessment on its own and by failing entirely to consider that in relation to the year of income 1953 there was no evidence of any property transactions likely to attract income tax, but contrary evidence to

the effect that no such transactions had taken place in that year." The deceased had made no return of income and the Commissioner had no information on which to base an assessment. He therefore made a "blind" assessment, as he was unquestionably entitled to do, and chose a round figure somewhat higher than the highest assessments for the proceeding years, that is, Shs. 240,000/-, of which Shs. 200,000/- was attributed to profits and Shs. 40,000/- to rents.

Before the Supreme Court, the appellants sought to prove that the deceased had sold no immovable properties during the year in question and argued that the assessment ought to be reduced to Shs. 40,000/-. The learned judge did not deal with this assessment separately but rejected the appellants' contentions, ruling that it was for the appellants to prove what had been the entire income of the deceased and that that income had been less than the amount on which tax had been assessed.

I have already dealt with that ruling in relation to assessments based on specific transactions. It seems to me that the principle must be the same where an assessment is expressly related to a particular source of income. Here again I think the Commissioner has the choice of putting in issue either the entire income of the taxpayer or a particular source of income and where he limits the issue to a particular source of income, it is, I think, wrong for the court to refuse to reduce the assessment merely because there may have been income from some other source not in issue.

Again, I do not think it necessary to remit the proceedings to the Supreme Court, because, although there is no express finding on the facts of this particular assessment, the learned judge has made it clear, first, that he did not regard the witnesses for the appellants as reliable and, secondly, that he did not consider either of those witnesses had been in a position to testify fully as to the facts. It is unnecessary for me to deal with the first of those propositions because the second is sufficient to dispose of the matter. There were two witnesses for the appellants, Sheikh Abdul Gaffer, a son of the deceased, and Nazir Malik, who had served the deceased as a clerk. Sheikh Abdul Gaffer testified that he had been in America and returned in 1953, when he took over the entire administration of his father's properties. He said:

> "From my personal knowledge there were no property transactions in 1953 . . . I know that because at that time I was in charge of father's business and no sales took place."

The value of that evidence must, however, be weighed having regard to the witness' own statement, in cross-examination, that he returned to Kenya in July, 1953. In view of that admission, I think the learned judge was entitled to conclude that the witness was "unlikely to be able to give accurate evidence as to the whole of his father's income".

The other witness, Nazir Malik, said that he could not remember any land transactions in 1953 and had been unable to find any record of any such transactions in the books of the deceased or in the trust books but he had to admit that he could not be sure there had been no transactions. Clearly no great weight could be attached to that evidence.

That appears to have been the whole of the evidence for the appellants and no book of account for 1953 or bank statement or other documentary evidence appears to have been produced.

There is nothing to indicate that the deceased sold any immovable property in 1953, and the circumstances of his health and absences from East Africa may make it seem improbable that there was any sale, but the onus is on the appellants to prove that there was none and I do not think, on the evidence I have reviewed, that any court could reasonably have held that that onus had been discharged.

Counsel for the appellants also submitted that the estimate assessment for 1953 was grossly inflated. I will deal briefly with this submission, although I am doubtful whether it was properly within the scope of the appeal. Appellant's counsel compared the assessment with those for previous years and argued that it was unrealistic to suppose that the deceased might have had his most successful year at a time when his state of health was such that he was advised not to attend to business. With respect, I do not think that argument carries much weight, when the nature of the business is considered. The amount of the estimated profit might have resulted from a single sale, calling for little effort on the part of the deceased.

In making an estimate under s. 71 (3) of the East African Income Tax (Management) Act, 1952, the Commissioner must act "to the best of his judgment" and he will, of course, take into account all relevant information known to him. Where he has made such an assessment and the taxpayer has failed to prove it wrong, as in this case, this court would, in my opinion, only be justified in interfering if the amount of the assessment were such as, in the words of Windham J., (as he then was) in *X. v. Income Tax Comr*. (2) 2 E.A.T.C. 39 at p. 45):

> "would lead to an inevitable presumption that they must have been arrived at by a process wholly capricious or perverse."

The assessment for 1953 was certainly rather higher than those for the preceding years, and considerably higher than some of them, but I see no reason to conclude that it must necessarily have been too high.

The fourth and fifth grounds of appeal concerned the additional tax, which it was alleged, should not have been imposed or which, in the alternative, was manifestly excessive. It was agreed that the question of additional tax for the years of assessment 1940 to 1945 should be left in abeyance pending the outcome of the cross-appeal, and counsel for the appellants therefore limited his argument to the years of assessment, 1946 to 1951, and the years of income, 1951 to 1953.

The learned judge expressed the view that up to 1950 it was possible that the deceased may honestly have believed that he was not liable to tax on the profits from the sale of immovable property. He also accepted without reserve evidence that the deceased was infirm throughout the later years of his life and was frequently absent from Kenya. He thought, however, that the consistent and protracted withholding of information requested by the Commissioner was such as to indicate an intention to suppress that information, and he considered therefore that the appellants had failed to discharge the onus which lay on them of satisfying the Commissioner that there had been no gross or wilful neglect, so as to enable them to require him to remit the whole of the additional tax to which they were in the first instance automatically liable both under the Kenya Income Tax Ordinance and the East African Income Tax (Management) Act, 1952.

Where, with respect, I think the learned judge was in error, was in considering, for this purpose, all the years of assessment together. It seems to me that each year must be considered on its merits. The learned judge was, of course, entitled to look at the general pattern of the deceased's conduct in order to interpret his conduct at any particular time but it would be wrong to refuse to remit additional tax for one year because of fraud or wilful default in another.

In respect of the year 1946, the deceased was three months late in furnishing his return but the Commissioner did not seek to impose additional tax under s. 28 (1) (*a*) of the Kenya Income Tax Ordinance. He did, however, assess additional tax under para. (*b*) on the basis that there had been omitted from the return the profits on the sales of plots 719 and 491/2. I have already mentioned that the learned judge thought it at least possible that prior to 1950 the deceased

may honestly have believed that he was not liable to tax on these profits. It was in a letter dated May 10, 1952, that the Commissioner first suggested that the deceased might be liable and asked for particulars of sales. He re-iterated this in a letter dated July 16, 1952 when he enquired particularly regarding plots 719 and 491/2. On August 11, 1952, however, he wrote to the deceased saying that "a good deal of the information asked for" was "already available here" and enclosed a schedule which included the particulars relating to the two plots. In those circumstances, and even taking into account the deceased's records of omissions and evasions, I do not think the learned judge was justified in finding that the appellants had failed to discharge the burden of proving, in respect of the year 1946, that the failure of the deceased to include in his return profits from sales of immovable property was not due to gross or wilful neglect.

The circumstances relating to the 1949 assessment are materially different. In the first place, the deceased was three years late in furnishing his return. Secondly, hardly any information regarding the relevant properties was available to the Commissioner when he wrote the letter, mentioned above, of August 11, 1952. Thirdly, it was not until August 5, 1953, that is, almost a year later, that information was furnished regarding plot 201/216. I would not, therefore, interfere with the learned judge's finding regarding the 1949 assessment.

As regards the year of assessment 1951, it appears that the deceased was over a year late in furnishing his return. The return did not show the sale of a property in Uganda known as Fatima Farm and it is not clear from the record when or how this transaction became known to the Commissioner. Clearly the appellants failed to discharge the onus in respect of that year.

The deceased made no returns for the years of income 1951, 1952 and 1953. It was argued that he was in failing health and absent from Kenya for much of this time. In my opinion the learned judge was right in regarding that submission as insufficient. The deceased was well aware of the duty to render returns; he had adult sons assisting him in his affairs; he was a man of substance and employed an accountant, or had employed one in the past. I see no reason to interfere with the learned judge's finding regarding those years.

It was further argued that even if the Commissioner had been right in refusing wholly to remit the additional tax, he should have reduced the amount below the statutory maximum. I express no opinion on the question whether the court has power to reduce an assessment of additional tax, (a question considered but not decided in *Trustees of the Sheikh Fazal Ilahi Sons Trust v. Income Tax Comr*. (3) because it was conceded for the purposes of this case, that the court has such power. Such a power has been exercised, for example in *Trustees of the Sheikh Fazal Ilahi Noordin Charitable Trust v. Income Tax Comr*. (4). That was a case where the general circumstances were similar to those of the present case. It concerned the liability to tax of one of the trusts of the deceased and ignorance of liability and the illness of the deceased were, as in the present case, among the factors urged in mitigation. Sir Ronald Sinclair, then V.-P., said (2 E.A.T.C. at p. 307):

> "In my view this was a bad case of wilful neglect as from the end of 1951 onwards though not so bad as to require the imposition of the maximum penalty. Inasmuch as no returns for the years of income 1951 to 1953 were ever furnished, I would, while reducing the penalty, still impose a severe one, namely an amount equal to double the basic tax for which the appellants are liable in respect of each of those three years."

In the present case, it was also submitted in mitigation that no false statement had been made at any time. Except for one year, information had been supplied to the Commissioner and he accepted it as correct. The most that could be said was that the deceased had been guilty of delay.

I think that it is presenting too favourable a picture. I think the exhibits produced in the Supreme Court point irresistibly to a policy of evasion. At the same time, I do not think it was so bad a case as to call for the maximum penalties and I see no reason for treating it differently from the case I have just referred to. I think that approach should apply to the additional tax under the Kenya Income Tax Ordinance, as to that under the East African Income Tax (Management) Act, 1952, even though the former is less severe. I would accordingly remit the additional tax for the year of assessment 1946. I would reduce the additional tax for the year of assessment 1949 by the amount of the tax attributable to plot 188/1 and one third of the tax attributable to plot 201/216. I would also reduce the additional tax for the year of assessment 1951 and for the years of income 1951, 1952 and 1953 by one third.

The last ground of appeal concerned the order for costs made in the Supreme Court. The learned judge remarked that the appellants had succeeded in four out of eleven appeals and said that they could not be deprived of their costs in relation to those appeals, while the respondent should have his costs in respect of the remainder. He thought it desirable to make a single order and awarded the respondent five-eighths of his costs. The first point on this order is, of course, that the appellants had in fact succeeded on five appeals and not four. The second is that there is no explanation how the figure of five-eighths was arrived at and *prima facie* it appears excessive. Counsel for the respondent suggested that the learned judge might have based his proportion on the amounts of tax involved in the appeals but even if that supposition is correct, the award would appear to be wrong, since it would have the effect of giving the respondent his costs and depriving the appellants of theirs. I think, therefore, that the order for costs must be revised. I will return to this after considering the cross-appeal, to which I now turn.

The learned judge allowed the appeals in respect of the years of assessment 1940, 1942, 1943, 1944 and 1945, holding that those assessments were raised out of time. The assessments were clearly outside the period of seven years prescribed in s. 72 of the East African Income Tax (Management) Act, 1952, but it was submitted on behalf of the Commissioner that there had been wilful default by the deceased, sufficient to bring into operation the provisions of para. (*a*) of the proviso to s. 72.

The learned judge held, and it has not been challenged, that the onus was on the Commissioner to prove such fraud or wilful default. He held that the delay which certainly occurred in the rendering of returns for most of the years in question, while it might amount to wilful default, would not empower the Commissioner to invoke para. (*a*), because that paragraph can only be used “for the purpose of making good to the revenue of the Territories any loss of tax attributable to the fraud or wilful default”; the tax on those returns had been paid and there was therefore no loss to be made good. The learned judge was not satisfied that the failure to include profits from immovable property was attributable to wilful default, which he defined in relation to income tax as “the intentional abstention from doing something in relation to income tax which the abstainer knows he is under a legal obligation to do.” The learned judge said that he had no doubt “having regard to the correspondence as a whole that the failure was in many instances due to an intention to obstruct the authorities and as such constituted wilful default” but he thought that wilful default must, for the purposes of para. (*a*) have occurred within the period of limitation. As I have said, he thought the deceased might up to 1950 honestly have believed that profits from the sale of land were not taxable. If that were so, the default was only wilful after that date.

Counsel for the respondent did not challenge the proposition that for the purposes of para. (*a*) the fraud or wilful default must have occurred within the

period of limitation but he submitted that in the present case there had been a deliberate policy of obstruction, which in itself constituted wilful default, and which began during the seven year period. Counsel for the appellants argued that wilful default could not be considered in general but must be related to each year of assessment, and he submitted that there was no single finding of wilful default during any of the years in question or within the period of limitation following them.

On this question, I am in agreement with counsel for the appellants' submission and I see no reason to interfere with the finding of the learned judge.

To sum up,

(i) I would in part allow the appeal so far as it relates to the income tax and surtax for the year of assessment 1949 by reducing the amount of income assessed by a sum equal to the profit made on the sale of plot 188/1;

(ii) In all other respects, I would dismiss the appeal against the assessments to income tax and surtax for the years of assessment 1946 and 1949 and the years of income 1951, 1952 and 1953;

(iii) I would allow the appeal against the refusal to remit or reduce the additional tax imposed, to the following extent:

(*a*) I would remit the additional tax for the year of assessment 1946;

(*b*) I would reduce the amount of additional tax for the year of assessment 1949 by such part thereof as is attributable to the sum referred to in para. (i) above and by one-third of the balance;

(*c*) I would reduce the amount of additional tax for the year of assessment 1951 by one-third;

(*d*) I would reduce the amount of additional tax for the years of income 1951, 1952 and 1953 to twice the amount of the tax for which the deceased was liable;

(iv) I would allow the appeal against the order for costs to the extent stated below;

(v) I would dismiss the cross-appeal.

As regards the costs in the Supreme Court, I do not think it is practicable to work out any precise formula, but having regard to the number of issues on which in my view the appellants should succeed, the amounts involved and the time spent on the various issues, I think the fairest order would be that each side bear its own costs.

As regards the costs in this court, I think it would be reasonable for each side to bear its own costs of the appeal but that the appellants should have their costs of the cross-appeal, and I would certify for two counsel.

Duffus JA: I have had the considerable advantage of reading the draft judgment of Spry, J.A. This is an appeal and cross appeal from the decision of the Supreme Court on appeals from eleven assessments of income tax for the years 1946–1953. The facts of this rather complicated and lengthy matter are fully set out in the judgment of Spry, J.A. The trial judge upheld the assessments in six cases and these are the subject of the appeal and for convenience may be referred to by their Supreme Court appeal as 59, 65, 66, 67, 68 and 69, and allowed the appeal in the five other cases, being appeals as 60, 61, 62, 63 and 64 which are the subject of the cross-appeal.

I agree with Spry, J.A. but as the appeal raises points of considerable importance I would deal with certain aspects of the matter. The first point of importance is clearly set out in ground 1 of the memorandum of appeal which states:

"1. The learned judge erred in law in holding that in general in order to establish that an assessment to income tax is excessive, the appellant must

> prove what was in fact his total income, and that the sum of such total income must in fact be less than the sum upon which the appellant was assessed, because in all appeals except appeal no. 69, the amounts assessed were specifically attributable to certain land transactions with their legal incidents and implications and to nothing else, and these were the issues properly before the court."

In other words the point here is whether in any appeal against an assessment the taxpayer must in all cases prove his total income even if the issue was in fact only on the question of whether a particular transaction was income or capital. In dealing with this matter the learned trial judge said:

> "Logically it seems to me that where the burden of proving that an assessment is excessive rests upon the taxpayer it is not necessarily sufficient to discharge this burden for him to prove that some element in the income upon which he is purported to have been assessed is not income at all inasmuch as he may have had other sources of income."

and then further he stated:

> "In general, therefore, in my view to establish that an assessment to income tax is excessive the appellant must prove what was in fact his total income and that sum must in fact be less than the sum upon which he was assessed."

Section 71 of the East African Tax (Management) Act, 1952 lays down the procedure to be followed by the Commissioner when making an assessment. This states:

> "71 (1) The Commissioner shall proceed to assess every person chargeable with tax as soon as may be after the expiration of the time allowed to such person for the delivery of his return.
>
> (2) Where a person has delivered a return, the Commissioner may
>
> (*a*) accept the return and make an assessment accordingly; or
>
> (*b*) if he has reasonable grounds for thinking that the return is not a true and correct return, refuse to accept the return and, to the best of his judgment, determine the amount of the income of the person and assess him accordingly.
>
> (3) Where a person has not delivered a return and the Commissioner is of the opinion that such person is liable to tax, he may, according to the best of his judgment, determine the amount of the income of such person, and assess him accordingly, but such assessment shall not affect any liability otherwise incurred by such person by reason of his failure or neglect to deliver a return."

Additional assessments are made under s. 72 and the relevant portion of this sections states:

> "72. Where it appears to the Commissioner that any person liable to tax has not been assessed or has been assessed at a less amount than that which ought to have been charged, the Commissioner may, within the year of income or within seven years after the expiration thereof, assess such person at such amount or additional amount as, according to his judgment, ought to have been charged. . . ."

The Commissioner then has to act under s. 74 and has power to revise the amount of assessment on an objection being taken by the taxpayer, and the taxpayer has a right of appeal to a local committee or direct to the court under s. 78. The appeals in this case were made direct to the court under the provisions of s. 78 and I would refer in particular to the provisions of sub-ss. (5) and (6) of this section which state:

> "(5) The onus of proving that the assessment complained of is excessive shall be on the person assessed.

(6) The judge may confirm, reduce, increase, or annul, the assessment or make such order thereon as to him may seem fit."

Counsel for the appellants if I understood him correctly, in his address submitted that assessments by the Commissioner may be classified under three heads when the matter is being considered on appeal. These are (*a*) a "blind" assessment. This occurs when the taxpayer has made no return and here counsel for the appellants agrees that the onus is on the taxpayer to prove his true and correct income in order to have the assessment revised by the court; (*b*) an assessment which is based on a certain specific category of income and nothing else. Here again counsel submits that the taxpayer only has to prove his income in this particular respect and not go further to prove his income on issues not in dispute; (*c*) when the Commissioner bases his assessment on a particular transaction, then the taxpayer has only on appeal to deal with this particular transaction.

Counsel for the respondent agrees that the findings of the learned trial judge went too far but he did not agree with counsel for the appellant's division into three classes. Counsel for the respondent was good enough to draw the attention of the court to a previous unreported decision of this court in the case of *Ratan Singh v. Income Tax Comr*. (1) in which this point was dealt with although it does not appear to have been fully argued. Spry, J.A. refers to the relevant portion of the judgment of Gould, Ag.-P. which held, in effect, that the trial judge had been wrong to take into account the possibility of the taxpayer having other undisclosed sources of income.

I am in no doubt that the dictum of the learned trial judge, Mayers, J., which I have set out before, is altogether too wide. The law as contained in s. 78 of the 1952 Act or s. 113 of the 1958 Act is clearly stated, that is, the onus of proving the assessment objected to is excessive shall be on the person assessed. Each case must depend on its particular facts and there are some cases where counsel for the appellant's classification may be a convenient method of approach. Under ss. 71 and 72 the Commissioner has been given wide powers but the law intends that he should act reasonably. When the Commissioner assesses under s. 71 or s. 72 he determines the income of the taxpayer according to the best of his judgment. The taxpayer then has the onus of proving that his assessment is excessive. The Commissioner is under no obligation to state how he arrives at his determination of income but when he does do so, and it is reasonable and proper that he should when he bases his findings on specific figures or on a specific category of income, then the issue is narrowed and the taxpayer can, in my view, discharge the onus of proving that the Commissioner's assessment is excessive by confining his evidence to the specific transactions or categories of income on which the Commissioner based his findings.

The taxpayer's onus of proof therefore depends on the particular facts in each case. This ground of appeal applies to the four appeals Supreme Court appeals no. 59 (1946), no. 65 (1949), no. 68 (1952) and no. 69 (1953).

I agree with Spry, J.A. that the learned trial judge erred in not considering the transactions in each of these appeals on their merits but I also agree that there are sufficient facts and findings in the record and in his judgment, for this court to deal with all these appeals and not have to send them back to the Supreme Court for further consideration.

I agree further that there was ample evidence to support the judge's finding that the deceased taxpayer was engaged in the business of buying and selling land, and that on the evidence the Commissioner was justified in regarding the two transactions in 1946 (appeal no. 59) and one transaction in 1952 (appeal no. 68) as being sales in the course of his business and that therefore the profits arising were income and not capital. With regard to the year 1949 (appeal no.

65) the Commissioner's assessment was based on two specific transactions and the judge found that one of these transactions, the sale of plot 188/1 was of land bought for the taxpayer's daughter and was not a revenue transaction. I agree with Spry, J.A. that on the evidence the other transaction was in fact a revenue transaction but that the judge should have reduced the amount of income assessed for 1949 by the profit realised on the sale of plot 188/1.

The assessment for the year 1953 (appeal no. 69) was to some extent a "blind" assessment but Mr. Brown, the Principal Investigation Officer of the Income Tax Department agrees that the estimated income of £10,000 was based on property transactions. I am in some doubt as to whether the taxpayer would not, on the facts of this case, have to prove all his income, which of course he has not done, but in any event even if the issue is confined to property transactions then although the judge made no specific finding I agree with Spry, J.A. that on the evidence before us on the record and from such findings as the judge has made in his judgment, it is clear that the appellants have not discharged the onus of proving that the assessment in respect of this year was excessive.

Neither of the two witnesses called by the appellant that is, the appellant himself, a son and the executor of the deceased taxpayer nor his witness, Mr. Malik, were in a position to say with certainty whether there were any property transactions in 1953. There is also the fact that it would appear that no proper books of account, bank statements or other reliable documentary evidence was produced to cover this period. The learned trial judge commented on the fact that the taxpayer's books were kept in Urdu and that they had not been translated as a whole into English. The learned judge in the course of his judgment said:

> "It is therefore impossible to say that in the books there may not be many items of a revenue nature which have not been disclosed to the income tax authorities. In this regard it should be observed that despite repeated requests for balance sheets, no balance sheets and no profit and loss accounts have ever been submitted, and, according to Mr. Malik, no balance sheets could be prepared because there were no individual plot accounts in the taxpayer's books. Likewise, it appears very much open to question whether the taxpayer's books, even had they been translated into English, could properly be regarded as forming a complete and accurate guide to his affairs; thus the list of properties allegedly transferred by the taxpayer for partial consideration to the charitable trust appears, not in the taxpayer's books, but in the charitable trust books. Hence, other properties may have been disposed of to one or other of the other trusts or companies, of which there were I think some six or seven associated with the taxpayer, without appropriate entries being made in the taxpayer's books."

and further on the learned judge said:

> "So too, the conduct of the taxpayer in relation to properties transferred by him to the charitable trust is such as to give rise to considerable doubt as to what may have been the nature of the activities of his. Thus, properties which were allegedly sold to the charitable trust for partial consideration were not transferred on the register of titles to that trust at all, but remained registered in the taxpayer's name until they were sold to third parties; the conveyance of sale being in at least one case executed by the appellant pursuant to a power of attorney in his favour by his father. As already observed, in at least one and I believe several instances a plot was purchased by the taxpayer and resold by him to a sub-purchaser the conveyance being from the original vendor direct to the sub-purchaser. Hence, it is impossible to say that the taxpayer may not have participated in a considerable number of similar transactions without there being any record in the Register of Titles, of his

> having ever been interested in the relevant plots. Furthermore, in addition to transactions disclosed by the taxpayer or his representatives there were certainly other transactions, one at least being upon the Moshi register; it is therefore impossible to say whether there may not have been other transactions upon other registers. For these reasons it seems to me wholly impossible to say that the appellant has established these transactions of property or that any of the assessments for relevant years was excessive."

I am therefore of the definite view that the appellants have not in this particular case discharged the onus on them and proved that the assessment for 1953 was excessive.

On the question of the additional taxation which affects the years 1946–1953 I agree with Spry, J.A. that each additional assessment must be considered on its own merits. It has been agreed that this court has power to reduce the assessment of additional tax and this has been done by the court in similar cases. I entirely agree with the reasoning and ultimate decisions arrived at by Spry, J.A. in respect of the additional taxation as affecting all the various appeals.

I agree with Spry, J.A. that the cross-appeal should be dismissed. The only ground of appeal was that "the learned judge erred in fact and in law in misdirecting himself as to the evidence before him and in holding that the assessment to which appeals 60 to 64 inclusive in the court below relate were raised out of time". On the facts the learned judge was, in my view, completely justified in finding that there had been no fraud or wilful default proved to have occurred within the period of limitation.

I approve of the order for costs, and also the final order as proposed by Spry, J.A.

Sir Samuel Quashie-Idun P: I have read the judgments of Spry and Duffus, JJ.A., and I have nothing to add to what they have stated in their judgments.

I make an order in the terms proposed by Spry, J.A., in his judgment, both as to the subject matter of the appeal and as to costs.

Appeal allowed in part. Cross appeal dismissed.

For the appellants:
B O'Donovan, QC and *H Shroff*
B Sirley & Co, Nairobi

For the respondent:
PJ Treadwell (Senior Asst. Legal Secretary, East African Common Services Organization)
The Legal Secretary, East African Common Services, Organization

Thornhill v Islay Thornhill and another
[1965] 1 EA 268 (CAK)

Division: Court of Appeal at Kampala

Date of judgment: 5 February 1965

Case Number: 57/1964

Before: Sir Samuel Quashie-Idun P, Sir Clement De Lestang and Duffus JJA

Sourced by: LawAfrica

Appeal from: High Court of Uganda – Bennett, J

[1] Divorce – Evidence – Affidavit – Undefended divorce suit – Adultery committed abroad – Application to prove adultery by affidavit – Grounds for application expense and inconvenience of bringing witness from abroad – Discretion of court.

[2] Divorce – Domicil of choice – Animus manendi – Petitioner employed in Uganda for three and half years – Petitioner born elsewhere – Shares in company employing him his only assets in Uganda – Relevance of nationality.

Editor's Summary

In an undefended petition on the ground of the respondent's adultery the petitioner applied under O. 17 r. 1 of the Civil Procedure Rules for an order that the evidence of a witness who had obtained a confession statement from the respondent be given on affidavit to save the cost and inconvenience involved in bringing the witness to Uganda from the United Kingdom. The judge dismissed the application on the ground *inter alia* that leave to adduce evidence by affidavit should be given as an exceptional indulgence in special circumstances. In his view "the cost and inconvenience of bringing a witness from the United Kingdom would not be very great" and was not sufficient ground for allowing proof of adultery by affidavit. After the dismissal of the application counsel for the petitioner asked the court to hear evidence of the petitioner on the question of domicil and give its ruling whether the petitioner had acquired a domicil of choice in Uganda. The evidence was that the petitioner was born in the United Kingdom in 1918 but soon after his birth returned to Ceylon where his father was born and had lived all his life; that the petitioner was educated in the United Kingdom but when aged seventeen had returned to and taken employment as a tea planter in Ceylon; that in 1961 the petitioner came to Uganda and was then employed by a company to manufacture and market instant tea; and that the petitioner had a substantial shareholding in this company but that if the venture was unsuccessful he would find other employment in the tea industry which might involve taking a post in Kenya. On this evidence the judge held that there was insufficient evidence of a settled intention to remain in Uganda permanently to enable the court to hold that the petitioner had acquired a domicil of choice there. On appeal,

Held –

(i) the judge misdirected himself in dismissing the application which should have been granted both on the ground of inconvenience and expense and on the ground that the court would not be likely to derive any advantage from the presence of the witness;

(ii) the petitioner had established the acquisition of domicil of choice in Uganda: lack of Uganda nationality did not affect animus manendi.

Appeal allowed. Case remitted to the trial court.

Cases referred to in judgment

(1) *Gayer v. Gayer*, [1917] P. 64.

(2) *Goodman v. Goodman and Pinfield*, [1920] P. 67.

(3) *Ramsay v. Liverpool Royal Infirmary*, [1930] A.C. 588.

(4) *Donaldson* (*or Nichols*) *v. Donaldson*, [1949] P. 363.

(5) *Stone v. Stone*, [1959] 1 All E.R. 194.

(6) *Field v. Field*, [1964] E.A. 43 (C.A.).

(7) *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130.

February 5. The following judgments were read:

Judgment

Sir Samuel Quashie-Idun P: The petitioner filed a petition in the High Court at Kampala praying for a dissolution of his marriage with the respondent on the ground of the respondent's adultery with the co-respondent and also for other relief as to the court may seem fit. By an order of the court, the summonses and copies of the petition were served upon the respondent by personal service through her advocates in England and upon the co-respondent out of jurisdiction by registered post. The petition was not defended either by the respondent or the co-respondent. At the hearing the court made the following order:

> "I am satisfied that this is *prima facie* evidence that petition and summons have been served on the respondent and co-respondent and that they have not appeared in person or by agent on the date mentioned in the summons. The petition may therefore proceed as an undefended divorce cause."

On July 1, 1964, counsel for the petitioner moved the court for an order that the evidence of one Charles Frederick Francis Fleet be given upon affidavit and that Fleet's evidence be limited to matters referred to in an affidavit sworn to by petitioner's counsel, Richard Eric Hunt on June 26, 1964. The application was made under O. 17, r. 1 of the Civil Procedure Rules (U) to which I shall refer later in this judgment.

The affidavit of Hunt filed in support of the motion contained the following allegations:

> "1. That I am a partner in the firm of Wilkinson & Hunt, Advocates of Kampala and my firm has the conduct of these proceedings on behalf of the petitioner in this cause.
>
> 2. That on June 9, 1964 I received from my firm's agent in London, Messrs. T. & N. Blanco White, Solicitors, an affidavit by one Charles Frederick Francis Fleet, the legal executive of the said solicitors, setting out the circumstances relating to a visit by him on October 14, 1963 to the offices of solicitors acting for the respondent, at which office the respondent was then present identified by the said deponent and admitted the acts of adultery upon which the petition is based and did sign a written statement in relation thereto which is annexed to the said affidavit.
>
> 3. The cost and inconvenience involved in bringing the said deponent to Uganda to give evidence in this cause would in my submission be unjustified in the event of the petition being undefended."

The affidavit of Charles Frederick Francis Fleet which was sought to be used as evidence contained the following facts deposed to by the deponent, viz:

> "1. I have the conduct of these proposed Divorce Proceedings under the guidance of my Principal.
>
> 2. Pursuant to my instructions I telephoned the offices of Messrs. Mac-Robert Son & Hutchison of 51, Moss Street, Paisley, Renfrewshire, Scotland, Solicitors for Mrs. Islay Thornhill. An appointment was made for me to call and meet Mrs. Islay Thornhill on October 14, 1963; there is now produced and shewn to me marked 'C.F.F. 1' the letter from Mrs. Islay Thornhill's Solicitors confirming this appointment.

3. I called at the Offices of the said solicitors at 51, Moss Street, Paisley, Renfrewshire, Scotland, as aforesaid on October 14, 1963. I was introduced to a lady described to me as Mrs. Islay Thornhill of Lachwinnoch Renfrewshire and I recognised her from the photograph now produced and shewn to me marked 'C.F.F. 2'.

4. I explained to Mrs. Islay Thornhill who I was and why I was there and warned her that she was not required to speak to me or to make a written statement unless she desired to do so and that anything she said would be taken down in writing and used in evidence in divorce proceedings. She told me that she had committed adultery with Mr. John Reddoch and dictated her statement to me and then signed the same in my presence and in the presence of her Solicitors. The said statement is now produced and shewn to me marked 'C.F.F. 3'."

On July 12, 1964, the court (Bennett, J.), delivered a written ruling dismissing the application for an order for the evidence of Fleet to be given upon affidavit. After the dismissal of the application counsel for the petitioner made the following application:

> "I would ask the court to hear the evidence of the petitioner on the question of domicile today and to give a ruling. If the ruling is against us then the case would not proceed."

The court granted the application and counsel for the appellant then called the petitioner who gave evidence. It would be sufficient to refer to the material parts of the petitioner's evidence.

He stated that he was a tea planter and consultant and was living at the Grand Hotel, Kampala. He was born in Wales in April, 1918. His father, who was born in Ceylon and lived there all his life, served with the British Army in the First World War and it was during that period of service that the petitioner was born in the United Kingdom. After the War the petitioner and his mother returned with his father to Ceylon. The petitioner was educated in the United Kingdom, returned to Ceylon at the age of 17 and was employed as a tea planter. Up to the year 1961 and apart from the Second War years when he was engaged in Military Service, the petitioner lived in Ceylon from the age of 17 years.

In 1957, he decided to look for another country to live in where he could continue his occupation as a tea planter and consultant. He came to Uganda in 1961 and was employed as a consultant by Solutea Ltd. which manufacture and sell instant tea. He and his brother have shares in the company and his own shares amount to £7,000. In May, 1961, he went to the United Kingdom to order plant for the company and proceeded to Ceylon in August where he remained till May, 1962. He returned to the United Kingdom and later to Uganda in January, 1963. In May, 1963, he went back to Ceylon to complete negotiations to sell his family estate and returned to Uganda in October, 1963, from which date he had lived in Uganda. He stated that the prospect of producing instant tea in Uganda was very good and that he and his brother had patented their process for making instant tea. He said that he wished to make Uganda his permanent home and that he had no leaning to go anywhere else. He intends to purchase a house in Kampala and that he was hopeful of being able to get his money from Ceylon.

In answer to questions put to him by the court, the petitioner stated as follows:

> "If Solutea Ltd. does not make a success of making instant tea, I don't think I shall have any difficulty in finding a job in the Tea Industry. It could happen that if I do not succeed here I might take employment in Kenya, but I don't know Kenya. I would not ever wish to live in the U.K. At end of

> my working life I would like to live in Uganda, but if Uganda was to become like Ceylon I would not like to stay."

After reviewing the petitioner's evidence on the issue of domicil, and after referring to certain authorities on the point, the learned trial judge made the following findings:

> "In my judgment, there is insufficient evidence of a settled intention on the part of the petitioner to remain in this country permanently.
>
> I find that the petitioner has not acquired a domicil of choice in Uganda, and that, consequently, he retains his domicil of origin.
>
> The petition is dismissed."

From the order dismissing the motion and the judgment dismissing the petition the petitioner has appealed on the following grounds of appeal:

> "1. That the learned judge erred in refusing leave to the appellant to give evidence by affidavit proving the confession made by the respondent in view of the pure formality of such evidence.
>
> 2. That the learned judge erred in holding that the duty of the court would be rendered difficult if it is deprived of the advantage of seeing the only witness to prove the fact of adultery on the assumption that this was the only proof of adultery which assumption was incorrect.
>
> 3. The learned judge erred in deciding that this was not a proper case to allow evidence by affidavit.
>
> 4. The learned judge erred in deciding that the position of the appellant in the case of *Bell v. Kennedy* (1868) L.R. 1 Sc. & Div. 307 was similar to that of the appellant.
>
> 5. The learned judge erred in assessing the effect of the appellant's evidence as to his intention to make Uganda his permanent home.
>
> 6. The learned judge erred in not holding that the appellant had acquired a domicil of choice in Uganda and in failing to consider the effect of the authorities of *Stone v. Stone* (1959) 1 All. E.R. 194 and *Donaldson* (*or Nichols*) *v. Donaldson* (1949) P. 363."

In respect of the first, second and third grounds which were argued together by counsel for the appellant, he submitted that the trial judge was wrong in refusing to exercise his discretion to allow evidence to be given on affidavit, and that he misdirected himself in law.

The application for leave to allow the petitioner to prove certain facts by affidavit was made under O. 17, r. 1 of the Civil Procedure Rules which states:

> "1. Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:
>
> Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit."

This rule is applicable to divorce proceedings by virtue of s. 31 of the Divorce Ordinance (Cap. 112) (U). Section 34 of the Ordinance also applies.

In dismissing the application, the learned trial judge appears to have based his decision on the grounds (1) That leave to adduce evidence by affidavit should rarely be given and as an exceptional indulgence in special circumstances, (2) That the cost and inconvenience of bringing a witness from the United Kingdom would not be very great, (3) That sufficient grounds for granting the application were not

shown and (4) The nature of the evidence upon which the petitioner

intended to rely in proof of adultery would render it difficult for the court to satisfy itself that the petition is not prosecuted in collusion with the respondent.

The learned trial judge also supported his decision with the dictum of Lord Cozens-Hardy in the case of *Gayer v. Gayer* (1) [1917] pp. 67, 68 and 69 where the learned Master of the Rolls stated in effect that it was unreasonable to admit evidence by affidavit in order to save expenses and that no judgment for divorce can be obtained by consent. It is to be observed that in *Gayer v. Gayer* (1) Scrutton, L.J., who dissented from the judgment of Cozens-Hardy, M.R. and Warrington, L.J., stated as follows in his judgment:

> "Broadly speaking, for some forty years after the institution of the Divorce Court such orders were rarely made, and very rarely indeed for the proof of the vital fact of adultery. For the next twenty years down to the present time such orders were made in undefended cases with increasing frequency, until now they are made in large numbers, allowing affidavits to be used for proof of adultery as well as more formal matters. . .
>
> I do not think it is possible to lay down any more general rule than that there is to be no rule against proving adultery in foreign countries by affidavit, but that each case is to be dealt with on its own special facts. I should propose to allow the appeal and remit the case to the Divorce Court, for further consideration. My brothers, however, disagree . . . they are more impressed with the desirability in the public interest of avoiding even the remote possibility of mistake or collusion; and I am more impressed with the desirability of making justice sufficiently cheap to be accessible to the poor, even at the risk of some lack of certainty. In my view each judge of the Divorce Court will still have to use his discretion in each case after considering the views expressed in these judgments."

Order 17, r. 1 of the Civil Procedure Rules empowers the court to exercise its discretion to allow or not to allow evidence to be given by affidavit. The proviso to the rule states that where any party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order authorising the evidence of such witness to be given on affidavit shall not be made.

Order 17, r. 1 of the Uganda Civil Procedure Rules is different in its wording from the English Matrimonial Causes Act of 1857 on which the authority of *Gayer v. Gayer* (1) was based. The act reads:

> "Subject to such rules and regulations as may be established as herein provided, the witnesses in all proceedings before the court where their attendance can be had shall be sworn and examined orally in open court: Provided that parties, except as hereinbefore provided, shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party or by direction of the court, be subject to be cross-examined by or on behalf of the opposite party orally in open court, and after such cross-examination may be re-examined orally in open court as aforesaid by or on behalf of the party by whom such affidavit was filed."

The difference between the Uganda rule and the English act, as I see it, is that while the court in Uganda has no power to allow evidence to be given on affidavit where it appears to the court that either party bona fide desires production of a witness for cross-examination, under the English act the opposite party, or by direction of the court, was entitled to cross-examine the deponent whose affidavit had been accepted as evidence and who could be re-examined by the party who is relying on the affidavit. It is to be noted that under the English Matrimonial Causes Rules, 1950, r. 25 (2) where any party reasonably desires the production of a witness for cross-examination and that the witness can be

produced no order can be made authorising evidence of such witness to be given on affidavit. The rule further states that the expenses of such witness at the trial must be specially reserved. This English rule appears to be similar to the r. 1 of O. 17 of the Uganda Civil Procedure Rules.

It seems to me that in Uganda the proviso to r. 1 of O. 17 is one of the guiding factors which should influence a court in deciding whether it should grant an application to lead evidence on affidavit or not. In other words, if there is no application from the opposite party to be given an opportunity to cross-examine a witness or if the court does not so direct, then, the court is entitled to exercise its discretion in the matter, and the discretion, of course, should be exercised judicially.

Can it be said that the learned trial judge in the present case, in refusing to accept evidence on affidavit, exercised his discretion judicially? With respect, I think he did not. As I have stated earlier in this judgment, one of his reasons for refusing to admit the evidence on affidavit was that it should be done rarely and in exceptional cases. Here is a case in which allegations of adultery have not been denied either by the respondent or co-respondent, both of whom have not entered appearance or indicated any intention to be represented at the trial. The respondent and co-respondent live in the United Kingdom. It must be assumed that the petitioner must have undergone some expense in procuring the evidence which was sought to be given on affidavit. I cannot conceive of a case rarer and more exceptional than the present one.

The learned trial judge also stated in his judgment that the cost and inconvenience of bringing a witness from the United Kingdom would not be great “in these days of rapid and inexpensive air travel”. With great respect, I disagree that air travel in these days is inexpensive, although I agree that it is rapid. But the question seems to be this – is it justifiable legally to put the petitioner to the expense of bringing a witness from the United Kingdom to testify about a fact which is not denied and in respect of whose evidence the court has a discretion to accept on affidavit, particularly as the petition is not defended and no application was made to have the witness orally examined? I think the answer which should be in the negative is also a rejoinder to the learned trial judge’s statement that no sufficient grounds for granting the application were shown.

As to the learned trial judge’s statement that the nature of the evidence upon which the petitioner intended to rely in proof of adultery would render it difficult for the court to satisfy itself that the petition is not prosecuted in collusion with the respondent, I would say firstly that there was nothing before the learned trial judge entitling him to go beyond the statement contained in the petition that there was no collusion or connivance existing between the petitioner and the respondent. Secondly, the fact that the respondent was alleged to have confessed to adultery is not by itself any evidence of collusion. Thirdly, if the person whose evidence was sought to be given on affidavit had appeared to give oral evidence of the respondent’s confession of adultery, I doubt if any evidence of collusion could have been extracted from him, and fourthly, I can find nothing in the motion and the affidavit filed in support which shows that the only evidence sought to be relied on in proof of adultery was the one contained in the affidavit. I therefore think that the learned trial judge misdirected himself in this respect. In *Goodman v. Goodman and Pinfield* (2) it was held that there is no rule of practice that an affidavit, made in pursuance of leave to give evidence by affidavit, must not contain allegations of adultery.

I now come to grounds 4, 5 and 6 which were argued against the learned trial judge’s judgment on the issue of domicil.

I have in the earlier part of this judgment stated in summary the evidence of the petitioner on the issue of domicil. In his judgment the learned trial judge stated as follows:

> "I was favourably impressed by the frank way in which the petitioner gave evidence and I believe him to be a witness of truth. A person whose domicil is in question may himself give evidence of his intentions, but evidence of this nature is to be accepted with considerable reserve, even if the truthfulness of the witness be admitted: . . .
>
> The onus is of course, on the petitioner to prove a change of domicil. . . .
>
> The petitioner's association with Uganda has been relatively short. It seems a fair inference from his evidence that Uganda's chief attraction for him lies in its tea industry. . . . His intention to remain in Uganda appears to be largely contingent upon the success of Solutea Ltd's commercial venture. His position is not altogether dissimilar to that of the appellant in *Bell v. Kennedy* . . .
>
> In my judgment, there is insufficient evidence of a settled intention on the part of the petitioner to remain in this country permanently.
>
> I find that the petitioner has not acquired a domicil of choice in Uganda, and that, consequently, he retains his domicil of origin.
>
> The petition is dismissed."

The learned trial judge relied on certain authorities in arriving at his conclusion that the petitioner had not proved that he was domiciled in Uganda. One of the cases referred to was *Ramsay v. Liverpool Royal Infirmary* (3) which, in the judge's view, supported the principle of law that the onus is on the petitioner to prove a change of domicil.

In that case an action was instituted by beneficiaries under a will against the testator's next-of-kin for a declaration that the testator who died in Liverpool was in fact domiciled in Scotland at the date of his death. It was held that in the absence of independent evidence of an intention on the part of the testator to change his domicil, the burden which lay on the next-of-kin of proving that the testator had abandoned his domicil of origin had not been discharged. Although I agree that the onus of proving a change of domicil is on the petitioner the case referred to is clearly distinguishable from the instant case in that in the instant case it is the person who is seeking to establish his domicil and not his next-of-kin, whose evidence the court is considering.

In Rayden on Divorce (8th Edn.) at p. 36, para. 12, the following passage appears:

> "The burden of proving that a domicil has been chosen in substitution for the domicil of origin is on him who asserts that the domicil of origin has been lost; the intention must be proved with perfect clearness. It is not necessary that a change of nationality should be intended, or any steps be taken to secure naturalisation; . . . If residence and intention of permanency are both present, a new domicil is acquired, even if a desire to retain the old one is expressed."

It would appear from the passage quoted above that the learned trial judge's remarks in his judgment that the petitioner has taken no steps to apply for Uganda nationality is a misdirection. In Halsbury's Laws (3rd Edn.) Vol. 7, the following passage appears at p. 15, para. 28,

> "domicil of choice is acquired later by the actual removal of an individual to another country accompanied by his animus manendi".

At p. 16, para. 31, the following passage also appears:

> "Any person not under disability may at any time change his existing domicil and acquire for himself a domicil of choice by the fact of residing in a country other than that of his domicil of origin with the intention of continuing to reside there indefinitely.
>
> For this purpose residence is a mere physical fact, and means no more than personal presence in a locality, regarded apart from any of the circumstances attending it. If this physical fact is accompanied by the required state of mind, neither its character nor its duration is in any way material."

In *Donaldson* (*or Nichols*) *v. Donaldson* (4) the marriage between the petitioner and the respondent, an Air Force officer, had been dissolved in Florida where the respondent was serving. Subsequently, the wife petitioned for divorce in England on the ground of her husband's adultery with another woman with whom he had gone through a form of marriage. The respondent's answer to the petition while denying adultery was that the marriage with the petitioner had already been dissolved. It was held that the respondent had acquired a domicil of choice in Florida at the time of the decree, and that as that decree was valid, there was in consequence no subsisting marriage between the petitioner and the respondent.

In his judgment, Ormerod, J. stated as follows:

> "I am quite satisfied that, although he went to Florida in the first place because it was his duty to go and, indeed, remained there the whole time for the same reason, nevertheless he had during the time that he was in Florida conceived the desire to remain there, and that, although he was in Florida in the course of his duties, he was also there from choice, and had every intention of remaining there from choice – that is to say, I am satisfied that he was in fact residing and had in fact acquired an intention of continuing to reside in Florida."

This decision was applied and followed in the later case of *Stone v. Stone* (5). In his judgment Collingwood, J. stated as follows:

> "In the present case I accept the husband's evidence that in 1957 he conceived the desire to remain in England and formed the intention to make this country his permanent home. I am satisfied that this intention has persisted ever since, and that but for the exigencies of his service he would be living here permanently. Owing to these exigencies his residence here is restricted to the periods of his leave."

The petitioner's evidence before the trial judge was that he had obtained employment in Uganda, has invested £7,000 into the business with which he is concerned, that he wished to make Uganda his permanent home and that he intends to purchase a house in Kampala. It is also clear in his evidence that he has abandoned his domicil of origin which was Ceylon. The fact that the petitioner was living in a hotel, in my view, does not disprove his intention to reside in Uganda indefinitely. Neither do I think that his evidence that "if Uganda was to become like Ceylon (he) would not like to stay" can in any way be accepted as evidence of an intention not to stay in Uganda For, after all any person is entitled to change his domicil even after acquiring a domicil of choice in a particular place.

The facts of the present case are somewhat similar to those in the case of *Field v. Field* (6), in which this court held, reversing the decision of the Supreme Court of Kenya, that the change of domicil had been established.

For the reasons I have given, I would allow the appeal, set aside the decisions of the court below, both on the application for the evidence of Charles Frederick Francis Fleet to be given upon affidavit and on the question of the petitioner's domicil, and remit the case to the court below to proceed with the trial in the light of this decision.

Sir Clement De-Lestang: I agree with the order proposed by the learned President, but as we are disagreeing from the learned trial judge, I would briefly give my reasons for so doing in my own words.

Two questions arise for decision in the appeal. The first is whether the learned trial judge was right in refusing an application on the part of the petitioner for certain evidence to be given by affidavit. The petitioner was, to use a neutral term, living in Uganda and the respondent in Scotland. The petition, founded on adultery with a named co-respondent, was undefended. The evidence sought to be given was that of a solicitor who, on behalf of his firm, had the conduct of the divorce proceedings in England. It was to the effect that by appointment he met the respondent in the offices of her solicitors in Scotland, was there introduced to her as the respondent, and also recognised her as being the respondent from a photograph attached to the affidavit, that she admitted having committed adultery with the co-respondent and signed a statement to that effect in his presence. The statement was also annexed to the affidavit.

There is no doubt that the court below had a discretion whether to allow evidence by affidavit or not, and it is well settled that in such a case a Court of Appeal should not interfere with the discretion of the judge unless it is clearly satisfied that he was wrong (*Charles Osenton & Co. v. Johnston* (7)).

It is necessary, therefore, to examine the learned judge's reasons for refusing the application. The learned judge held, following *Gayer v. Gayer* (1) that leave to prove adultery by affidavit in undefended cases where the witnesses are abroad, or for other reasons cannot give evidence in open court, should rarely be given and only as an exceptional indulgence in special circumstances. He went on to say that there were no sufficient grounds for allowing proof of adultery by affidavit because in his view "the cost and inconvenience of bringing a witness from the United Kingdom would not be very great" and because the nature of the evidence would render the duty of the court, to satisfy itself that the petition is not presented in collusion with the respondent, a difficult one. He also assumed that the evidence in question would be the only evidence of adultery. In my view the present case comes within the exception to the rule concerning appeals from the exercise of a discretion by a judge and consequently the decision is open to review by this court. For example it seems to me that the learned judge was, with respect, wrong to assume that the affidavit evidence would be the only evidence of adultery in the case. Indeed, we were assured by counsel for the appellant that there would in addition be the evidence of the petitioner himself and correspondence. In any case it was recognized by the Court of Appeal in *Gayer v. Gayer* (1) that in special circumstances adultery might be proved by affidavit alone and this is not infrequently allowed nowadays. Again I think he was clearly wrong in his observation that the cost and inconvenience of bringing a solicitor from the United Kingdom to Uganda would not be very great. It is no exaggeration to say that to a large number of people the cost of such a journey would be prohibitive and to all but the wealthy cause serious financial embarrassment and hardship. The inconvenience would also be equally great. Consequently the refusal of the application may result in grave injustice to the petitioner. Moreover, it is difficult to appreciate how the presence of such a witness in court could assist the court in detecting any collusion which may exist between the petitioner and the respondent. The witness was an officer of the court testifying to an incident which could not but have taken place and his evidence could only be factual and to some extent formal. For these reasons it seems to me beyond doubt that in the circumstances of this case the application was one which should have been granted both on the ground of inconvenience and expense and on the ground that the court would not be likely to derive any advantage from the presence of the witness.

The other question is whether the learned judge was right to hold that the petitioner had not acquired a domicil of choice in Uganda.

I will not repeat the facts which are fully set out in the judgment of the learned President. Suffice it to say that here is a person whose domicil of origin was Ceylon, since his father was domiciled there at his birth. He has left Ceylon, sold his family estate there and does not want to live there any more. He has come to Uganda where he is employed in a business in which he has considerable pecuniary interest. He intends to make Uganda his permanent home and wishes to retire in Uganda eventually, but because he said that it could happen that if he did not succeed in Uganda he might take employment in Kenya, a country he did not know, and that if Uganda was to become like Ceylon he would not like to stay, the learned judge held that there was insufficient evidence of a settled intention on his part to remain in Uganda permanently and consequently he had not acquired a domicil of choice in Uganda. With great respect, I cannot agree with the learned judge's conclusion. Merely because a person expresses the hypothetical opinion that if things do not go the way he hopes they will, he might have to leave the country in which he has decided to establish himself and make his home, does not negative his present intention to remain permanently in that country, which is all that is necessary to acquire a domicil of choice therein. Having accepted the petitioner as a witness of truth, I fail to understand how the learned judge could reject his evidence that he intended to make Uganda his home.

For this and other reasons given by the learned President, I consider that it was abundantly proved that the petitioner had acquired a domicil of choice in Uganda.

Duffus JA: I have had the advantage of reading the draft judgments of the President and De Lestang, J.A. I agree with these judgments but would make a few comments on the question of the giving of evidence on affidavit.

Order XVII, r. 1 of the Civil Procedure Rules and s. 34 of the Divorce Ordinance (Cap. 112) apply. Section 34 reads:

> "34. The witnesses in all proceedings shall be examined orally.
>
> Provided that the parties may verify their respective cases by affidavit, but so that the deponent may be orally cross-examined and re-examined either on the application of the other party of by direction of the court."

As the learned trial judge held, this provision is similar to s. 46 of the English Matrimonial Causes Act of 1857, which was the subject of the judgment he refers to in the case of *Gayer v. Gayer* (1). As Lord Cozens-Hardy, M.R. remarked in his judgment in that case, the language of the section is somewhat obscure but there can be no doubt that the judge was correct in finding that s. 34 does give him a discretion to allow proof of adultery, or of any other relevant fact, to be given by affidavit at the trial. I agree that the trial judge does appear to have exercised his discretion in this case under a misapprehension of the facts. It does not appear from the record before us that the affidavit would be the only evidence of adultery, in fact, counsel for the petitioner states that the petitioner intended to adduce further evidence on this question. The petitioner had so far only given evidence on the question of domicil. Then the evidence to be given by affidavit is only as to the signing of a written confession of adultery by the respondent, a fact not in dispute and one which would be largely only formal evidence. The petitioner would be put to considerable expense and inconvenience to have this witness brought to Uganda and I cannot see how his presence could be of any real assistance to the court in determining whether the petition had been presented in collusion with the respondent. I agree, therefore, that in the

circumstances of this case the application should have been granted.

I am also of the view, for the reasons stated by the President and De Lestang, J.A., that the petitioner had established the acquisition of a domicil of choice in Uganda. I agree, therefore, with the order proposed by the learned President.

Appeal allowed. Case remitted to the trial court.

For the appellant:
PJ Wilkinson, QC and *BE de Silva*
Wilkinson & Hunt, Kampala

The respondent did not appear and was not represented.

The Kabaka's Government v Musa NSW Kitonto
[1965] 1 EA 278 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 June 1965
Case Number:	14/1965
Before:	Crabbe, Sir Clement De Lestang and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Buganda – Sheridan, J. and Slade, J

[1] Jurisdiction – Buganda Courts – Suit filed in High Court of Buganda – Suit for damages for negligence – Issue of vicarious liability involved – Action between African parties – Plaint framed as common law action – Application for transfer of suit to Principal Court – Whether Buganda Courts have jurisdiction to administer new native customary law developed after 1940 *– Buganda Courts Ordinance* (*Cap.* 77) *s.* (10) (*b*) [*U*].

Editor's Summary

The respondent filed an action in the High Court of Buganda claiming damages for negligence against the appellant. The respondent and the appellant were both Africans. It was alleged in the plaint that one S. acting in his capacity and the scope of his employment as servant of the appellant, negligently and unskilfully removed two sound wisdom teeth instead of two decayed teeth. The appellant had applied for transfer of the suit to the Principal Court of Buganda under s. 7 of the Buganda Courts and this was refused by the judge. By s. 9 (*c*) of the Buganda Courts Ordinance, the Principal Court and other courts established under that Ordinance are debarred from exercising jurisdiction in any proceedings "taken under any Ordinance or any English law in force in the Protectorate". Further the law to be administered by the Buganda courts is specified in s. 10 (*b*) as the native customary law prevailing in Buganda on or

after the commencement of the Ordinance. The judge interpreted s. 10 (*b*) of the Buganda Courts Ordinance as meaning that Buganda courts only have jurisdiction to administer and enforce customary law which had effect in Buganda at the date of the commencement of the Buganda Courts Ordinance in 1940 and which continued to have validity at any material time thereafter. The judge excluded from the jurisdiction of the Buganda courts any new customary law which might develop after 1940, for instance by assimilation into customary law of common law principles, on the ground that they would acquire jurisdiction which they did not have in 1940 and so derogate from the provisions of s. 9 (*c*) of the Buganda Courts Ordinance. The case then went on for hearing and judgment was given for the respondent. On appeal the main ground of appeal was that the judge erred in holding that the Principal Court of Buganda had no jurisdiction to try the case and it was submitted that the common law tort of negligence is well known to Buganda customary law and that the judge should have ordered the transfer of the suit to the Principal Court of Buganda. For the respondent it was submitted that with the repeal of s. 20 of the Uganda Order in

Council, 1902, the common law, in its application to cases to which Africans are parties, is no longer subject to native law, and that any suit now "taken" under the common law is in the same position as if it were "taken" under an Ordinance or applied statute, and thus by s. 9 (*c*) of the Buganda Courts Ordinance is solely within the jurisdiction of the High Court.

Held –

(i) the expression "High Court" in s. 7 of the Buganda Courts Ordinance, after Uganda attained independence, must be construed as including High Court of Buganda;

(ii) section 10 (*b*) of the Buganda Courts Ordinance confers jurisdiction on Buganda courts to administer native customary law as from time to time in force, whether it developed before 1940 or after and the customary law contemplated in the sub-section is a living law capable of adaptation and development;

(iii) a suit which in form is "taken" under the common law, to which Africans only are parties, is within the sole jurisdiction of the Buganda Courts if the cause of action is recognised by Buganda customary law, whether that customary law developed and became recognised as such before 1940 or after.;

(iv) in the case of a plaint "taken" under the common law, the material question is whether the cause of action is in substance known to native law or not; if it is the Buganda Courts have jurisdiction and the form of the action is immaterial;

(v) the case should have been transferred to the Principal Court on the grounds that the common law tort of negligence and the concept of vicarious responsibility are known to and form part of the customary law, and because it did not appear that any Ordinance or applied statute or English common law concept unknown to customary law would be likely to be invoked.

Appeal allowed.

Cases referred to in judgment

(1) *Mutyaba v. Kalanzi*, [1960] E.A. 367 (U).

(2) *Reuben Musanje v. Tomasi Yamulemye*, [1961] E.A. 716 (C.A.).

(3) *Kivu v. Lukiko* (1942), 6 U.L.R. 109.

(4) *Wamala v. Sebutemba*, [1963] E.A. 631 (U).

(5) *Phillips v. William Whiteley*, [1938] 1 All E.R. 566.

(6) *The Yuri Maru*, [1927] A.C. 906.

(7) *Kajubi v. Kabali* (1944), 11 E.A.C.A. 34.

June 3. The following judgments were read:

Judgment

Law JA: This is an appeal against the judgment and decree of the High Court of Buganda (Sheridan, J.) in Civil Case No. B.378 of 1963, and against an interlocutory order in that suit, made by Slade, J.

refusing to transfer the proceedings to the Principal Court of Buganda, under s. 7 of the Buganda Courts Ordinance (Cap. 77). The plaintiff, now the respondent, claimed damages for negligence against the defendant/appellant (hereinafter referred to as the Kabaka's Government), alleging in his plaint that a Mr. Sebowa, "acting in his capacity and the scope of his authority as a servant of the Government", negligently and unskilfully removed two sound wisdom teeth from his mouth instead of two decayed teeth. By its defence, the Kabaka's Government denied the alleged negligence, and pleaded that the transfer of the proceedings was compulsory under s. 7 of the Buganda Courts Ordinance for the reason that the Principal Court had jurisdiction to try the case. An application for such transfer was duly made, but was dismissed by Slade, J. Grounds 1 to 4 inclusive of the

memorandum of appeal are directed against the refusal of Slade, J. to order the transfer of the proceedings to the Principal Court, and ground 5 against the assumption by Sheridan, J. of jurisdiction to hear and determine the suit in spite of the averment in the defence that the transfer of the suit to the Principal Court was mandatory under s. 7 of the Buganda Courts Ordinance. The remaining grounds of appeal, 6 to 9 inclusive, are directed against the learned trial judge's findings in his judgment on the merits of the suit. These grounds can, in my opinion, be simply disposed of. I consider that there was sufficient evidence to support the finding of Sheridan, J. that Mr. Sebowa, as servant of the Kabaka's Government, had negligently extracted two sound teeth from the plaintiff's mouth instead of two decayed teeth. The quantum of damages awarded has not been challenged, and in my view this appeal, so far as it relates to the merits, fails and must be dismissed. The first five grounds of appeal, however, raise questions of considerable legal and constitutional importance.

The relevant provisions of the Buganda Courts Ordinance are to be found in ss. 4, 7, 9, and 10. Section 4 limits the exercise of jurisdiction by Buganda courts to cases, such as the one now under consideration, in which all parties are Africans. Section 7, excluding the proviso which is not material to this appeal, reads as follows:

> "Where any proceedings of a civil or criminal nature which a court has jurisdiction to try are commenced in a subordinate court or the High Court, they shall be transferred for hearing to a court having jurisdiction."

The words "a court" in the Buganda Courts Ordinance are defined in s. 2 as meaning a court established under that Ordinance and include the Principal Court. The words "High Court" in s. 7 are not defined, because when the Buganda Courts Ordinance was enacted in 1940, the only High Court in existence was the High Court of Uganda. The Constitution of Uganda, published as a Schedule to the Uganda (Independence) Order in Council, 1962 (Legal Notice 251 of 1962) established by s. 94 a High Court of Buganda, with the same jurisdiction within Buganda as the High Court of Uganda has within Buganda, except as to certain specified constitutional matters. By s. 3 of the Interpretation and General Clauses Act, 1963, "High Court" means the High Court of Uganda, or the High Court of Buganda within the limits of its jurisdiction. It seems, therefore, that the expression "High Court" in s. 7 of the Buganda Courts Ordinance must now be construed as including the High Court of Buganda.

By s. 9 (*c*) of the Buganda Courts Ordinance, the Principal Court and other courts established under that Ordinance are debarred from exercising jurisdiction in any proceedings:

> "taken under any Ordinance or any English . . . law in force in the Protectorate . . ."

The expression "any English law in force in the Protectorate" includes applied English Statutes and English Common Law, as McKisack, C. J., held in *Mutyaba v. Kalanzi* (1) a conclusion approved by Forbes, V.-P. in *Reuben Musanje v. Yamulemye* (2) ([1961] E.A. (C.A.) at p. 723). The law to be administered by the Buganda courts is specified in s. 10 of the Buganda Courts Ordinance, and for the purposes of this appeal para. (*b*) of that section is relevant:

> "(*b*) the native customary law prevailing in Buganda on or after the commencement of this Ordinance."

Slade, J. in his order refusing to transfer the proceedings the subject of this appeal to the Principal Court interpreted this paragraph as meaning that the Buganda courts only have jurisdiction to administer and enforce customary law which had effect in Buganda at the date of the commencement of the Buganda

Courts Ordinance in 1940 and which continued to have validity at any material time thereafter. He excluded from the jurisdiction of Buganda courts any new customary law which might develop after 1940, for instance by the assimilation into customary law of common law principles, on the ground that they would thus acquire jurisdiction which they did not have in 1940 and so derogate from the provisions of s. 9 (*c*) of the Ordinance. This forms the substance of ground 3 in the memorandum of appeal, which reads:

> "That the learned judge erred in holding that under sub-s. 10 (*b*) of the said Ordinance the jurisdiction of the Buganda Courts in regard to customary law is confined to such customary law as had effect in Buganda at the date of the commencement of the said Ordinance and that customary law contemplated in that subsection is not a living law capable of adaptation and development."

I agree with the submissions of counsel for the appellant in support of this ground of appeal. As Whitley, C.J. said in *Kivu v. Lukiko* (3):

> "native customary law is capable of growth, and this is recognized in the Buganda Courts Ordinance where by s. 10 (*b*) the native courts are empowered to administer 'the native customary law prevailing in Buganda on or after the commencement of this Ordinance'. The word 'after' is important. The spread of education, contact with European civilization, and the setting up of a more complex political order are bound to introduce new legal concepts."

Clearly, if the legislature had intended to restrict native courts to the administration of customary law in force in 1940, to the exclusion of customary law which might develop thereafter, it would have so provided specifically. I have no doubt that s. 10 (*b*) confers jurisdiction on the Buganda courts to administer native customary law as from time to time in force, whether it developed before 1940 or after.

A difficulty which has frequently arisen, and which has been the subject of decisions of this court, is this: which court has jurisdiction when the plaint (as in this case) is framed as a common law action, but the defendant claims that the cause of action is known to native customary law? The position before the repeal, in 1962, of s. 20 of the Uganda Order in Council, 1902, was as stated by Forbes, V.-P. in *Musanje's* case (2) ([1961] E.A. (C.A.) at p. 724):

> "It is clear from the provisions of s. 20 that the English common law in its application to Uganda in cases to which natives are parties, is subject to native law (except in so far as that native law may be repugnant to justice or morality); but native law is subject, *inter alia*, to the provisions of any Ordinance. In these circumstances, where a case between Africans in Buganda purports to be 'taken under' English common law, if the cause of action is known to native law, it is the native law which is to be applied. Whatever the form, the case in substance is . . . a case under native law."

Has the repeal of s. 20 of the Uganda Order in Council, 1902, in any way changed this position? The High Court, whether of Uganda or Buganda, is now no longer to be guided by native law; this is made clear by s. 2 of the Judicature Ordinance, 1962, which provides that the jurisdiction of the High Court shall be exercised:

(*a*) in conformity with the written laws in force in Uganda, and

(*b*) subject to such written laws, in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on 11th August, 1902, and in conformity with the powers vested in and according to the practice and procedure observed by and before Courts of Justice in England at that date.

Counsel for the respondent submits that with the repeal of s. 20 of the Uganda Order in Council, 1902, the common law, in its application to cases to which Africans are parties, is no longer subject to native law, and that any suit now "taken" under common law is in the same position as if it were "taken" under an Ordinance or applied statute, and thus by s. 9 (*c*) of the Buganda Courts Ordinance solely within the jurisdiction of the High Court. If this is so, then the meaning of "customary law" in s. 10 (*b*) of this Ordinance must now be restricted to a very narrow field indeed. I do not think this can be the true position. In my view the position at present is that a suit which in form is "taken" under the common law, to which Africans only are parties, is within the sole jurisdiction of the Buganda courts if the cause of action is recognized by Buganda customary law, whether that customary law developed and became recognized as such before 1940 or after. In other words, where the common law and customary law conflict, the customary law prevails, and support for this view is in my opinion to be found in the proviso to s. 2 of the Judicature Ordinance, which provides that the common law shall be in force only so far as the circumstances of Uganda and its inhabitants permit, and subject to such qualifications as local circumstances may render necessary. The views of SLADE, J. as stated in his order the subject of this appeal, and in his judgment in *Wamala v. Sebutemba* (4) to which he referred in his order, appear to be:

(1) that the native law which the Buganda courts have jurisdiction to administer does not include native customary law which can be shown to have come into existence since the date of the commencement of the Buganda Courts Ordinance, a view with which I have already expressed my disagreement; and

(2) that the dictum of Forbes, V.-P. in *Musanje's* case (2) that where a case "taken under" the common law comprises a cause of action known to native law, it is the native law which prevails and must be applied, must be modified as a result of the repeal of s. 20 of the Uganda Order in Council, 1902, so as to exclude from the jurisdiction of the Buganda courts any case whose determination might possibly involve, even to a slight or incidental degree, some aspect of the common law which does not form part of customary law as in force in 1940.

It is against this second proposition that the first two grounds of appeal are directed. They are stated as follows:

"(1) That the learned judge erred in holding that the Principal Court of Buganda had no jurisdiction to try this case.

(2) That the learned judge erred in holding that for the reasons elaborated in the judgment given by him in a case previously decided, viz. *Wamala v. Sebutemba and Others* (4), the decisions of the Court of Appeal in a line of cases including *Reuben Musanje v. Yamulemye* (2) [1961] E.A. 716 and *Semakula v. Bwanika* (C/A 36 of 1963 unreported) in regard to the interpretation of s. 7 of the Buganda Courts Ordinance (Cap. 77) are not applicable after the revocation of s. 20 of the Uganda Order in Council, 1902."

In my view, the repeal of s. 20 of the Uganda Order in Council, 1902, does not necessitate any modification of the principles laid down by Forbes, V.-P. in *Musanje's* case (2), although it does affect his reasoning that native law prevails over the common law because the 1902 Order in Council required the courts to be guided by native law. In the case of a plaint "taken" under the common law, as was the plaint the subject of this appeal, the test whether the proceedings should have been transferred to the Principal Court is, in the circumstances of this case which are not concerned with the enforcement of any Ordinance or Statute, "was the cause of action known to native law?" If it was, the Buganda

courts have jurisdiction. The form of action is immaterial, if the cause of action is in substance known to native law. I stress the words "in substance", which were, no doubt, used advisedly by Forbes, V.-P., because in my view the mere possibility of some refinement of the common law arising, which is not known to customary law, is not necessarily a reason for refusing to transfer a case to Buganda court, if that court can, by application of principles known to customary law, effectively dispose of the case. For instance, the plaint now under consideration involves, on the face of it, two propositions: firstly, that one Mr. Sebowa negligently extracted two sound teeth; and secondly, that the Kabaka's Government as his employer, was vicariously responsible for this negligence. Appellant's counsel has quoted an ample wealth of authority, to which I need not refer, to show that the common law tort of negligence is well known to Buganda customary law, and I have no doubt that this is so. As regards the doctrine of vicarious responsibility, counsel for the appellant submits that it is also a concept well known to customary law, and has cited the opinions of publicists in support of this view, such as Haydon on Law and Justice In Buganda, and Elias on The Nature of African Customary Law, and again I have no doubt that this is so. Why then did Slade, J. refuse to transfer these proceedings to the Principal Court? Apparently because he was not satisfied that it would not be required to administer the common law in some respect, which he did not define, unknown to customary law. Sheridan, J. at the trial of the suit indicated that he agreed with the order of Slade, J. because "this is a claim for professional negligence". But it was not pleaded that the respondent's servant, Mr. Sebowa, held himself out as possessing special skill and knowledge such as to be expected from a qualified dentist, and indeed the evidence at the hearing established that Mr. Sebowa was not qualified professionally either as a doctor or a dentist. He is a Medical Assistant employed at the Bombo Hospital, and his duties were described by himself in evidence as follows "We perform the minor duties of a doctor. We don't fill teeth. I can extract loose teeth. We don't have a dental chair or other equipment". In fact, he was no more of a professional man in the matter of dental surgery than a jeweller is a surgeon when he undertakes to pierce a customer's ears, the jeweller not being under a duty to exercise the same standard of care as a surgeon, but merely to take reasonable precautions against infection (*Phillips v. William Whiteley Ltd.*) (5). It is not necessary to decide whether the common law concept of the duty owed by a professional man is known to the customary law of Buganda, because the question does not arise in this case. In my view the proceedings, the subject of this appeal, should have been transferred to the Principal Court on the application of the Kabaka's Attorney General, on the grounds that the common law tort of negligence and the concept of vicarious responsibility are know to and form part of the customary law, and because it did not appear that any Ordinance or applied Statute or English common law concept unknown to customary law would be likely to be invoked. In the event, the suit was decided in favour of the respondent on the basis that ordinary negligence had been established on the part of Mr. Sebowa, and not on the basis of any failure to exercise the special standards of skill and care expected from a professionally qualified man.

The short answer seems to me to be that where a cause of action at common law in a suit to which Africans alone are parties, and which does not involve consideration of an Ordinance or applied statute, is shown to be known to and form part of the native customary law prevailing in Buganda, then for the purposes of the Buganda Courts Ordinance that suit is within the exclusive jurisdiction of the Buganda courts, under s. 10 (*b*) of the Ordinance, and not to be considered to be English law excluded from the jurisdiction of those courts by s. 9 (*c*), although the suit is expressed to be "taken" under the English

common law. In my view, the first 4 grounds of appeal succeed, and this appeal should be allowed with costs here and below. The costs of this appeal should be taxed on the agreed basis that the appeal be deemed to have been heard in Kampala and not in Nairobi as it in fact was. The inevitable consequence is that the judgment and decree of Sheridan, J. will have to be set aside, but I express the personal hope that the Kabaka's Government will see its way open to abide by that judgment, which was in my respectful opinion sound in every respect, in so far as the issues of liability and damages are concerned, instead of putting the respondent to the trouble and expense of instituting fresh proceedings in the Principal Court.

Crabbe JA: I agree. In my view where an application is made for transfer of a case to a Buganda Court under s. 7 of the Buganda Courts Ordinance, (Cap. 77) the High Court to which the application is made will have to apply two tests. These are: (1) Are the parties to the proceedings Africans within the definition of s. 2 of the Buganda Courts Ordinance (Cap. 77)? (2) Does the plaint in substance (in a civil case) disclose a cause of action known to Buganda law? Or (in a criminal prosecution) do the facts alleged in the charge disclose an offence known to Buganda law or is the prosecution taken under any law which the Buganda courts are authorized to administer? If the answers to both questions are in the affirmative then the court ought to make the order of transfer, and it is immaterial that the case sought to be transferred has common features with English law.

This appeal turns to a substantial degree, on the interpretation of s. 10 (*b*) of the Buganda Courts Ordinance (Cap. 77). Dealing with the submission of counsel for the Buganda Government that the language of this sub-section envisages the assimilation into customary law of common law principles Slade, J. said:

> "The effect of this submission on the interpretation of s. 10 (*b*) is therefore that new custom, previously unknown and which may indeed be foreign to the previous concepts of customary law can be established after the date of the commencement of the Buganda Courts Ordinance. With respect to Mr. Jayarajan I am unable to accept that proposition. It does not seem to me that the words 'customary law prevailing in Buganda on *or after* the commencement of this Ordinance' have the positive effect claimed for them: the paragraph in question, *in my opinion*, means that the Buganda Courts have jurisdiction to administer and enforce customary law which had effect in Buganda at the date of the commencement of the Ordinance which continues to have validity at any material time subsequent to that date and which has not ceased to have validity by reason of, for example, replacement by written law or by being regarded as obsolete and so no longer applicable in modern conditions."

It has been contended in this appeal by counsel for the appellant that the restrictive interpretation which the learned judge placed on s. 10 (*b*) of the Buganda Courts Ordinance (Cap. 77) is erroneous in that such interpretation would stultify any development and adaptation in the customary law. The word "prevailing" in the sub-section, in my judgment, may either mean prevailing or existing at the date when the Buganda Courts Ordinance came into force or prevailing or existing when the dispute arose. The section is therefore capable of bearing either meaning, and "as the use of words in the English tongue is not so rigidly governed by rule as to render impossible either of the alternative constructions of the parties", (*per* Lord Merrivale in *The Yuri Maru* (6) [1927] A.C. at p. 910), counsel for each party relied upon the interpretation that supported his contention. If the language of a statute admits of two constructions the court ought to adopt that construction that is reasonable and more in accord

with the presumed intention of the Legislature. The construction that the learned judge adopted would, with respect, lead to absurd results, because it would prevent the courts from recognising any evolutionary changes in the customary law that have taken place since 1st September, 1940. A statute is deemed to be speaking all the time until it is repealed, and I have no doubt that if it was the intention that the application of the native customary law was to depend upon its existence at a particular date the legislature would clearly have said so. A characteristic feature of the native customary law is its flexibility, and as was properly remarked by Sheridan, C.J. in *Kajubi v. Kabali*, (7) ((1944), 11 E.A.C.A. at p. 37): "Custom is not necessarily immutable" In its contact with European civilization foreign concepts may creep into the native customary law and influence it without necessarily depriving it of its essential character of custom. A customary law that once prevailed may now exist in a modified form owing to modern political, social and economic developments. The new or modified custom may be deemed to have acquired the force of law if it is shown that the members of the community recognize it as an obligatory rule which regulates the conduct of persons within that community.

In my view Slade, J.'s interpretation of s. 10 (*b*) was erroneous and his order of 11th December, 1963 must be set aside. It follows therefore that the hearing before, and judgment of, Sheridan, J. in the substantive case were without jurisdiction and must also be set aside. The appeal is accordingly allowed and the orders of the court are in the terms proposed by Law, J.A.

Sir Clement De Lestang JA: I have had the advantage of reading in advance the judgment of LAW, J.A., with which I entirely agree.

The proceedings in the present case are between Africans as defined in the Buganda Courts Ordinance. The action is framed as a common law action for the tort of negligence, a cause of action also well known to native customary law. It was held in *Haji Ibrahim Mutyaba v. Arthur Asaph Kalanzi* (1)(*a*) that in these circumstances the Buganda courts had jurisdiction and that the action ought to be transferred to a Buganda court because by virtue of s. 20, Uganda Order in Council, 1902, native customary law (except in so far as it may be repugnant to justice or morality) prevailed over the common law whether there was inconsistency between them or not. This decision was expressly approved by this court in *Reuben Musanje v. Tomasi Yamulemye* (2).

Section 20 of the Uganda Order in Council, 1902, was repealed by the Buganda (Constitution) Order in Council, 1962, which by s. 90 of the schedule thereto established the High Court of Buganda with "jurisdiction as may be conferred on it by this Constitution or any other law", and by s. 94, the High Court of Buganda "which shall have within Buganda the same jurisdiction as the High Court of Uganda has within Buganda and this Constitution or any other law", except in certain constitutional matters which are not relevant here.

I do not think that the revocation of s. 20 of the Uganda Order in Council, 1902, and the reconstitution of the High Court without express jurisdiction to administer native customary law has affected the legal position. The jurisdiction of the High Court is defined in the Judicature Ordinance, 1962, the relevant portion of s. 2 of which provides:

> "Subject to the provisions of this Ordinance, the jurisdiction of the High Court shall be exercised:
>
> (*a*) in conformity with the written laws which are in force in Uganda on the date on which this Ordinance comes into operation (including the laws applied by this Ordinance) or which may hereafter be applied or enacted; and
>
> (*b*) subject to such written laws and so far as the same do not extend or apply:

(i) in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 11th August, 1902; and

(ii) Provided that the said common law, doctrines of equity and statutes of general application shall be in force in Uganda only so far as the circumstances of Uganda and its inhabitants permit, and subject to such qualifications as local circumstances may render necessary."

It will be observed that although the High Court is no longer required to be guided by native law, it is not enabled to administer the common law without qualification. The common law which it is authorized to administer is subject to the Buganda Courts Ordinance, which is a written law and only applies (*a*) so far as that ordinance does not extend or apply, and (*b*) so far as the circumstances of Uganda and its inhabitants permit and subject to such qualifications as local conditions may render necessary.

Since the Buganda Courts Ordinance establishes courts to administer and enforce "the native customary law prevailing in Buganda on or after the commencement of the ordinance", it seems to me to be clear that in so far as Africans are concerned native customary law, to which they are subject, prevails over the common law even now. Any other conclusion would take away most of the jurisdiction of the Buganda courts which would be left only with jurisdiction in matters known to customary law and unknown to the common law, and in respect of the written laws they are expressly authorized to administer or enforce, a result clearly not contemplated. I agree with the order proposed by Law, J.A.

Appeal allowed.

For the appellant:
PM Jayrajan
PM Jayrajan, Mengo, Uganda

For the respondent:
SH Dalal
Dalal & Singh, Kampala

R v WY Wilken
[1965] 1 EA 286 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	22 June 1964
Case Number:	36/1964
Before:	Sir John Ainley CJ
Sourced by:	LawAfrica

[1] Criminal law – Practice – Assessors – No practice that assessors should all be of the same race as accused.

[2] Criminal law – Trial – Assessors – Objection to them on behalf of accused – Extent of examination of ability to understand – Whether racial composition of panel discriminatory under s. 26 *of the Kenya Independence Order in Council,* 1963*.*

[3] Constitutional law – Criminal law – Trial – Assessors – Whether racial composition of panel discriminatory under s. 26 *of the Kenya Independence Order in Council,* 1963*.*

Editor's Summary

The accused was a European charged with the murder of an African by confining him in a box with insufficient air until he could be handed over to the police. Prior to Kenya's Independence a European on a capital charge was tried under special provisions of the Criminal Procedure Code (Part VII, Cap. 75) with a jury of Europeans, while an Asian or an African on a similar charge was tried by three assessors who were in practice invariably of the same race as the accused. After Independence juries were abolished and Europeans came under the same provisions relating to assessors as anyone else. The trial judge heard counsel in the absence of the assessors on the accused's right to object to the panel or to individual assessors whether on racial or other grounds.

Counsel for the accused submitted that the practice of the judge in selecting assessors of the same race as the accused should now extend to this accused. Such would be a proper and judicial exercise of the judge's discretion – a discretion that counsel conceded the judge to have. It followed from *Nyagu's case* (1959) E.A.C.A. 875 (C.A.) that the judge's choice was subject in practice to the accused being allowed to object on as yet unspecified grounds, to the panel as well as to the individuals selected. Their opinion on fact and law is not binding on the judge, but he usually gives great weight to their views on tribal questions and customs. In taking advantage of their ability to assist "the court will always apply the test of what is fair to an accused person, keeping in mind the principles of natural justice". (*R. v. Wesonga* (1948), 15 E.A.C.A. 65, *R. v. Beihweihwa* (1943), 10 E.A.C.A. 59). Counsel submitted that by this test the assessors should be all Europeans. Another ground was that a non-European assessor's ability to assist on say medical evidence would be limited by his command of the language of the court and its nuance, even though he was entitled to have it translated to him. What qualification would be acceptable to the court? Counsel continued: "It is an invidious position to be in to have to make a selection, but, if justice must be seen to be done, and if one applies the test of what is fair to an accused person keeping in mind the principles of natural justice, I would submit, with respect, My Lord, that an accused had the right, and I think it is an inalienable right, to have European assessors when an accused is a European. I say this for these reasons. I do not wish, I preface my remarks, to base my argument and submission on any other ground than the test of fairness, My Lord, under the Constitution." The continuance of existing laws is provided for in s. 4 of the Kenya Independence Order in Council, 1963. The law, in the form of the practice of choosing assessors of the same race as the accused, has been observed before and since Independence in the case of Africans. To depart from this would be to give a discriminatory effect to the law contrary to s. 26 if the Constitution. It would also cause bigger problems in future of formulating a basis of selection of a mixed panel. Counsel quoted the Minister of Justice in a Debate of 30th July, 1963, when The National Assembly had the chance to make a jury available to everyone but rejected it because in most districts it was not easy to find a jury which appreciated what was being argued in court. The then current system of assessors would be applied to all, the Minister said, and that would be fair and remove discrimination in the form of juries for Europeans. The system then and since then was to select African assessors from the panel when the accused was an African and so now that the accused was a European the assessors should be Europeans.

Counsel for the prosecution submitted that the Crown was not concerned as to who the assessors were. The practice had been to match their race with that of the accused so that where there was an African and an Asian accused the practice had invariably been to choose a mixed panel of those races. The practice extended to the accused's tribe. It is open to the court to depart from tradition. Historically assessors were treated as expert witnesses (*R. v. Mutwiwa* (1944), 11 E.A.C.A. at p. 68) and that would justify a mixed panel. Now the Court of Appeal treats assessors more as a jury. It would be discriminatory here to have only European assessors.

Counsel for the accused in reply asked the judge to question the proposed assessor to reveal his understanding of the issues. The learned Chief Justice refused because that would raise the issue prematurely; he would simply ask the proposed assessor whether he spoke English and go upon his answer.

Held –

(i) although there has been a practice to try an African accused with the aid of three African assessors and similarly an Asian accused with three Asian assessors, this has not conferred upon an accused

of any race the right to be

tried with aid of assessors exclusively of his own race, nor has it established a principle that it is necessarily just and essential that a man should be so tried and it would be wrong that any such principle should be established;

(ii) whether an assessor has a full and comprehensive command of the language of the court, namely, English, is very important and the judge's selection of assessors should be governed by the help which he anticipates he will gain from the individuals upon his list, and an attempt should be made to select from those summoned three assessors who will give the maximum assistance in the particular case to be tried.

Order: Two Europeans and one African assessors selected.

Judgment

Sir John Ainley CJ: I have listened very carefully to what has been said, and well said, if I may say so, by counsel for the accused. I think, however, that no valid objection has been raised to anyone upon the list of assessors.

It is said that the accused, who is a European, should be tried with the aid of three European assessors. It has been, I am aware, the general practice in Kenya to try Asians with three Asian assessors, and to try Africans with the aid of three African assessors, and it has, I believe, been usual to summon exclusively African assessors where the accused is an African and to summon exclusively Asian assessors where the accused is an Asian. Europeans have, of course, hitherto been tried by European juries. All this has not conferred upon an accused of any race the right to be tried with the aid of assessors exclusively of his own race, nor has it, to my mind, established a principle that it is necessarily just and essential that a man should be so tried. It would be wrong, I think, that any such principle should be established. In some cases, perhaps in very many cases, it may be desirable that the judge should be assisted by assessors conversant with the ways, customs, beliefs and language of a particular community, but there can be no hard and fast rule in the matter and certainly I think the judge's powers of selection should not be governed or fettered by considerations of race.

Language may often be very important. In this case, however, I believe that the non-European assessors are English-speaking. The judge's selection of assessors should, in my view, be governed by the help which he anticipates he will gain from the individuals upon his list. Though admittedly there must be an element of chance in the matter, an attempt should be made to get from those summoned three assessors who will give the maximum assistance in the particular case to be tried. In this case there is at least, I believe, one very important African witness and I decide that the Court will best be assisted by two European assessors and by an English-speaking African assessor, and I shall make my selection in accordance with the decision.

Order: Two European and one African assessors selected.

For the Crown:
KC Brookes (Public Prosecutor, Kenya)
The Attorney General, Kenya

For the accused:

B Georgiadis
Hamilton Harrison & Matthews, Nairobi

Abdul Karim Khan v Mohamed Roshan
[1965] 1 EA 289 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	11 June 1965
Case Number:	52/1963
Before:	Crabbe, Sir Clement De Lestang and Law JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Miles, J

[1] Pleading – Election – Not arising on alternative inconsistent claims.

[2] Practice – Pleadings – Action for specific performance of contract – Alternative reliefs for damages and rescission claimed – Whether obligatory on plaintiff to elect which relief he intends to pursue.

[3] Practice – Amendment of pleadings – Plaint – Action for specific performance of contract, damages and rescission – Further claim for refund of money spent on property – Amendment sought to base claim under s. 70 *of Indian Contract Act,* 1872 *– Amendment refused.*

Editor's Summary

The appellant sued the respondent on an agreement in writing whereby the respondent agreed to sell to him an undivided half share in a property for a price which he had paid. Subsequently the respondent charged the property with a company and refused to complete the sale. Paragraph 10 of the plaint averred that the appellant had at all material times been and was ready and willing to perform his obligations under the agreement. The reliefs claimed by the appellant were specific performance of the agreement, with alternative prayers for damages for breach of contract and for rescission of the agreement and return of moneys allegedly paid thereunder. When the case came on for hearing counsel for the respondent raised an objection in limine that the reliefs claimed were not maintainable in law. The counsel for the appellant then applied for amendment of para. 7 of the plaint to include a claim based on s. 70 of the Indian Contract Act, 1872, for the repayment of moneys allegedly spent on improvements. The judge ordered *inter alia* that the plaint as it stood did not support a claim for damages or rescission, and that the proposed amendment to para. 7 be disallowed. On appeal it was contended for the appellant, that the appellant was empowered by O. 7 r. 6 of the Civil Procedure (Revised) Rules, 1948, to claim in his plaint any relief available to him "either simply or in the alternative" and that this is what the appellant had done in the plaint. For the respondent it was submitted that the appellant, as plaintiff, was under an obligation before opening this case at the hearing to elect which of the alternative claims pleaded in his plaint he intended to rely on, to the exclusion of the others. It was further submitted that in view of para. 10 of the plaint the appellant had elected to restrict his claim to one for specific performance only.

Held –

(i) a plaintiff who seeks relief in respect of several distinct claims founded upon separate and distinct grounds is entitled to state them separately and distinctly; and where the claims are inconsistent he can legitimately state them in the alternative and adduce evidence in support of his claim without being put to an election.

(ii) the averment that a plaintiff has been at all times and still is willing to perform his obligations under the contract, the subject of suit for specific performance, is an essential ingredient to support a claim for specific performance and it relates only to that claim; further it does not mean that the plaintiff is precluded from pursuing an alternative claim in the same proceedings, such as a claim for damages at common law against the defendant for breach of contract or for rescission of contract.

(iii) rescission is an equitable remedy, and on the facts it was within the discretion of the court to determine whether the appellant's prayer for rescission ought to be granted; the judge erred in holding that the plaint did not support a claim for rescission or damages.

(iv) the court was justified in refusing to allow the amendment to para. 7 of the plaint so as to include a claim for the repayment of moneys allegedly spent on improvements under s. 70 of the Indian Contract Act, because s. 70 only applies in the absence of any express agreement, and therefore was inconsistent with the alternative claims for specific performance, damages and rescission.

(v) the court will hesitate to allow an amendment which introduces fresh matters into the pleadings or an amendment which creates an inconsistency on the pleadings.

Appeal allowed in part.

Cases referred to in judgment

(1) *Farrant v. Olver* (1922), 91 L.J. Ch. 758.

(2) *Vine v. National Dock Labour Board*, [1956] 1 All E.R. 1; [1956] Q.B. 658; [1957] A.C. 488; [1956] 3 All E.R. 939.

[1957] A.C. 488; [1956] 3 All E.R. 939.

(3) *Ardeshir Mama v. Flora Sassoon* (1928), 52 Bom. 597.

(4) *Hipgrave v. Case* (1885), 28 Ch. D. 356.

(5) *Ind Coope & Co. v. Emmerson* (1887), 12 App. Cas. 300.

(6) *Bagot v. Easton* (1877), 7 Ch. D. 1.

(7) *Phillipps v. Phillipps* (1878), 4 Q.B.D. 127.

(8) *Scarf v. Jardine* (1882), 7 App. Cas. 345.

(9) *Tildesley v. Harper* (1878), 10 Ch. D. 393.

(10) *Dominion Coal Co. Ltd. v. Dominion Iron & Steel Co.*, [1909] A.C. 293.

June 11. The following judgments were read:

Judgment

Crabbe JA: This is an appeal against the decision of Miles, J. in the Supreme Court of Kenya whereby he ruled (1) that the plaint as it stood did not support a claim for damages or rescission and (2) that an amendment to para. 7 of the said plaint and a new prayer (numbered IV) and also the amended prayer for declaration be disallowed.

In order to appreciate the points argued in this appeal it is necessary to look at the original plaint which was filed on behalf of the plaintiff on 5th May, 1962. It was as follows:

"Plaint

1. The plaintiff is an Asian Male residing at Mtito Andei and his address for service for the purpose of this suit is care of Kean & Kean Advocates, Princes' House, Government Road, Nairobi.

2. The defendant is an Asian Male, residing in Nairobi and his address for service is his residence Hobley Road off Juja Road, Nairobi.

3. By an agreement in writing made between the plaintiff and the defendant on the 26th day of September, 1957, the defendant agreed to sell and the plaintiff agreed to buy one undivided half share in a plot of land and stone buildings erected thereon situate at Mtito Andei and known as Asian Hotel at the price or sum of Shs. 14,450/-.

4. It was further agreed by the parties hereto in the said written agreement that as from the 1st day of October, 1957, the plaintiff and the defendant

should share equally the income and the expenditure from and in respect of the said property.

5. The plaintiff duly paid the sum of Shs. 14,450/- to the defendant in the year 1957 in accordance with the said Agreement.

6. It was further provided by the said written Agreement that the defendant should register the property in the defendant's and plaintiff's names on payment by the plaintiff of the full sum of 14,450/-.

7. In the years 1959 and/or 1960 the plaintiff with the acquiescence and/or agreement of the defendant spent a sum of Shs. 15,500/- on improvements to the said property.

8. The defendant contrary to the obligations imposed on him by law in consequence of the said agreement, charged the said property with the Credit Finance Corporation Limited by a Charge dated the 9th day of May, 1960.

9. Notwithstanding repeated requests by the plaintiff, the defendant has neglected and refused and continues to neglect and refuse to take any steps towards the completion of the said Agreement of Sale and has repudiated the said Agreement of Sale.

10. The plaintiff has at all material times been and is now ready and willing to perform his obligations under the said Agreement.

11. The cause of action is within the jurisdiction of this Honourable Court.

WHEREFORE the plaintiff prays for judgment for:

(i) Specific performance of the said Agreement by a transfer to the defendant by the plaintiff of one half undivided share and the said property freed and discharged from the charge in favour of the Credit Finance Corporation Limited.

(ii) Further or alternatively damages for breach of contract including the return of the money paid plus interest thereon.

(iii) Alternatively rescission of the said Agreement and re-payment of the money paid thereunder with interest thereon at such rate as to this Honourable Court may seem fit.

(iv) A declaration that the plaintiff is entitled to a charge on the said property for the money paid (together with interest thereon) and any damages and costs awarded in this action.

(v) Further or other relief.

(vi) Costs."

The suit was not listed for hearing until 2nd May 1963 when counsel for the defendant raised an objection *in limine* that the reliefs claimed were not maintainable in law. Counsel for the plaintiff then applied to amend the plaint, but defendant's counsel opposed this application also, and after a short argument he submitted that the court could not, in any case, deal with the amendment until his preliminary objection had been considered. The learned trial judge acceded to this submission, and observed, quite rightly in my view, that the court could only look at the plaint.

Then after hearing the arguments of counsel for both parties the learned judge made a short ruling as follows:

"Ruling. I do not consider that upon the pleading as it stands there is sufficient material to justify my holding that specific performance could not be granted. I consider upon the authorities cited by Mr. Khanna, in particular *Hipgrave v. Case* and *Ardeshir Mama v. Sassoon*, that Mr. Khanna's contention that the plaint as it stands does not support a claim for damages or rescission is of great force. I will deal with the point later in my judgment if necessary. I understand that an application will be made to amend the

> plaint. I will give counsel for the plaintiff until tomorrow morning to formulate his amendment which will no doubt be approved and decide then whether to allow it or not.
>
> B. R. Miles, J."

In this Ruling the learned trial judge does not appear to have made any definite ruling on the questions of damages and rescission. But the formal Order of the court was drawn in these terms:

> "It was Ordered that upon the pleading as it stood there was not sufficient material to justify the court holding that specific performance could not be granted and that the plaint as it stood did not in the view of the court support a claim for damages or rescission . . ."

I understand this order to mean that the facts averred in the plaint do not disclose a cause of action so far as the alternative prayers of damages and rescission are concerned. Both parties are bound by this order which was drawn up by consent, and it must be taken as a formal expression of what the learned judge had in mind when he said in his ruling: "that counsel for the respondent's contention that the plaint as it stands does not support a claim for damages or rescission is of great force".

It is alleged in the first two grounds of appeal filed that the learned trial judge erred in holding that the plaint did not support a claim for damages or rescission and overlooking the fact that such prayers were, as they properly might be, "further or alternatively" to the prayer seeking specific performance.

A great deal of time was devoted to an argument as to whether the plaintiff could properly seek damages and an order for rescission as alternatives to a claim for specific performance. The argument of counsel for the appellant was, if I may put it briefly, that the form of the plaintiff's pleading is permitted by O. 7, r. 6, of the Civil Procedure Rules of Kenya, which reads as follows:

> "Every plaint shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement."

Counsel for the respondent conceded that a plaintiff could claim reliefs in the alternative, but he submitted that before opening his case at the hearing the plaintiff must elect which of the alternative claims pleaded he intends to rely on. In support of this contention counsel first cited the case of *Farrant v. Olver* (1) in which Sargant, J. said that as a general rule a plaintiff claiming alternative reliefs can choose at the hearing which relief he will ask for. But Sargant, J. further continued:

> "If the plaintiff had asked for rescission and forfeiture of the deposit alone, he would clearly have been entitled to that form of relief. It can make no difference that he has asked alternatively for specific performance, It would be rather shocking if the plaintiff had first to take a decree for specific performance which he did not desire, and then come later for rescission and forfeiture of the deposit."

With respect, I do not think that this case decided that it is obligatory on a plaintiff claiming alternative reliefs to elect which relief he intends to pursue. The choice appears to be at the discretion of the plaintiff, and it seems to me that the effect of *Farrant v. Olver* (1) is that once the plaintiff has made his election he cannot subsequently proceed with the relief which he has abandoned at the hearing. In my view *Farrant v. Olver* (1) is against counsel for the respondent's

contention that the plaintiff cannot proceed with a claim for specific performance and at the same time ask for an alternative relief of rescission. It seems to me that the true legal position is that stated clearly and succinctly in the following passage from Halsbury's Laws (3rd Edn.) Vol. 36 para. 485:

> "A plaintiff who seeks to enforce the specific performance of a contract may claim in the alternative that the contract may be rescinded, provided that the alternative relief is based on the same state of facts, though the conclusions of law to be drawn from those facts may be different. If the plaintiff has claimed relief in the alternative in his writ and statement of claim, he may elect, on his motion for judgment in default of defence coming on for hearing, in favour of rescission and forfeiture of the deposit."

Counsel for the respondent next quoted in support of his general submission the following passage from Halsbury's Laws (3rd Edn.) Vol. 15 at p. 173:

> "Where a plaintiff merely claims alternative reliefs the general rule is that he can elect at the trial for which he will ask, but he may have made a prior election, for example, by his pleadings, from which he will not be permitted thereafter to depart, and where relief is asked on footings which are inconsistent (for example, damages on the basis of a contract having been repudiated and being discharged and a declaration on the basis that the contract is subsisting) the plaintiff should be put to his election at the trial."

He submitted that by alleging in para. 10 of his plaint that he had "at all material times been and now is ready and willing to perform his obligations under the said agreement," the appellant had elected to restrict his claim to one for specific performance only. Counsel for the respondent cited the case of *Vine v. National Dock Labour Board* (2) as an authority for the proposition that a plaintiff who has elected by his pleading is not permitted to depart from it. I do not doubt this as a correct statement of principle, but counsel made a great play on the averments in para. 10 referred to above and contended that by those words the plaintiff had unequivocally made his election. For this contention counsel relied on two cases: *Ardeshir Mama v. Flora Sassoon* (3) and *Hipgrave v. Case* (4). The learned trial judge also appears to have relied on these two cases. But with respect, the decisions in these two cases must be confined to the special facts which arose therein, because, in my view, they are clearly distinguishable from the instant case. *Hipgrave v. Case* (4) only decided that a plaintiff cannot succeed on a claim for damages in substitution for specific performance when he has even after the action began disentitled himself to specific performance. This principle was applied in *Ardeshir Mama v. Flora Sassoon* (3) where the plaintiff alleged in his plaint that he was always ready and willing to perform the contract, and claimed specific performance, and also such damages as the court should think fit in addition or in substitution for specific performance. About nine months before the trial the plaintiff's solicitors formally notified the defendant to the effect that the appellant had decided to abandon his claim for specific performance, and that he would, instead, at the trial claim damages against the defendant for breach of contract. At the trial an objection was taken *in limine* that the appellant could not recover damages without amending his plaint. The plaint was accordingly amended by leave and the appellant converted the suit into one for breach of contract only. The trial judge gave judgment for the appellant, but on appeal his judgment was set aside. The appellant appealed further to the Judicial Committee of the Privy Council, where consideration was given to the fact whether upon a proper construction of s. 19 of the Indian Specific Relief Act, 1877, the learned trial judge could award damages, seeing that the appellant had abandoned his claim to specific performance. Lord Blanesburgh, who delivered the judgment of

the Committee, reviewed the historical development of the law in relation to the rights of the injured party in a breach of contract suit, and outlined the two different jurisdictions of the English courts to give redress up to 1858. Before this date an injured party could elect to treat the contract as at an end and sue "purely at law" for damages for breach, and no suit for specific performance, whatever the result of the action at law, was maintainable by him. On the other hand, if he brought a suit for specific performance in equity he was deemed to be treating the contract as subsisting, and the onus was cast upon him to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. The Court of Chancery, where alone the injured party could obtain specific performance, insisted upon the averment of these words. By choosing one form of action the aggrieved party precluded himself from claiming the relief to which he would be otherwise entitled if he had brought his action in another form. Circumstances arose in which it was found that although the contract was one of which specific performance could be given, yet damages were the more appropriate remedy. .In 1858, therefore, Lord Cairn's Act was passed, and by s. 2 thereof it became lawful for the Court of Chancery, if it should think fit, to award damages to the injured party either in addition to or in substitution for such injunction or specific performance, and that such damages might be assessed in such manner as the court should direct. It would appear therefore that as from 1858 the necessity for an election between damages and specific performance does no longer arise. But the jurisdiction to award damages conferred by s. 2 did not change the principles upon which, before the Act, the Court of Chancery acted and granted specific performance. Thus in *Ardeshir Mama v. Flora Sassoon* (3) Lord Blanesburgh observed ((1928) 52 Bom. at p. 621):

> "The limited effect of the section was not long left in doubt, wide as are apparently its terms. In a series of decisions it was consistently held that just as its power to give damages *additional* was to be exercised in a suit in which the Court *had* granted specific performance, so the power to give damages as an *alternative* to specific performance did not extend to a case in which the plaintiff had debarred himself from claiming that form of relief, nor to a case in which that relief had become impossible."

The position now in England is that, since the passing of the Judicature Act, 1873 (now replaced by the Judicature Act, 1925) any judge of any Division of the High Court is empowered to grant any remedy, legal or equitable. However, the jurisdiction to grant specific performance of "contracts between vendors and purchasers of realty, including contracts for leases" is assigned to the Chancery Division. But the jurisdiction to award damages in this Division is concurrent with that to order specific performance, and therefore where there is a claim for damages alternative to a claim for specific performance the court possesses the power to award damages at law where the claim for specific performance fails (see Chitty on Contracts, (21st Edn.) at p. 394 para. 776). And where the claim for specific performance succeeds the court can give damages in substitution for specific performance, or in addition to specific performance in whole or in part.

One of the objects of the Judicature Acts is to enable the court before which a suit is brought to adjudicate, as far as possible, all matters in controversy between the parties so as to avoid multiplicity of actions concerning any such matters. The High Court is now a composite court of law and equity and can grant specific performance or award damages as an alternative remedy. Dealing with the object and effect of the Judicature Act, 1873 Lord Watson said in *Ind. Coope & Co. v. Emmerson* (5) ((1887) 12 App. Cas. at p. 308):

> "The main object of the Judicature Act was to enable the parties to a suit to obtain in that suit and without the necessity of resorting to another court, all remedies to which they are entitled in respect of any legal or equitable claim or defence properly advanced by them, so as to avoid a multiplicity of legal proceedings . . . The Act of 1873 deals with the remedies and not with the rights of parties litigant. It was not intended to affect, and does not affect, the quality of the rights and claims which they bring into court, and submit to the judgment of the court, whether as plaintiff's or as defendants."

It seems to me, therefore, that the averment in para. 10 of the plaintiff's plaint that the plaintiff "has at all material times been and is now ready and willing to perform his obligations" which formerly denoted an election to have the suit tried in the English Court of Chancery is no longer of any significance as far as the choice of court is concerned, and a *fortiori* in Kenya where the courts of common law and Equity have never existed as separate divisions.

Counsel for the respondent further submitted, if I understood his argument, that the averment in para. 10 presupposes the subsistence of the contract whilst the claim for damages postulates that the contract had come to an end. In short, his argument was that the plaintiff could not blow hot and cold, and that the defendant was entitled to know the exact nature of the case which he had to meet. Counsel for the respondent referred to the passage in Halsbury's Laws (3rd Edn.) Vol. 15 p. 173 para. 341 already cited and took a stand, rather confidently, on the statement that "where relief is asked on footings which are inconsistent (for example, damages on the basis of a contract having been repudiated and being discharged and a declaration on the basis that the contract is subsisting) the plaintiff should be put to his election at the trial." The authority for this proposition is stated in the footnotes in Halsbury's Laws as *Vine v. National Dock Labour Board* (2), which is a majority decision of the Court of Appeal. Counsel for the respondent himself referred the court to the same case reported in [1956] 1 Q.B. 658 and [1957] A.C. 488. I have since discovered in [1956] 3 All E.R. 939 that the House of Lords has overruled this statement. I am now satisfied that there is no substance in that point on which counsel for the respondent otherwise addressed us with his characteristic forcefulness. In my judgment, a plaintiff who seeks relief in respect of several distinct claims founded upon separate and distinct grounds is entitled to state them separately and distinctly; and where the claims are inconsistent he can legitimately state them in the alternative and adduce evidence in support of his claim without being put to an election. (See *Bagot v. Easton* (6); *Philipps v. Philipps* (7) ((1878) 4 Q.B.D., C.A. at p. 134); O. 2 rr. 1 (1), (3) and 2 (1) of the Civil Procedure (Revised) Rules, 1948) [K.].

Counsel for both parties were so pre-occupied with the form of the plaintiff's pleadings that very little was said by Mr. Mackie-Robertson on the merit of ground one of his grounds of appeal. The first question to consider is whether the plaint discloses a cause of action for damages for breach of contract. The plaint alleges in substance an agreement between the appellant and the defendant for the sale of land for Shs. 14,450/-. It is further alleged that the appellant paid the full sum of Shs. 14,450/- to the defendant, but that the defendant failed to complete the said agreement and had repudiated it. If these facts are not sufficient to support a claim for damages for breach of contract, then with respect to the learned trial judge, I do not know what other facts will.

With regard to the prayer for rescission, counsel for the respondent made two submissions to the learned judge. These are (1) that the claim for rescission is inconsistent with the averment in para. 10 of the plaint and (2) there is no allegation that a notice of rescission has been communicated to the defendant. Such notice it was contended is essential to an effective rescission. I have said

enough earlier in this judgment to show that a plaintiff who seeks to enforce specific performance of a contract may claim in the alternative that the contract may be rescinded. To my mind, the second argument overlooks the fundamental distinction between rescission effected by the act of the party and rescission by judicial decree pronounced in a suit for rescission. A rescission by the act of the party is an election to avoid the contract, and it is not complete until the decision to elect has been communicated to the other side "in such way as to lead the opposite party to believe he has made a choice": *Scarf v. Jardine* (8) ((1882) 7 App. Cas. at p. 361). In a suit for rescission the judicial decree is an act of the court and there is no need for the aggrieved party to give notice to the guilty party. The distinction is clearly stated in Salmon and Williams on Contracts (2nd Edn.), p. 263 as follows:

> ". . . rescission may be effected either by the act of the party himself or by a judicial decree obtained by him in a suit for rescission. Rescission by the act of the party himself is nothing more than an act of election, whereby he chooses between rescinding the contract and confirming it, and intimates his election, by words or conduct, to the other party. The result is the automatic and immediate dissolution of the contract *ab initio*. In a suit for rescission, on the other hand, the operative act is not that of the party, but that of the Court itself, which by judicial decree rescinds the contract and makes such consequential orders as are necessary for the adjustment of the rights and obligations of the parties."

In the present case there is no allegation in the plaint that the plaintiff himself took any steps to rescind the contract. But the plaint sets out fully the facts relating to the agreement and the breach, and prays, as an alternative to other remedies, for judgment for rescission and other consequential orders. Rescission is an equitable remedy, and on the facts it was within the discretion of the court to determine whether the plaintiff's prayer for rescission ought to be granted. In the circumstances of this case I think the learned trial judge erred in upholding Mr. Khanna's contention that the plaint does not support a claim for rescission, and I can see nothing in the judgments of *Hipgrave v. Case* (4) and *Ardeshir Mama v. Flora Sassoon* (3) supporting such contention.

The last ground of appeal was directed to the learned trial judge's refusal to allow amendments to the plaint. In refusing leave the learned judge said:

> "The case has proceeded for a year on the footing that there is a claim for specific performance and para. 10 of the plaint alleges that 'the plaintiff has at all material times been and is now ready and willing to perform his obligations under the said agreement'. This amendment is based upon a case which is entirely inconsistent with that pleaded. In my opinion to allow it would offend against the principle laid down in the decision of the Privy Council. The paragraphs cited by Mr. Chawla from Atkins' Forms must be read subject to this decision which is binding on me.
>
> I accordingly disallow the amendment to para. 7 of the plaint and the new prayer IV and also the amended prayer for a declaration."

At the trial counsel for the plaintiff applied for leave to amend para. 7 of the plaint to read as follows:

> "7. In the years 1959 and/or 1960 the plaintiff with the acquiescence and/or agreement of the defendant spent a sum of Shs. 15,500/- on improvements to the said property. *The aforesaid amount was spent by the plaintiff lawfully and on behalf of the defendant, not intending to do so gratuitously and in anticipation of the plaintiff becoming a co-owner of one half undivided share of the said*

> *property and of which improvements the defendant has enjoyed and, in the event of the plaintiff not becoming a co-owner, will enjoy the benefit*."

He also tried to add the following new prayer:

> "(iv) *In the event of this Honourable Court not decreeing specific performance of the said contract, the sum of Shs.* 15,500/- *as mentioned in paragraph* 7 *hereof* (*together with interest thereon at such rate and from such time as this Honourable Court deems just*) *under section* 70 *of the Indian Contract Act*."

For the appellant, counsel submitted that the learned judge had power to make the amendments because the amendments were within the rules.

There can be no doubt that by O. 6 r. 8 the court has power to allow necessary amendments to pleadings at any stage, but the granting or refusal of an application for such leave to amend is a matter within the discretion of the trial judge. This court will not in the ordinary circumstances interfere with the exercise of that discretion unless satisfied that the learned judge has applied a wrong principle or can be said to have reached a conclusion which would work manifest injustice between the parties. In *Tildesley v. Harper* (9) Bramwell, L.J. dealing with the question of amendment of pleadings made these oft-quoted observations ((1878) 10 Ch.D. at p. 396):

> "I have had much to do in Chambers with applications for leave to amend, and I may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise. I confess that if the present case had come before me I should have had some doubt whether the defendant had made a *bona fide* mistake, as the mistake is so very obvious. I should probably have required some affidavit or statement by the solicitor to shew that the slip in the pleading was a *bona fide* one, and if satisfied on that point, I should not have refused leave to amend."

Later Bramwell, L.J. said (*ibid* at p. 397):

> "It is quite right that the rules of the court should be observed, and that a party should be fined for his mistake, but the fine should be measured by the loss to the other side, and not by the importance of the stake between the parties."

In this case no argument which I heard during the hearing of this appeal has persuaded me that the learned judge erred on any principle of law in refusing the application for the amendments. The additional facts pleaded in paragraph 7 were quite obvious omissions, and counsel for the plaintiff at the trial admitted that these were referred to in correspondence with the defendant. Perhaps, what is a more serious obstacle to the plaintiff was the introduction of fresh matters into his pleadings. The claims for specific performance, damages and rescission are all founded upon an express agreement. The amendment sought to be made to para. 7 and the addition of prayer (IV) were based on s. 70 of the Indian Contract Act, which only applies in the absence of any express agreement, and therefore inconsistent with the alternative claims for specific performance, damages and rescission. Surely, the court cannot allow an amendment which creates inconsistency in the pleadings. Considering all the circumstances of this case I feel unable to interfere with the learned judge's exercise of discretion, refusing to allow the proposed amendments to the plaint.

In the result I would allow the appeal against the learned judge's order that the plaint did not support a claim for damages and rescission, and I would set

aside that order. I would dismiss the appeal against the order disallowing amendments to the plaint.

On the question of costs, I would allow the appellant two-thirds of the costs of the appeal and certify for two counsel. As regards the costs of the proceedings in the court below, I would set aside the order awarding costs to the respondent in any event and would order that they be costs in the cause.

Sir Clement De Lestang JA: The appellant brought an action against the respondent wherein he alleged that by an agreement in writing the respondent agreed to sell to him an undivided half share in a property for a price which he paid, that subsequently to the agreement the respondent charged the property with the Credit Finance Corporation Ltd. and thereafter refused to complete the sale. Paragraphs 7 and 10 of the plaint are relevant. They read as follows:

> "7. In the years 1959 or 1960 the plaintiff with the acquiescence and/or agreement of the defendant spent a sum of Shs. 15,500/- on improvements to the said property.
>
> 10. The plaintiff has at all material times been and is now ready and willing to perform his obligations under the said agreement."

The plaintiff sought the following reliefs, *inter alia*:

> "(i) Specific performance of the said agreement by a transfer to the defendant by the plaintiff of one half undivided share and the said property freed and discharged from the charge in favour of the Credit Finance Corporation Ltd.
>
> (ii) Further or alternatively damages for breach of contract including the return of the money paid plus interest thereon.
>
> (iii) Alternatively rescission of the said agreement and re-payment of the money paid thereunder with interest thereon at such rate as to this Honourable Court may seem fit."

By his defence the respondent alleged that the agreement was rescinded by mutual consent and a new agreement entered into under which he counter-claimed for a sum of money alleged to be due to him by the appellant.

When the case came on for hearing a year later, counsel for the respondent, objected that the reliefs claimed were not maintainable in law. Counsel, for the appellant, contended the contrary and also applied to amend, *inter alia*, para. 7 of the plaint to read:

> "7. In the years 1959 and/or 1960 the plaintiff with the acquiescence and/or agreement of the defendant spent a sum of Shs. 15,500/- on improvements to the said property. *The aforesaid amount was spent by the Plaintiff lawfully and on behalf of the defendant, not intending to do so gratuitously and in anticipation of the Plaintiff becoming a co-owner of one half undivided share of the said property and of which improvements the Defendant has enjoyed and, in the event of the Plaintiff not becoming a co-owner, will enjoy the benefit*."

and to add the following new prayer:

> "(iv) *In the event of this Honourable Court not decreeing specific performance of the said contract, the sum of Shs.* 15,500/- *as mentioned in paragraph* 7 *hereof* (*together with interest thereon at such rate and from such time as this Honourable Court deems just*) *under section* 70 *of the Indian Contract Act*."

Counsel for the respondent opposed the application for amendment on the ground of delay, inconsistency and inapplicability. The learned judge gave two

rulings which were subsequently incorporated in a single formal order wherein it was ordered:

(*a*) "that upon the pleading as it stood there was not sufficient material to justify the court holding that specific performance could not be granted and that the plaint as it stood did not in the view of the court support a claim for damages or rescission"

and

(*b*) "that the amendment to paragraph 7 of the plaint and the new prayer IV . . . be disallowed . . .".

It is against the decision in (*a*) that the plaint did not support a claim for damages or rescission and the disallowance of the amendments in (*b*) that the appellant appeals to this court. It is necessary to deal with each matter separately.

As regards the former, it is contended by counsel for the appellant, that a plaintiff is empowered by O. 7, r. 6 of the Civil Procedure Rules of Kenya to claim in his plaint any relief available to him "either simply or in the alternative" and that this is what the plaintiff has done in the present case since in the plaint specific performance, damages for breach of contract and rescission of the contract are claimed in the alternative.

Counsel for the respondent, as I understood him, contends:

(1) that the averments in the plaint do not support the claim for damages and rescission,

(2) that those two reliefs are inconsistent with each other as also with the claim for specific performance and consequently, so he argued, the plaintiff must elect at the beginning of the trial which relief he wants, and

(3) that in any event the averment in the plaint that the plaintiff was and is ready and willing to carry out his part of the contract constitutes an election to treat the contract as subsisting and therefore defeats the other reliefs asked for.

In my view counsel for the respondent's first and third contentions may be disposed of in a few words. To sustain a claim for damages, for breach of contract or for rescission of a contract, it is sufficient to allege the existence of a contract and a breach by the other side. The plaint contains those necessary averments in clear terms. An averment in a plaint that the plaintiff is and was ready and willing to perform his obligations under the agreement is indispensable to a claim for specific performance and where several reliefs are sought in that plaint, as in the present case, must be taken to relate solely to that to which it is appropriate. The very fact that reliefs to which the averment may be inappropriate are included shows that it was never the intention of the plaintiff to give up his right to those reliefs. It cannot, therefore, amount to an election.

Counsel for the respondent's second contention is founded on the argument that since the basis of a claim for specific performance differs from that of a claim for damages for breach of contract or for rescission of a contract, the plaintiff, while he may include inconsistent reliefs in his plaint, must elect at the commencement of the hearing which remedy he will pursue. In support of this contention he relies on the following passage in Halsbury's Laws (3rd Edn.) Vol. 15, p. 173:

> "Where a plaintiff merely claims alternative reliefs the general rule is that he can elect at the trial for which he will ask, but he may have made a prior election, for example, by his pleadings, from which he will not be permitted thereafter to depart, and where relief is asked on footings which are inconsistent

> (for example, damages on the basis of a contract having been repudiated and being discharged and a declaration on the basis that the contract is subsisting) the plaintiff should be put to his election at the trial."

and *Farrant v. Olver* (1) and *Vine v. National Dock Labour Board* (2).

I do not understand the passage in Halsbury's Laws as requiring an election whenever alternative reliefs are claimed, but only where the plaint contains inconsistent averments which render the proceedings embarrassing to the defendant as in *Vine's* case (2). The facts of that case were peculiar. The plaintiff brought an action for damages for wrongful dismissal *and* for a declaration that his purported dismissal was illegal, *ultra vires* and invalid. It will be noted that the reliefs were not claimed in the alternative. Originally the statement of claim contained an averment that the plaintiff had ceased to be employed by the defendants. Subsequently para. 6 of the statement of claim was amended to read:

> ". . . the defendants repudiated their contract of employment with the plaintiff. The plaintiff elected to treat the said contract as discharged by the defendants' said repudiation. Alternatively the plaintiff elected to treat the said contract as still subsisting."

He was given damages and a declaration. The defendants appealed and the Court of Appeal set aside the declaration. In his judgment, Singleton, L.J., said at p. 669:

> "In my judgment the question ought to have been posed to the plaintiff: what remedy do you seek? If he had said that he sought both damages and a declaration, he might have been asked why, and he might have been asked to elect."

Later on, after quoting para. 6 of the statement of claim as amended, he said:

> "Where that takes one I am not clear; but one thing on which I am clear is that it ought not to take one both ways. The plaintiff ought to have been put upon his election, and if he had been the case would have been much clearer than it is today . . . I think that it is embarrassing to the defendants."

In the present case the reliefs were claimed in the alternative and there were no inconsistent averments in the plaint. Moreover, as Crabbe, J.A., has pointed out, *Vine's* case (2) went to the House of Lords ([1956] 3 All E.R. 939) where the decision of the Court of Appeal was reversed in part and their Lordships held, *inter alia*, that the form of the pleadings was no bar to the plaintiff obtaining the remedies he asked for. *Farrant v. Olver* (1) does not assist counsel for the respondent. That was an action for specific performance, or, alternatively, rescission. There was no defence to the action and at the hearing the plaintiff said he claimed the alternative relief and an order rescinding the agreement was made accordingly.

Counsel for the respondent also relied on *Hipgrave v. Case* (4) and *Ardeshir Mama v. Flora Sassoon* (3). These were cases of election before action and in the pleadings respectively which were held to be binding on the plaintiff. Incidentally, they illustrate the proposition that a plaintiff cannot be granted a relief which he has not claimed in his plaint unless he obtains an amendment thereto.

It seems to me beyond question that a plaintiff may seek alternative reliefs in his plaint, that it is up to him to decide at the trial which relief he will have and that he will not be put to any election unless the plaint contains inconsistent averments which are embarrassing. I think that what the plaintiff may do is

accurately stated in Fry on Specific Performance, (6th Edn.), p. 604, in these words:

> "Accordingly, a plaintiff may now come to the court and say, give me specific performance, and with it give me damages, or in substitution for it give me damages, or if I am not entitled to specific performance give me damages as at Common Law by reason of the breach of the agreement."

To this passage I would add "or rescind the contract" as an alternative to damages for breach of contract. For these reasons I am of opinion that the learned judge was wrong to hold that the plaint did not support a claim for damages and rescission.

As regards the amendment of the plaint, I am not satisfied that the learned judge was wrong in refusing it in the circumstances of this case. A claim under s. 70 of the Indian Contract Act only lies in the absence of an express contract. Here the action as a whole is founded upon an express agreement and para. 7 by alleging that the amount was spent with the acquiescence or agreement of the defendant almost takes it out of s. 70 of the Indian Contract Act. Moreover, the claim in para. 7 may be recovered as damages for breach of contract. For these reasons I am not disposed to interfere with the learned judge's discretion on the issue of amendment.

In the result I would allow the appeal insofar as it concerns the claims for damages and rescission and dismiss it insofar as it concerns the amendment. I would allow the appellant two-thirds of the costs of the appeal and certify for two counsel. I would set aside the order awarding costs in the court below to the respondent and order that they be costs in the cause.

Law JA: The appellant was the plaintiff in a civil suit in the Supreme Court in which he claimed from the defendant (now respondent) specific performance of an alleged agreement for sale of an undivided half share of certain land, with alternative prayers for damages for breach of contract and for rescission of the agreement and return of moneys allegedly paid thereunder. Upon preliminary objections taken at the hearing on behalf of the respondent, the learned judge ordered *inter alia*, that the plaint as it stood did not in his view support a claim for damages or rescission, and that certain proposed amendments to the plaint be disallowed whereby the appellant sought to introduce a new cause of action, based on s. 70 of the Indian Contract Act, for the repayment of moneys allegedly spent on improvements by him in anticipation that the alleged agreement of sale would be completed by the respondent. It is against these orders that the appellant now appeals. Counsel for the respondent, in support of the learned judge's order, has submitted that the appellant, as plaintiff, is under an obligation before opening his case at the hearing to elect which of the alternative claims pleaded in his plaint he intends to rely on, to the exclusion of the others, and he quoted in support of this submission the following passage from Halsbury's Laws (3rd. Edn.), Vol. 15, at p. 173:

> "Where a plaintiff merely claims alternative reliefs the general rule is that he can elect at the trial for which he will ask, but he may have made a prior election, for example, by his pleadings, from which he will not be permitted thereafter to depart, and where relief is asked on footings which are inconsistent . . . the plaintiff should be put to his election at the trial."

The clear meaning of this passage, as elucidated by reference to the cases cited in notes thereto, is that a plaintiff who has put forward alternative claims is entitled, if he so wishes, to elect for one or the other (as in *Farrant v. Olver* (1) (1922) 91 L.J. Ch. 758); or he may be held by the court to abide by some

earlier election which he has previously made, for instance in a solicitor's letter before trial in which one of the alternative claims is formally abandoned, as in *Ardeshir Mama v. Flora Sassoon* (3), or if he has elected in his pleadings to rely exclusively on one of the alternative claims, he may be held to that election. Counsel for the respondent submits that the appellant has elected, by para. 10 of his plaint, to confine himself to the claim for specific performance. Paragraph 10 is worded as follows:

> "The plaintiff has at all material times been and is now ready and willing to perform his obligations under the said agreement."

The averment that a plaintiff has at all times been and still is willing to perform his obligations under the contract, the subject of a suit for specific performance, is an essential ingredient to support a claim for specific performance, and it relates only to that claim. It does not mean that the plaintiff is precluded from pursuing an alternative claim in the same proceedings, such as a claim for damages at common law against the defendant for breach of the contract. There can be no objection to including alternative claims for specific performance and for damages at law in the same plaint, see for instance *Dominion Coal Co. Ltd. v. Dominion Iron and Steel Co*. (10) or alternative claims for specific performance and rescission, as in *Farrant v. Olver* (1). That this is quite proper is evident from the relevant forms of pleadings in Atkin's Forms and Precedents of Pleadings. Order 7, r. 6 of the Civil Procedure (Revised) Rules, 1948, provides specifically for the inclusion of alternative claims in the same plaint, and there is nothing in those Rules, or in the Civil Procedure Act, which requires a plaintiff to elect between his alternative claims at the beginning of the hearing or at any other stage thereof. Nor can I imagine a trial judge requiring a plaintiff so to elect, except possibly in the course of the hearing if it appears that an alternative claim is so inconsistent with one or more of the other claims, or so embarrassing to the defence, as in *Vine v. National Labour Dock Board* (2), that it is necessary for such an election to be made. In my view there is nothing inconsistent, so as to require election at any stage of the trial except at the plaintiff's option, between alternative claims for specific performance on the basis that the plaintiff always has been willing and is willing to perform the contract, and for damages for an alleged breach of the same contract by the defendant. If a breach by the defendant is established, then the third alternative remedy claimed by the plaintiff, that is to say rescission of the contract and return of moneys paid thereunder, might be the most appropriate relief in the circumstances, and again I can see no inconsistency between this claim and the alternative claims for specific performance or damages. Paragraph 9 of the plaint, which alleges that the respondent has neglected and refused and continues to neglect and refuse to take any steps towards completing the alleged agreement, and that he has repudiated the said agreement, provides in my opinion the necessary foundation for the alternative prayers for damages and rescission, in the event of the prayer for specific performance not being granted. In my view this appeal succeeds in so far as it complains of the learned judge's order that the plaint did not support a claim for damages and rescission. As regards the appeal against the judge's order refusing to allow certain proposed amendments to the plaint, I am of the opinion that the learned judge was justified in refusing to allow the amendment of para. 7 of the plaint, and the addition of prayer (iv), so as to include a claim for the repayment of moneys allegedly spent on improvements on the basis of s. 70 of the Indian Contract Act, because s. 70 applies only in the absence of any express contract. The proposed amendments are totally inconsistent with the alternative claims for specific performance, damages and rescission, all of which are based on an alleged agreement in writing made between the parties. In my view the appeal fails insofar as it complains of the learned judge's exercise of his discretion in

refusing to allow the proposed amendment to s. 7 and the inclusion of the proposed new prayer (iv). If in fact the appellant spent money in anticipation that the respondent would abide by the contract, any sums so expended might be a matter for consideration in the assessment of damages, should damages in the event be awarded to the appellant.

As regards the costs of this appeal, the appellant has in my view succeeded on his main grounds, and is entitled to two-thirds of the costs of the appeal. I would certify for two counsel. As regards the costs of the proceedings in the Supreme Court, which by paras. (2) and (4) of the Order the subject of this appeal were awarded to the respondent in any event, I would order that they be made costs in the cause, to be awarded in the light of the final result of this suit in the discretion of the trial judge.

Appeal allowed in part.

For the appellant:
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For the respondent:
DN Khanna
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Century Automobiles Ltd v Hutchings Biemer Ltd
[1965] 1 EA 304 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	28 June 1965
Case Number:	68/1964
Before:	Newbold V-P, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Miles, J

[1] Estoppel – Equitable estoppel – Estoppel by conduct – Landlord and tenant – Tenancy – Terms of tenancy agreed by exchange of letters – Tenancy terminable by either party giving three months notice – No alterations nor work to be done without consent of landlord – Substantial alteration proposed by tenant at its expense – Verbal assurance on behalf of landlord – Assurance that tenancy will not be determined unless premises required for supermarket – Verbal representation that supermarket will not be built for three to four years – Alterations carried out relying on landlord's assurance and representation – Notice determining tenancy given by landlord – Refusal by tenant to quit premises – Action for possession – Whether landlord estopped in equity from exercising its contractual right to determine tenancy – Whether doctrine of equitable estoppel applicable in Kenya.

[2] Landlord and tenant – Tenancy – Terms of tenancy agreed by exchange of letters – Tenancy terminable by either party giving three months notice – No alterations nor work to be done without landlord's consent – Substantial alterations proposed by tenant at its expense – Verbal assurance on behalf of landlord – Assurance that tenancy will not be determined unless premises required for supermarket – Verbal representation that supermarket will not be built for three to four years – Alterations carried out relying on landlord's assurance and representation – Notice determining tenancy given by landlord – Refusal by tenant to quit premises – Action for possession – Whether landlord estopped in equity from exercising its contractual right to determine tenancy.

[3] Evidence – Admissibility – Tenancy – Terms of tenancy agreed by exchange of letters – Tenancy terminable by either party giving three months' notice – Verbal assurance on behalf of landlord that tenancy will not be determined unless premises required for supermarket – Verbal representation that supermarket will not be built for three to four years – Whether evidence of oral assurances admissible – Evidence Act 1963*, s.* 97 *and s.* 98 [*K*].

Editor's Summary

An oral agreement confirmed by an exchange of letters, was made on March 20 1962 between the respondent company's managing director, and the appellant company, acting by two of its directors, whereby the respondent agreed to let the suit premises to the appellant. The material terms of the tenancy were that the tenancy was determinable by either party giving three months notice and that alterations could not be made without prior permission of the landlord. The suit premises were rented as godowns but shortly after the agreement the appellant company proposed to convert one of the buildings into a shop. One of the directors showed the managing director the preliminary drawings of the proposed conversion. The managing director said that he had no objection to the proposed conversion provided that it was done at the appellant's expense, that the tenancy would not be disturbed unless his plans for building a supermarket on the same site were successful; and that he would take three to four years to obtain permission for it from the City Council. Relying on this the appellant carried out the conversion spending about £1800.

In November 1962, the respondent gave three months notice to quit and deliver vacant possession, which the appellant refused to do. The respondent then sued for possession and the appellant's defence set up an equitable estoppel. The trial judge found that an assurance had been given "which amounted to clear representation (*a*) that the tenancy would not be determined unless the site was required for the purpose of a supermarket and (*b*) that this would not take place for at least for three years". The judge also found that the appellant company had acted on that assurance, incurring substantial expenditure. Nevertheless the judge made an order for possession on the grounds that the application of the doctrine of equitable estoppel would be in contravention of s. 108(B) (*q*) of the Indian Transfer of Property Act, 1882 and s. 99 of the Crown Lands Act. On appeal the main ground of appeal was that the judge had erred in holding that the two statutory provisions mentioned above precluded the application of the doctrine of equitable estoppel. The respondent cross-appealed on the grounds that the evidence accepted by the judge did not establish that any assurance had been given in the terms found by the judge; that any assurance that may have been given could not be interpreted as a clear and unequivocal representation intended to be acted on between the parties and was therefore insufficient to give rise to an equitable estoppel; and that evidence of the alleged assurance was inadmissible by reason of s. 97 and s. 98 of the Evidence Act, 1963.

Held –

(i) the terms of the contract not being in dispute, no attempt was being made to contradict, vary, add to or subtract from them and accordingly there is nothing in s. 97 and s. 98 of the Evidence Act, 1963 to preclude evidence of the alleged assurance;

(ii) the remarks made by the managing director of the respondent company amounted to a sufficiently clear and unequivocal assurance as between businessmen that the appellant company could regard itself as secure for three years, except in the event of the supermarket project materializing at an earlier date and the assurance was intended to be acted upon;

(iii) the doctrine of equitable estoppel applied in Kenya. *Nurdin Bandali v. Lombank Tanganyika Ltd*., [1963] E.A. 304 (C.A.) applied.

(iv) equity precluded s. 108(B) (*q*) of the Indian Transfer of Property Act from applying because the notice to quit was unconscionable;

(v) although the assurance was neither written nor registered it could be a "transaction" "affecting or limiting any right over land" which would be void in the face of a subsequent registered document. Even if it was an unregistered transaction it was not a 'disposition' contemplated in s. 99, s. 101 and s. 102 of the Crown Lands Act that would be unenforceable between the parties. The assurance then was available for an equitable estoppel;

(vi) the three elements required for an equitable estoppel to arise are: a clear and unequivocal representation; an intention that it should be acted upon; and action upon it in the belief of its truth.

Appeal allowed. Cross-appeal dismissed.

Cases referred to in judgment

(1) *Nurdin Bandali v. Lombank Tanganyika Ltd*., [1963] E.A. 304 (C.A.)

June 28. The following judgments were read:

Spry JA: This is an appeal from a judgment and decree of the Supreme Court of Kenya awarding the respondent company vacant possession of certain premises in Duke Street and Saldanha Road, Nairobi, damages and interest thereon and costs and interest thereon, and there is a cross-appeal.

It is not disputed that on or about March 20, 1962, an oral agreement was made between the respondent company, acting by its managing director, Mr. I. Somen, and the appellant company, acting by two of its directors, Mr. V. V. Patel and Mr. V. K. Patel, whereby the respondent company would let the suit premises to the appellant company. The terms of the agreement were confirmed by letter on or about the same day. The tenancy was to commence on April 1, 1962, and was to be terminable by either party giving three months' notice. The rent was to be Shs. 3,200/- per month, payable in advance. The respondent company was to remove certain wooden partitions but stipulated

> "No alterations or other work will be done by us to the premises. Any alterations and additions are to be paid for by you but prior permission in writing must be obtained from us for such work."

Substantial alterations were in fact carried out, with the permission of the respondent company. Not very long after, by a letter dated November 28, 1962, the respondent company gave the appellant company three months' notice determining the tenancy as on February 28, 1963, and when the appellant company refused to vacate the premises, the respondent company instituted proceedings in the Supreme Court.

The case for the appellant company was that the buildings were originally rented as godowns, and that only minor repairs were then contemplated. Only a few days after the agreement, however, the two Patels, if I may so describe them, had the idea of converting one of the buildings into a shop and consolidating their business there. They had already asked an architect to inspect the buildings to see what repairs were necessary; they now asked him to go back and prepare preliminary drawings for the proposed conversion. As soon as these were available, on or about March 27, 1962, Mr. V. V. Patel says that he took them to Mr. Somen's office and that a conversation took place on which the whole of these proceedings hinge.

Mr. V. V. Patel's account of the conversation was as follows:

> "I showed him the rough sketch. I told him our intention of taking our shop over there and it would cost £1,800 approximately. He said, 'I am not going to spend a penny on it. If you want to do so at your cost I have no objection.'
>
> I told him, 'as we have to spend such a substantial amount, if our tenancy is to be disturbed it won't be worth while to spend such a substantial amount.'
>
> He said, 'I am not a person of that type. Naturally I like good tenants like yourselves, but I would do so if I succeed in my plans for putting up a supermarket on these premises.'
>
> I asked him, 'How long will it take? If it is to be done in the near future then again it is not worth while to spend such a substantial amount.'
>
> Then he assured me, 'I will watch the political situation and seek permission from the City Council which will take at least 3 or 4 years.' After getting his assurance I asked R. C. Patel to prepare the plans. He did prepare plans."

Mr. Somen denied that this conversation ever took place, although he agreed that some time between March 27–30, 1962, sketches were shown to him and that he was informed of the proposal to convert one building into a shop. He claims that he was not told what the work would cost and that at that stage he

thought of it as a matter of minor alterations only. He conceded that there was some talk of his erecting a supermarket on the site, but he said that this was prior to the agreement for the tenancy. His evidence on this reads as follows:

> "The only time a supermarket was discussed was at the previous meeting prior to the writing of the letter of 20th March. Mr. Patel did not tell me that if I was thinking of putting up a supermarket in the near future it would not be worth their while spending much on the premises. I said I had to watch the political situation in the context of a quick or slow development in the context of a supermarket. But that was prior to the letter of March 20 and that was one of the reasons why I was not prepared to enter into any lease. I said I did not think that I would put up a supermarket for 3 or 4 years before March 20, before any letters were exchanged between us. I did not mean them to rely on that. If I had I would have entered into a longer lease with them. It was not said in the context of security of tenure for them. I would not have left a statement of that kind verbally. The implications were far too important for my firm. I would have confirmed that in writing. I am managing director of a public company could in no circumstances make a verbal statement of that nature. That is why my letter of March 20 went into such complete detail. I don't realise that a man would have relied on an undertaking by me."

The appellant company claimed that the alterations cost well over Shs. 46,000/- and that there were also substantial expenses of removal and loss of profits during the period of the alterations and removal, and that these expenses and losses were incurred in reliance on the respondent company's assurance. The appellant company accordingly claimed that the respondent company was debarred in equity from exercising its contractual right to determine the tenancy.

The learned trial judge accepted the evidence of Mr. V. V. Patel and rejected that of Mr. Somen. He found as fact that an assurance had been given, which

> "amounted to a clear representation:
>
> (*a*) that the tenancy would not be determined unless the site was required for the purpose of a Supermarket and
>
> (*b*) that this would not take place for at least three years."

He found that the appellant company had acted on that assurance, incurring substantial expenditure. He expressed some doubt whether on the basis of comparative hardship, equity would be on the side of the appellant company but he refrained from making any finding on that question, because he did not consider it necessary for the determination of the suit. He based his decision on a finding that the application of the doctrine of equitable estoppel would be in contravention of two statutory provisions, s. 108(*q*) of the Transfer of Property Act, 1882, of India, as applied to Kenya, and s. 99 of the Crown Lands Act (Cap. 280). He accordingly found for the respondent company and made an order for possession. After hearing further argument, he made a supplementary order for damages and costs.

The appeal was argued on two grounds, that the learned judge had erred in holding that the two statutory provisions mentioned above precluded the application of the doctrine of equitable estoppel.

The cross-appeal was argued on five grounds; that the findings of the trial judge on facts was against the weight of evidence and the probabilities; that the evidence accepted by the judge did not establish that any assurance had been given in terms as found by the judge and quoted above; that any assurance that may have been given could not be interpreted as a clear and unequivocal representation intended to be acted on between the parties and was therefore insufficient to give rise to an equitable estoppel; that a finding in favour of the appellant

company would create undue hardship to the respondent company and would therefore in itself be inequitable; and that evidence of the alleged assurance was inadmissible by reason of ss. 97 and 98 of the Evidence Act, 1963, (No. 46 of 1963).

I would mention here that counsel for the appellant, at various points of his argument, submitted that it was arguable that the alleged assurance could be interpreted as constituting an oral agreement. This submission would seem to have been an alternative to his main argument, although counsel argued that it was merely supplementary. Be that as it may, I do not think, with respect, that it was open to counsel to argue an oral agreement or novation. Such a submission was no part of the appellant company's pleadings, it was not one of the issues at the trial, it was expressly disclaimed by leading counsel for the appellant company, in his closing address at the trial, it was consequently not considered by the learned judge and it was not a ground of appeal. Counsel for the appellant also spoke of waiver, but for the same reason I do not think that was open to him, since waiver must be based on contract, as Newbold, J.A. (as he then was) pointed out in *Nurdin Bandali v. Lombank Tanganyika Limited* (1).

I propose to consider first the admissibility of the evidence on which the appellant company relied, then the questions of fact and finally the questions of law.

Section 97 of the Evidence Act, 1963, provides, so far as is relevant, that:

> "When the terms of a contract . . . have been reduced to the form of a document . . . no evidence shall be given in proof of the terms of such contract . . . except the document itself . . ."

and s. 98, so far as is relevant, provides that:

> "When the terms of any contract or grant or other disposition of property . . . have been proved according to s. 97 of this Act, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms;
>
> Provided that:
>
> (iv) the existence of any distinct subsequent oral agreement to rescind or modify any such contract . . . may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of such documents."

I see nothing in those provisions to preclude evidence of the alleged assurance. The terms of the contract were not in dispute and no attempt was being made to contradict, vary, add to or subtract from them. What was being asserted was that a subsequent assurance was given, which when acted upon raised an equity in favour of the appellant company and precluded the respondent company from exercising its undisputed contractual right. Paragraph (iv) of the proviso is not relevant, because the very basis of the argument on equitable estoppel is that there was no subsequent oral agreement.

Counsel for the respondent, while conceding the heavy onus on anyone seeking to attack a finding of credibility by a trial judge, submitted that there were grounds justifying that course in the present case. In particular, he relied on the fact that the learned judge made no reference in his judgment to the evidence of Mr. F. W. G. Bompas, another director of the respondent company, which in counsel for the respondent's submission, corroborated the evidence of Mr. Somen. I have examined the evidence of Mr. Bompas and it seems to me

to be of very little significance. Much of it is indefinite and so far as it can be said to confirm the evidence of Mr. Somen, it is only on matters that are not in issue. I see no reason to criticize the learned judge for making no reference to it. Respondent's counsel also pointed to certain details of evidence, as supporting Mr. Somen's evidence, and he also argued on the inherent probabilities. I think I need only say that I am not satisfied that the learned judge overlooked or misdirected himself on any evidence of substantial significance and I see no grounds on which this court would be justified in interfering with his findings on credibility.

Counsel for the respondents then argued that even if the evidence of Mr. V. V. Patel were accepted in its entirety, it did not justify the finding by the learned judge of a specific assurance in the terms I have quoted above. He pointed out that if the alleged statement by Mr. Somen that:

> "I would do so – that is, evict the appellant company – if I succeed in my plans for putting up a supermarket on these premises"

were to be taken as an assurance that he would not give the appellant company notice in any other circumstances, it would amount to giving the appellant company a perpetual tenancy except in the event of a supermarket being erected, which would be absurd. He also pointed out that the learned judge's finding as to the alleged assurance was at variance with his summary of Mr. V. V. Patel's evidence, which was as follows:

> "It is the defendants' case that when Mr. Somen was shown the rough plans of the proposed alterations, they received from him an assurance that he would not determine the tenancy unless the site was required for the erection of a supermarket and that this was not likely to happen for at least three or four years."

Counsel for the appellant seemed reluctant to commit himself on the correctness of the learned judge's finding but when pressed, said that he could not defend the first half, that shown as (*a*), but did seek to support the second, (*b*).

For my own part, I think the finding of the learned judge cannot be upheld but I find myself unable to agree either with counsel for the respondent or with counsel for the appellant as to the correct interpretation of Mr. V. V. Patel's evidence. As I read that evidence, it amounts to an assurance that the appellant company could regard itself as secure for three years, except in the event of the supermarket project materializing at an earlier date. This is materially different from the learned judge's interpretation, but the difference is not of any practical importance because the respondent company did not purport to determine the tenancy so as to be able to build a supermarket but merely in order to obtain a higher rent.

The only other question substantially of fact is whether judgment in favour of the appellant company would have caused such hardship to the respondent company as itself to be inequitable. As I have said, the learned judge made no finding on this but he did find that:

> "The market, in fact was rising, so that the defendants would be doing very well out of this arrangement."

I am unable to find anything in the evidence to support the observation that the market was rising, if this means at the time of the alleged assurance or when the alterations were carried out. It does appear from the evidence that rents subsequently rose but I do not think that is of any relevance.

The learned judge appears also to have attached considerable weight to the fact that the appellant company was able, after moving into the suit premises, to

let for Shs. 2,600/- per month a shop in Victoria Street which it formerly occupied and to vacate a cellar which it rented as a store at Shs. 500/- per month. The learned judge commented that:

> "The result is that the net rent, so to speak, which they are paying for the suit premises is only Shs. 100/- per month."

With respect, that is a complete misdirection. There is no evidence to show on what tenure the shop in Victoria Street was held by the appellant company, what price the appellant company may have paid for it or what ground rent was payable. On the face of the evidence, the appellant company had moved its business from a shop and a store to another shop and another store at an increased expenditure of Shs. 100/- per month. There is no evidence to show whether the transaction was profitable or not. In any event, what the court was concerned with was the equities between the parties, and whether the rent the appellant company obtained for its Victoria Street shop was favourable or unfavourable was quite irrelevant.

Counsel for the respondent did not rely on these propositions, but based his argument concerning the equities on the proposition that, assuming, as all the witnesses said, a higher rent can be commanded for a term of years than for a month to month letting, it would have been unfair for the appellant company to get, in effect, a three year tenancy at a rent appropriate to a tenancy terminable on three months' notice. I do not, with respect, think there is any substance in this argument. The equity arose, if it arose at all, at the time when the assurance was acted upon, which was very shortly after the rent had been freely negotiated. The premises had been vacant for a year and Mr. Somen may have been just as anxious to keep his new tenant as the appellant company was to stay, provided that his supermarket project was not prejudiced.

There can be no doubt that the doctrine of equitable estoppel applies in Kenya. There is the clearest authority in *Nurdin's* case (1). It is true that the judgment in that case dealt with the law of Tanganyika but the reasoning applies with equal force in Kenya. I may add that while I have read all, I have not thought it necessary to refer to any of the English cases cited to us by learned counsel on the doctrine of equitable or promissory estoppel, since the law on the subject, so far as this appeal is concerned, is contained in *Nurdin's* case (1).

In his judgment in *Nurdin's* case (1), Newbold, J.A., remarked:

> "The precise limits of an equitable estoppel are, however, by no means clear. It is clear, however, that before it can arise one party must have made to another party a clear and unequivocal representation, which may relate to the enforcement of legal rights, with the intention that it should be acted upon and the other party, in the belief of the truth of the representation, acted upon it."

Applying those tests to the present case, two difficulties immediately present themselves. The first is whether the assurance given by Mr. Somen can be regarded as "clear and unequivocal"; the second is whether it was given "with the intention that it should be acted upon".

Counsel for the respondent argued with some force that the terms of the alleged assurance could not be regarded as clear, and he submitted that it was inconceivable that the managing director of a public company could have intended to bind the company not to give notice determining a tenancy, by an assurance which might be perpetual or would at least last for three years, with no power to increase the rent. The alleged assurance was no more, in counsel

for the respondent's submission, than a mere estimate of the time likely to elapse before Mr. Somen's plans could mature.

It is the first of these points which has occasioned me the greatest difficulty because, using the ordinary meaning of the word, it seems impossible to describe as "clear" an assurance the terms of which have given rise to such lengthy argument. On the other hand, the application of the doctrine would be whittled down almost to nil if assurances given in the course of ordinary conversations were required to have the precision that a lawyer would desire. After some hesitation, I have reached the conclusion that the remarks which Mr. Somen has been held to have made would, at least as regards their minimal effect, have seemed clear and unequivocal to any reasonable person and were, in fact, regarded as such by Mr. V. V. Patel. By the "minimal effect" I mean the interpretation which I have earlier put on the assurance.

I entertain no doubt that if the conversation was substantially as Mr. V. V. Patel testified, the assurance was intended to be acted upon. This does not, of course, mean that Mr. Somen necessarily intended or even contemplated all the legal consequences that would flow from the assurance: what it does mean is that Mr. Somen knew, and must be presumed to have intended, that his remarks would lead directly to the expenditure by the appellant company of the cost of the proposed alterations to the suit premises. To quote again from *Nurdin's* case (1), ([1963] E.A. at p. 317):

> "in the case of estoppel if the representations, by word of (*sic*) conduct, of the respondent were such as to induce the appellant to alter his position in the belief that the respondent's rights would not be asserted, then the respondent may be estopped from asserting those rights even though it never intended to give them up."

I pass then to the question whether the provisions of s. 108 of the Transfer of Property Act, 1882, of India, as applied to Kenya or s. 99 of the Crown Lands Act precluded the court from applying equitable principles. Equity cannot, of course, be invoked to achieve a result which would be unlawful.

The relevant part of s. 108 reads as follows:

> "108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:
>
> . . .
>
> (B) Rights and Liabilities of the Lessee
>
> . . .
>
> (*q*) on the determination of the lease, the lessee is bound to put the lessor into possession of the property."

The learned judge held that to give effect to the assurance "would override the provisions of section 108". Counsel for the respondent argued, first, that to defeat the statutory provision, the appellant company had to establish a contract, which had never been pleaded and had expressly been disclaimed in the lower court, and, secondly, that the lease had been legally terminated by the notice to quit and that the respondent company had only gone to court to obtain possession.

With respect, I am not persuaded by that argument. The essential issue in these proceedings is whether the respondent company was entitled to determine the tenancy; if it was, it was entitled to possession; but I can see nothing in s. 108 which precluded the court from saying that in equity the respondent

company had not been entitled to determine the tenancy and if that were said, and properly said, para. (*q*) would, in my opinion, have no relevance.

Section 99 of the Crown Lands Act reads as follows:

> "99. All transactions entered into, affecting or conferring or purporting to confer, limit or extinguish any right, title or interest, whether vested or contingent, to, in or over land registered under this Part (other than a letting for one year only or for any term not exceeding one year), and all mutations of title by succession or otherwise, shall be registered under this Part."

It is conceded that the land is registered under Part X of the Act.

The learned judge took the view that "transaction" in this section must be given a wide meaning and he observed that

> "It seems difficult to say that an assurance which has the effect of suspending the rights of the plaintiffs to determine the tenancy for three years is not a transaction 'affecting or limiting any right over land.' "

Reading together ss. 99, 101 and 102 of the Act, it seems clear that the intention was that all dispositions, with certain exceptions, of land to which Part X of the Act applies are to be in writing and registered, but it is to be observed that a document which is not registered is not unlawful, nor indeed is it absolutely void: it is void only:

> "against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent document which has been duly registered."

It would seem, therefore, that an unregistered transaction may be enforceable as between the parties thereto.

Section 100 of the Act contains a more rigorous provision that no evidence is to be receivable in any civil court of certain classes of transaction unless they have been effected by an instrument in writing registered under the Act, but the classes of transaction are much more narrowly defined than those referred to in s. 99 or s. 101 and certainly cannot be held to include the assurance with which this appeal is concerned.

I find nothing, then, in the Act to prevent the court holding that the respondent company was estopped in equity from exercising its contractual right to determine the tenancy for the period of the assurance, whether or not the assurance is to be regarded as a "transaction", which I find it unnecessary to decide.

To sum up, I consider that the learned trial judge was entitled to admit evidence of the alleged assurance and I see no ground for interfering with his findings of fact, except to the limited extent that I would interpret the terms of the alleged assurance rather more narrowly than he. I respectfully disagree with him, however, in that I do not consider that the application of the doctrine of equitable estoppel would contravene any statute law. I am not persuaded that there is any basis for the submission that greater hardship would result from giving effect to the assurance than otherwise.

I would therefore allow the appeal, with costs, and dismiss the cross-appeal, with costs. I would set aside the judgment, order and decree of the Supreme Court and substitute an order dismissing the suit. I would give a certificate for Queen's Counsel in the lower court and for two counsel in this court.

Newbold V-P: I have had the advantage of reading in draft the judgment of Spry, J.A., and I agree with his conclusion that the appeal should be allowed and the cross appeal dismissed. Subject to what I shall say on

certain aspects of the appeal and cross appeal, I also agree with his reasons for arriving at his conclusion.

As regards the appeal, on the assumption that the assurance given amounts to an equitable estoppel, I have no doubt that there is nothing in s. 108 of the Transfer of Property Act, nor in s. 99 of the Crown Lands Act, which would prevent the assurance from operating as an equitable estoppel. If the assurance has effect as an equitable estoppel it precludes the landlord from giving a notice which would determine the tenancy during the period covered by the assurance. This being so the tenancy would not be determined within that period and as a result s. 108(*q*) of the Transfer of Property Act, which relates to a position only on the determination of the tenancy, has no application in this case. As regards s. 99 of the Crown Lands Act, the equitable estoppel which arises in this case operates *in personam* and neither creates nor limits any interest in land; nor is it a "transaction entered into" within the meaning of that section. The result in my view is that this section also has no application in this case.

As regards the cross appeal, as I stated in *Nurdin Bandali v. Lombank Tanganyika Ltd.* (1) ([1963] E.A. at p. 318), before an equitable estoppel can arise "one party must have made to another party a clear and unequivocal representation . . . with the intention that it should be acted upon and the other party, in the belief of the truth of the representation, acted upon it". The three elements which must be present are first, a clear and unequivocal representation; secondly, an intention that it should be acted upon; and thirdly, action upon it in the belief of its truth. The trial judge has found as a matter of fact based on credibility that all three elements were present. There was evidence before him which entitled him so to do; there was also evidence before him which would have entitled him to come to a contrary conclusion. Having regard to the well known principles on which an appeal court acts on appeals of fact, I do not consider that it is open to us to disturb these findings of fact.

I confess that I have great difficulty in accepting that the assurance in this case amounted to "a clear and unequivocal representation". The assurance as found by the judge does not, to my mind, accord precisely with either the pleadings or the evidence; and counsel for the appellant in his argument was, in my view, rather vague as to the precise nature of the assurance. Spry, J.A., in his judgment elicits from the evidence an assurance different from that found by the trial judge and from that which I, for my part, believe to be the assurance as given and understood. Such a position is in itself a strong indication of how difficult it is to describe the assurance as clear and unequivocal. I do not consider that it is open to a judge to pick out from indeterminate phrases capable of different interpretations and results a nucleus and then to hold that such nucleus amounts to a clear and unequivocal representation giving rise to an equitable estoppel. On the other hand two business men discussing a business matter may, while differing as to the precise words used, be left with a very clear impression as to the precise effect of the words. The judge stated he accepted Mr. Patel's evidence and, in my view, Mr. Patel's evidence was that he understood that he would be allowed to remain in possession for a minimum of about three years. With considerable hesitation I accept that to be a sufficiently clear and unequivocal representation to found an equitable estoppel, though I confess I would have even greater doubts were it not for the views of my brethren.

In *Nurdin's* case (1) I said that "he who asks for equity must do equity". This does not mean that where an equitable estoppel arises the court must rewrite the contract between the parties. Such would be an intolerable position and might well result in a position neither intended nor desired by either party. In this case the assurance was given in relation to a letting at a certain rental.

The fact that rental values rose during the period covered by the assurance gives rise to no equity and I see absolutely no ground for accepting the submission that if an equitable estoppel is to arise then the rent should be increased.

The three year period covered by the assurance elapsed prior to the hearing of the appeal and the court was informed that possession was delivered up on the expiration of that period. Thus no necessity arises for any order for possession.

For these reasons I agree with the order proposed by Spry, J.A., and it is ordered accordingly. Any moneys paid by the appellant under the decree of the Supreme Court (as it then was) will of course be refunded.

Law JA: I have read the judgments prepared by Spry, J.A. and Newbold, V.-P. and agree with the conclusions reached and orders proposed by them.

Appeal allowed. Cross-appeal dismissed.

For the appellant:
JM Nazareth QC and *RD Patel*
Patel & Patel, Nairobi

For the respondent:
Bryan O'Donovan QC and *JDM Silvester*
Hamilton, Harrison & Mathews, Nairobi

Kisumu Trading Stores v K B Shah and another
[1965] 1 EA 314 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	22 June 1965
Case Number:	6/1965
Before:	Sir Samuel Quashie-Idun P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Wicks, J

[1] Master and servant – Liability of master for criminal act of servant – Scope of employment – Carriage of goods by servants of transporter – Theft of goods during transit – Claim against transporter for value of goods stolen – Whether transporter liable for value of goods stolen.

[2] Bailment – Bailment for reward – Theft by servant of bailee – Liability of master.

Editor's Summary

The respondents had been carrying goods belonging to the appellants from Mombasa to Kisumu. On such a trip a turnboy employed by the respondents to watch the goods on the lorry and prevent them from being stolen, disappeared with some of the goods. The turnboy was later convicted of theft of the missing goods. The appellants then filed an action for recovery of sum of Shs. 3,968/50 being the value of the missing goods which were not delivered. The trial judge dismissed the suit on the grounds that the respondents were not negligent in employing the turnboy having exercised reasonable care in selecting him, and that the loss was caused by an act which was not within the scope of employment of the turnboy. The judge further held that the turnboy had committed the crime for his own benefit and thereby severed his connection with the respondents, who as a result were in no way responsible for the loss. On appeal.

Held – the respondents as masters were liable for the value of the goods stolen, as the theft was committed by their servant in the course of his employment,

Appeal allowed.

Cases referred to in judgment

(1) *Lloyd v. Grace Smith & Co*., [1912] A.C. 716.

(2) *Barwick v. English Joint Stock Bank* (1867), L.R. 2 Ex. 259.

(3) *Mintz v. Silverton* (1920), 36 T.L.R. 399.

(4) *Goh Choon Seng v. Lee Kim Soo*, [1925] All E.R. Rep. 170.

(5) *Ilkiw v. Samuel*, [1963] 2 All E.R. 879.

(6) *United Africa Co. Ltd. v. Saka Owoade*, [1957] 3 All E.R. 216.

(7) *Cheshire v. Bailey*, [1905] 1 K.B. 237.

(8) *Morris v. C. W. Martin & Sons Ltd*., [1965] 2 All E.R. 725.

(9) *Canadian Pacific Railway Co. v. Lockhart*, [1942] 2 All E.R. 464.

(10) *Underwood Ltd. v. Bank of Liverpool*. [1924] All E.R. Rep. 230.

(11) *John Carter v. Hanson Haulage*, [1965] 1 All E.R. 113.

Judgment

The following judgments were read: **Sir Samuel Quashieidun P:** The facts in this case are not in dispute. They are briefly as follows. The respondents, prior to the November 20, 1963, had been carrying goods belonging to the appellants from Mombasa to Kisumu. On November 20, 1963, the respondents took delivery of a quantity of goods belonging to the appellants to be conveyed by the respondents to Kisumu. Some of the goods received by the respondents to be conveyed to Kisumu were not delivered and the appellants filed a claim for their value amounting to Shs. 3,968/50.

It was proved at the trial (*a*) that the respondents had employed one Mwangi as a turnboy to replace one of their boys who had fallen ill and was unable to work on the vehicle which conveyed the goods of the appellants on November 20; (*b*) on the journey to Kisumu it was observed that Mwangi had disappeared from the lorry conveying the goods and that some of the goods were missing; (*c*) that Mwangi was later charged with the theft of the missing goods and was convicted.

On the evidence led at the trial and the facts which were not in dispute, the main issue before the learned trial judge was whether or not the respondents, as employers of Mwangi, were liable for the criminal act committed by Mwangi.

There was evidence that Mwangi was introduced by one of the respondents' turnboys as being a good man before the respondents agreed to employ him. In his judgment the learned trial judge started as follows:

> "I find that the defendants did exercise reasonable care in selecting Mwangi and they were not negligent in retaining him as their servant. . . . it cannot be suggested that Mwangi, the turnboy, had any authority to dispose of the goods on behalf the plaintiff. . . . Mwangi's duties were to assist in conveying the plaintiffs' goods. . . . the loss was caused by an act which was not within the scope of Mwangi's employment. Mwangi committed the crime for his own benefit and thereby severed his connection with the defendants, who as a result are in no way responsible for the loss. This being so the action must be dismissed.

Action dismissed with costs."

Against the decision the appellants have appealed and the grounds argued are the following:

"1. The learned trial judge erred in law in holding that as Mwangi Maina, the turnboy employed by the respondents, stole the goods for his own benefit, he thereby severed his connection with the respondents and was consequently

no longer acting in the course of his employment as a servant of the respondents.

2. Having found as a fact that the goods in question were stolen by Mwangi Maina whilst acting as a turn-boy employed by the respondents, the learned judge erred in law in not holding that the theft of the goods by Mwangi Maina was committed in the course of the latter's employment with the respondents.

3. Having found as a fact that the goods were stolen by Mwangi Maina an employee of the respondents, the learned judge erred in law in failing to hold that the onus of proof was on the respondents to prove that the theft by the respondents' servant was not committed in the course of his employment and that the respondents had failed to discharge such onus.

4. The learned trial judge erred in law in not holding that the onus of proving that the goods were lost without negligence on the part of the respondents or their servants or agents, was on the respondents and that the respondents had failed to discharge that onus."

The submissions made in respect of all the grounds of appeal amount to this: whether or not the respondents are liable for the theft of the appellants' goods by Mwangi, a servant of the respondents, the theft having been committed on the lorry which was conveying the goods. I would state this question does not appear to have arisen for determination by this court previously and therefore is of some importance.

The learned trial judge relied on a number of decisions in support of his conclusion that in law the respondents were not liable for the loss suffered by the appellants as a result of the theft committed by the respondents' servant. In coming to that conclusion the learned trial judge appears to have been influenced by the fact that the respondents exercised reasonable care in selecting Mwangi as a turnboy and that, therefore, they could not be guilty of negligence in employing him to work on the lorry.

One of the decisions relied upon by the learned trial judge was *Lloyd v. Grace, Smith & Co.*, (1). In that case a solicitor's managing clerk was authorised by the solicitor to receive deeds and carry out sales and conveyances on behalf of his employer. While acting as representative of the solicitor's firm the clerk persuaded a client of the firm to sign documents transferring to the clerk a mortgage under which the client was the mortgagee and conveying to the clerk a freehold property owned by the client. The clerk then foreclosed the mortgage, sold the freehold property and appropriated the proceeds. The client was not aware of the contents of the document she signed and the solicitor was innocent of any participation in the fraud committed by his servant. In an action by the client against the solicitor for detinue of the deeds of the freehold property and for the amount had and received by the clerk in respect of the mortgage, it was held by the House of Lords that as the fraud was committed by the clerk in the course of his employment, and not outside the scope of his authority, the solicitor was liable to the client although he was innocent of the fraud which was committed – not for his benefit but for the benefit of the clerk.

In the present case, the learned trial judge appeared to have made a distinction between the fraud committed by the clerk in Lloyd s case and the crime committed by Mwangi, in that in the Lloyd's case the fraud was committed in the course of the clerk's employment, not outside the scope of his authority and for his own benefit. On the question of the fraud having been committed by a servant for his own benefit, Earl Loreburn, L.C., considering the decision of Willes, J. in *Barwick v. English Joint Stock Bank* (2) stated as follows in *Lloyd v. Grace, Smith & Co.* (1) viz:

> "Willes J. cannot have meant that the principal is absolved whenever his agent intended to appropriate for himself the proceeds of his fraud. Nearly every rogue intends to do that. . . .
>
> If the agent commits the fraud purporting to act in the course of business such as he was authorized, or held out as authorized, to transact on account of his principal, then the latter may be held liable for it."

In the same case Lord MacNaghten, in his judgment, stated as follows quoting the dictum of Lord Selborne, viz:

> "The decisions in all these cases proceeded,' he said, 'not on the ground of any imputation of vicarious fraud to the principal, but because (as it was well put by Willes, J., in *Barwick's* Case) "with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong".' "

The learned Lord then proceeded and stated as follows:

> "It is, I think, a mistake to qualify it by saying that it only applies when the principal has profited by the fraud. I think, too, that the expressions 'acting within his authority', 'acting in the course of his employment', and the expression 'acting within the scope of his agency' . . . mean one and the same thing. What is meant by those expressions is not easy to define with exactitude. To the circumstances of particular case one may be more appropriate than the other."

I concede that the facts in the present case are different from the facts in *Lloyd's* case (1), but there was a similarity in the act done by the servants in perpetrating the fraud. In each case the servant was employed to do a lawful act and the servant, in the course of the performance of the lawful act, decided to do an unlawful act not authorised by his employer, and for his own benefit. In other words, while purporting to act in the course of his employment, the servant in each case committed a fraud.

It seems to me that the legal test applicable to *Lloyd's* case (1) and the present case is not whether the employer is guilty of negligence or not, but, whether, on the facts and in the particular circumstances of the case, the employer is liable for fraud or crime committed by his servant in the course of his employment. In the *Lloyd's* case (1) the clerk had no authority to procure the client to sign a document transferring her mortgage to him, which act enabled him to defraud the client. It was by means of his employment that he had the opportunity to commit the fraud. In the instant case, the servant of the respondents was employed to watch the goods on the lorry and to prevent them from being stolen. I am unable to differentiate the fraud committed by the solicitor's clerk from the theft committed by Mwangi, the servant of the respondents. If the goods had been delivered at their destination and Mwangi had then stolen part of them, I would agree that Mwangi's employers would not be held liable, for then, Mwangi's act could not be said to have been done either in the scope of or in the course of his employment.

Another case which was relied upon by the learned trial judge was *Mintz v. Silverton* (3). In that case the plaintiff, who employed the defendant to convey the plaintiff's goods in the defendant's van, sent a boy in the plaintiff's service to accompany the goods. On the journey, the defendant's driver gave twopence to the plaintiff's servant to go into a coffee shop to buy some refreshment. Before giving the money to buy the refreshment, the driver asked the plaintiff's servant to deliver the invoice of the goods to him and he did so. When the plaintiff's servant returned from the coffee shop the van had been driven away

by the driver who stole the goods. The plaintiff then sued the defendant for damages for negligence. It was held (*a*) that the defendant was not negligent in his selection of the driver to convey the plaintiff's goods and (*b*) that the defendant was not liable for the theft committed by his servant because negligence was not proved against the defendant and the loss was caused by an act which was outside the scope of the employment of the defendant's servant.

I think there is a distinction between the facts in the *Mintz* case (3) and those in the instant case. In the *Mintz* case (3), the goods clearly were in possession of the plaintiff's servant who had their invoices and the position as between the plaintiff and the defendant appeared to be that the defendant's van and driver were hired to convey the goods. There was no contract or responsibility on the part of the defendant to look after the goods. When, therefore, the defendant tricked the plaintiff's servant to leave the van and to hand over the invoices to him, the defendant's servant was acting quite outside the scope of his employment by taking possession of the goods from the plaintiff's servant and thereby enabling himself to steal the goods. In the present case the goods of the plaintiff-appellants had been entrusted to the care of the defendant – respondents who had employed a servant to guard the goods.

I also think that the facts in the *Mintz* case (3) are also distinguishable from those in the case of *Lloyd v. Grace, Smith & Co.* (1). With respect, I think that the learned trial judge misdirected himself while considering the authority in the *Mintz* case (3).

In the case of *Goh Choon Seng v. Lee Kim Soo* (4) to which the attention of this court was directed by learned counsel for the respondents, the Privy Council held that when a servant does an act which he is authorised by his employment to do, in circumstances of in a manner which are unauthorised and improper, his employer is liable for the consequences of his wrongful act. Lord Phillimore stated in his judgment as follows:

> "where the servant is doing some work which he is appointed to do, but does it in a way which his master has not authorised and would not have authorised, had he known of it. . . . the master is, nevertheless, responsible."

I would refer to the case of *Ilkiw v. Samuels and Others* (5). In that case the employers of a driver had issued strict instructions to the driver not to allow their lorry to be driven by anybody else. The driver allowed a workman who was not a servant of the employers but had been engaged on loading, to move the lorry, showing him how to start the engine. The driver remained at the back of the lorry while the workman, who had never driven before, drove the vehicle. The vehicle was driven a few yards forward and the workman could not stop it when the driver shouted to him to stop. The lorry ran into the base of two conveyor belts between which the plaintiff was standing and injured the plaintiff. In an action for damages, it was held that the employers of the driver were liable in negligence because (*a*) their servant was negligent in allowing the workman to drive the vehicle; (*b*) the servant's negligence arose in the course of his employment since he was employed to have charge of and control of the lorry and at the time of the accident he was so employed. It was also held that the prohibition on allowing anyone else to drive was merely a prohibition on the mode of doing his job which was a prohibition of conduct within the scope of employment, disregard of which did not take the negligent act of driving outside the course of his employment.

Counsel for the appellants, called the attention of this court to the case of *United Africa Co., Ltd. v. Saka Owoade* (6) and expressed the view that if the decision in that case had been brought to the notice of the learned trial judge in

the present case it would have, perhaps, influenced him in favour of the appellants. In that case the defendant, who was a transport contractor, obtained employment from the plaintiffs to carry goods for them. He introduced to the plaintiffs two men as his driver and clerk and told the plaintiffs that when they had goods they should be given to the two men. The plaintiffs gave goods to the two servants of the defendant for carriage but the goods were never delivered. Subsequently the two men were convicted for theft of the goods. The plaintiffs then sued the defendant for the value of the goods. The plaintiffs then obtained judgment in the Supreme Court, Lagos. The decision was reversed by the West African Court of Appeal. The plaintiffs appealed to the Privy Council which allowed the appeal holding that the contractor was liable because the sole question was whether the wrong was committed *in the course of the servants' employment and the true inference from the facts was that the conversion of the goods was done within the course of the servants' employment.*

It is interesting to observe that in this case an attempt was made to persuade the Privy Council to apply the principle in *Cheshire v. Bailey* (7) which was referred to by learned counsel for the respondents. But in his judgment Lord Oaksey said:

> "the respondent . . . has argued before their Lordships' Board that a principal or master cannot be liable for his agent's or servant's fraud unless the principal or master has been himself negligent. This argument was based principally on *Cheshire v. Bailey*.
>
> In their Lordships' opinion, *Lloyd v. Grace, Smith & Co.*, establishes the principle that a master is liable for his servant's fraud perpetrated in the course of the master's business whether the fraud was committed for the master's benefit or not. The only question is whether the fraud was committed in the course of the servant's employment."

It is also interesting to note that while in the earlier authorities relating to the liability of the master for the fraud of his servant, the courts' decisions were based on the question as to whether or not the fraud or wrong was committed within the scope of the servant's employment, the later authorities, e.g. *Lloyd v. Grace, Smith & Co.* (1) and *United Africa Co., Ltd. v. Saka Owoade* (6) made it clear that the question was whether or not the action complained of was done in the course of the servant's employment.

In this connection I would refer to the very recent case of *Morris v. C. W. Martin & Sons Ltd.* (8). In that case the plaintiff had sent her mink stole to be cleaned by a furrier. The furrier, with the consent of the plaintiff, sent the mink to the defendants. While the fur was with the defendants, one of their servants who had only been in their employment for about two months, stole it. When the plaintiff sued the defendants to recover the value of the mink, the court held (*a*) that the furrier made a contract with the defendants on his own account and not as agent of the plaintiff, (*b*) that it was the furrier and not the plaintiff, who was liable to the defendants for charges for the cleaning, (*c*) that the defendants took proper steps to safeguard the goods and were not negligent in employing the servant who stole the mink, (*d*) that the defendants were not liable because the act of their servant in secreting the stole on his person and removing it from the premises of the defendants was not done in the course of his employment and (*e*) that the court felt bound by the authority of *Cheshire v. Bailey* (7).

The Court of Appeal (England) held, allowing the appeal and overruling the decision in *Cheshire v. Bailey* (7) and supporting the authority of *Lloyd v. Grace, Smith & Co.* (1) that – in the ultimate analysis, it depended on the nature of the duty owed by the master towards the person whose goods had been lost or damaged. If the master was under a duty to use due care to keep the goods

safely and protect them from theft and depredation, he could not get rid of his responsibility by delegating his duty to another. If he entrusted that duty to his servant he was answerable for the way in which the servant conducted himself therein – no matter whether the servant was negligent, fraudulent or dishonest.

The court also held that the plaintiff could sue the defendants direct for the loss of her goods by the misappropriation by their servant of both the plaintiff, as owner, and the furrier, as the first bailee, had concurrently the rights of a bailor against the third persons who were the defendants.

Learned counsel for the respondent also referred to other authorities to support his submissions that where a servant commits a crime and it is sought to make the master liable, the test is whether the wrongful act was committed within or outside the scope of the servant's employment or whether or not the act was done for the benefit of the master. The cases referred to are *Canadian Pacific Railway Co. v. Lockhart* (9); *Underwood, Ltd. v. Bank of Liverpool* (10) and the recent case of *John Carter v. Hanson Haulage* (11).

I have considered these authorities and I am of the opinion that they do not assist the respondents in view of the decision in *United Africa Co., Ltd. v. Saka Owoade* (6) which has not been overruled, but rather supported by *Morris v. C. W. Martin & Sons, Ltd.* (8).

For the reasons I have given, I think the appeal should be allowed with costs. I would set aside the judgment and decree of the learned trial judge and substitute a decree awarding the appellants the relief prayed for in the plaint, with costs. In my view this is not a case for a certificate for two counsel either in this court or the court below. As my brothers are in agreement, I make the order accordingly.

Duffus JA: I have read and agree with the judgment of the learned President and with the order he proposes.

The learned trial judge found that the respondents were carrying these goods as private carriers for reward and further there was no special term of the contract limiting their liability. There has been no appeal against this finding and the real issue in this case was whether the theft of the goods was done by the respondents' servant, the turnboy, in the course of his employment. This is a question of fact but with respect to the learned trial judge I am of the view that the evidence clearly established that the theft was committed by the turnboy during the course of his employment. I would refer to the evidence of the respondent where, in setting out the duties of the turnboy, he said–

> "The turnboy's duty is to help the driver on the road in the case of a break-down, to load and unload the goods on the lorry and to guard the goods. The turnboys alternate in sitting in the driver's cab, changing over from time to time for safety of the goods. None of our turnboys were authorised to remove any goods from the lorry without the permission of the driver."

The turnboy was not authorised to remove the goods but his duty was to guard them and the evidence establishes that he stole these goods whilst the lorry was in transit and during the time when his duty was to safeguard the goods. In these circumstances he clearly stole the goods in the course of his employment and his master is accordingly liable for his act.

Spry JA: I also agree.

Appeal allowed.

For the appellants:

RP Cleasby and *PS Talati*
Patel & Thakkar, Mombasa

For the respondents:
Ram Hira and *SR Patel*
Suryakant, R Patel, Mombasa

Dhanesvar V Mehta v Manilal M Shah

[1965] 1 EA 321 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	14 May 1965
Case Number:	3/1964
Before:	Crabbe, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Edmonds, J

[1] Limitation – Application for substitution of personal representative of sole plaintiff – Period of limitation – Whether art. 175*A or art.* 178 *of the Second Schedule to Indian Limitation Act,* 1877 *applicable – Civil Procedure* (*Revised*) *Rules,* 1948, *O.* 23 *r.* 3 *and r.* 8 [*K*].

[2] Practice – Suit in name of wrong plaintiff – Bona fide mistake – Death of right plaintiff – Application for substitution of personal representative of right plaintiff – Delay in making application – Discretion of Court – Discretion will not be exercised if it would defeat defence of limitation – Civil Procedure (*Revised*) *Rules,* 1948 *O.* 1 *r.* 10 [*K*].

Editor's Summary

The respondent filed a suit "as manager of the estate of M." a person of unsound mind and M. died on September 6, 1961 before the suit had come on for hearing. On March 12, 1962, the respondent filed an application under O. 23, r. 3 of the Civil Procedure (Revised) Rules, 1948 for an order that the suit be continued in his name as administrator of M. At the hearing of the application it was submitted for the appellant that the application was time barred as the period of limitation for such application was six months from the date of the death of the deceased plaintiff, under art. 175A of the Second Schedule to the Indian Limitation Act, 1877, as formerly applied to Kenya. For the respondent it was contended that the application was not time barred. Alternatively an application was made under O. 1 r. 10 for an order that the respondent in his capacity as personal representative of M. be substituted on the record, on the ground that the suit had been instituted in the name of a wrong person under a bona fide mistake and that the suit should have been instituted in the name of M. The judge in allowing the application held that the period of limitation was governed by Article 178, and that it was three years. The appellant appealed and the respondent cross-appealed on the ground that the judge ought to have brought the respondent on the record as the correct plaintiff under O. 1 r. 10.

Held –

(i) Article 175A of the Second Schedule to the Indian Limitation Act 1877 continued to apply after the local repeal of the Indian Civil Procedure Code, 1882 and it is to be read as if reference to s. 365 of the Indian Civil Procedure Code, 1882 were a reference to O. 23, r. 3(1) of the Civil Procedure (Revised) Rules, 1948.

(ii) the judge was wrong in allowing the application since it was made more than six months after the death of the deceased and under art. 175 ibid. six months is the period of limitation for such an application.

(iii) a person in a representative capacity must be regarded as a different person to himself in his personal capacity or in a different representative capacity, for the purpose of substitution "of any other person" as plaintiff under O. 1 r. 10.

(iv) at the time of making of the application for substitution under O. 1 r. 10 the suit had not abated and the court had jurisdiction to grant the application, but the question was whether the jurisdiction ought to have been exercised.

(v) in principle, it is not wrong for a court to allow amendment under O. 1 r. 10, when the period of limitation under O. 23, r. 3, has expired, but the amendment should not be allowed unless there is a reason for the delay which would have been sufficient to justify allowing an application under O. 23, r. 8.

(vi) the court would not be justified in exercising its discretion under O. 1 r. 10 as there had been delay in making the application and the effect of allowing the application would have been, if not to defeat a vested right, at least to defeat a *prima facie* defence of limitation.

Appeal allowed. Cross-appeal dismissed.

Cases referred to in judgment

(1) *R. M. Patton-Bethune v. Ramji Jethabhai*, Kenya Supreme Court (Mombasa) Civil Case No. 383 of 1952 (unreported).

(2) *H. P. Tajbhai & Co. Ltd. v. Nathalal Kara*, Kenya Supreme Court Civil Case No. 508 of 1958 (unreported).

(3) *Carswell v. Hyland* (1887), 3 T.L.R. 708.

(4) *Hughes v. Pump House Hotel Co.* (*No.* 2), [1902] 2 K.B. 485.

(5) *Hilton v. Sutton Steam Laundry*, [1945] 2 All E.R. 425.

(6) *Finnegar v. Cementation Co. Ltd.*, [1953] 1 All E.R. 1130.

(7) *Buchanan-Michaelson v. Rubinstein*, [1946] 2 All E.R. 663; (1964), 3 W.L.R. 1235.

(8) *Mabro v. Eagle, Star and British Insurance Co.*, [1932] 1 K.B. 485.

(9) *Ex p. Willey* (1883), 23 Ch. D. 118.

(10) *Brownsea Haven Properties v. Poole Corporation*, [1958] Ch. 574; [1958] 1 All E.R. 205.

(11) *Pugh v. Golden Valley Railway Co.*, [1880] 15 Ch. D. 330.

(12) *R. v. Wycombe Railway Co.* (1867), 2 Q.B.D. 310.

(13) *Pate v. Pate*, [1915] A.C. 1100.

(14) *Fulvahu v. Goculdas Valabdas* (1885), 7 Bom. 275.

(15) *Bhoyrub Dass Johurry v. Doman Thakoor*, 5 Cal. 139.

May 14. The following judgments were read:

Judgment

Spry JA: The facts out of which these proceedings arose are as follows. On April 7, 1960, in Miscellaneous Cause No. 25 of 1958, Manilal Mohanlal Shah (to whom, for convenience, I shall refer as "Manilal") was given leave to institute certain proceedings on behalf of Mohanlal Karamshi Shah, a person of unsound mind, (to whom I shall refer as "the deceased").

A plaint was filed on October 31, 1960, in the name of Manilal "as Manager of the estate of Mohanlal

Karamshi Shah who is unable to manage his affairs due to mental disorder" and the defendants named filed written statements of defence. The deceased, however, died on September 6, 1961, before the suit had come on for hearing.

On January 31, 1962, Manilal, having obtained letters of administration, filed a chamber summons under O. 23, r. 2, of the Civil Procedure (Revised) Rules, 1948, (to which I shall refer as "the Revised Rules") asking for his name as personal representative of the deceased to be substituted for that of the plaintiff. The summons was heard on February 7, 1962, when counsel for the appellant, took a preliminary objection, submitting that the appropriate rule was r. 3, not r. 2. Counsel for the applicant conceded that the point was well taken and asked for leave to amend. This was refused by the learned judge, on the ground that while, under O. 23, r. 12, an application under r. 2 is to be

made by chamber summons, an application under r. 3 must, to comply with O. 50, r. 1, be by notice of motion. The learned judge did not consider that proceedings begun by chamber summons could, by amendment, be transformed into proceedings by notice of motion.

On March 12, 1962, Manilal filed a notice of motion under O. 23, r. 3, of the Revised Rules for an order that the suit be continued in his name as administrator and this was heard on March 27, 1962, when Mr. Gautama again raised a preliminary objection, this time that the application was time barred. He submitted that the period of limitation for such an application was six months, under the provisions of art. 175A of the Second Schedule to the Indian Limitation Act, 1877, as formerly applied to Kenya and as saved, so far, *inter alia*, as such matters are concerned, by the proviso to s. 41 of the Limitation Act (Cap. 11 of the 1948 Revised Edition of the Laws of Kenya).

Learned counsel for the applicant, while contending that the application was not time barred, made an alternative application under O. 1, r. 10, of the Revised Rules. He entertained a doubt whether it had been correct to file the plaint in the name of Manilal as manager. He thought that to comply with O. 21, r. 1 and 15, the suit should have been brought in the name of "Mohanlal Karamshi Shah, a person of unsound mind by his next friend Manilal Mohanlal Shah who is the duly appointed manager of the estate of the said Mohanlal Karamshi Shah". He submitted that if the suit had been brought in the name of the wrong person, under a *bona fide* mistake as to the effect of the order of April 7, 1960, it would be proper to allow the substitution of the name of the real plaintiff and since the real plaintiff had since died, it would be proper to allow the substitution of the name of Manilal as personal representative of the deceased.

After two adjournments, the hearing was concluded on October 22, 1963, and on October 28 the learned judge delivered his ruling.

In this he held that the period of limitation for an application under O. 23, r. 3, of the Revised Rules is governed by art. 178, not by art. 175A, of the Second Schedule to the Indian Limitation Act, 1877. He did not give detailed reasons, considering it sufficient to adopt the reasoning contained in a ruling of Mayers, J., when considering the same question in *R. M. Patton-Bethune v. Ramji Jethabhai* (1), which he had himself previously followed when considering *H. P. Tajbhai & Co. Ltd. v. Nathalal Kara* (2) the analagous question of the period of limitation for applications to bring on the record the personal representative of a deceased defendant. He therefore rejected counsel for the appellant's objection and allowed the application, and did not consider it necessary to consider the alternative application under O. 1, r. 10.

It may be convenient at this point to quote the two articles of the Indian Limitation Act, 1877, to which reference will be made. They are arts. 175A and 178 and they are as follows, excluding parts not relevant to this appeal:

> "Art. 175A. Under S. 365 of the Code of Civil Procedure, by the legal representative of a deceased plaintiff . . .; six months from the date of the death of the deceased plaintiff . . ."
>
> "Art. 178. Application for which no period of limitation is provided elsewhere in this schedule, . . .; three years from the date when the right to apply accrues."

In his ruling referred to above, Mayers, J., had drawn attention to the difference between sections 365 and 366 of the Indian Code of Civil Procedure, 1882, (to which I shall refer as "the 1882 Code") read together, and Order 23, r. 3 (1) and (2) of the Revised Rules; that is, that under the latter a suit abates automatically if the personal representative of a deceased plaintiff fails to apply,

within the prescribed time, to be made a party, whereas under the earlier statute, the suit only abated on an order of the court. He went on to say that in his opinion, in the interpretation of art. 175A, s. 365 of the 1882 Code could not be looked at in isolation but had to be read together with s. 366.

The learned judge considered that the essential question was whether s. 4 of the Indian Acts (Amendment) Ordinance (Cap. 2 of the 1948 Revised Edition of the Laws of Kenya) permitted a reference to Order 23, r. 3, of the Revised Rules to be substituted in art. 175A for the reference to s. 365 of the 1882 Code. He said that if it were only necessary to consider s. 365, he would unhesitatingly have held that the substitution was merely formal, but that reading ss. 365 and 366 together, as he thought he should, and comparing them with sub – rr. (1) and (2) of O. 23, r. 3, the difference was substantial and therefore the article could not be held to apply. He therefore held that art. 178, the residuary article, applied and that the period of limitation was three years.

The argument before us was similarly largely based on the assumption that the matter was governed by s. 4 of the Indian Acts (Amendment) Ordinance and that the question was whether the differences between Order 23, r. 3 and ss. 365 and 366 were formal or substantial. I do not propose to examine those arguments, because, with respect, I think they were misconceived.

I think the best approach to the problem is the historical one, beginning at 1897. In that year, the East African Order-in-Council, 1897, applied, *inter alia*, the Indian Limitation Act, 1877, and the Indian Code of Civil Procedure 1882, to the East Africa Protectorate. Since the two Acts were applied simultaneously, art. 175A clearly took effect without any alteration or need for interpretation.

This state of affairs continued until 1924 (the learned judge's reference to 1970 appears to have been a mistake), when the Civil Procedure Ordinance, 1924, (No. 3 of 1924) was enacted. This repealed, "the Indian Code of Civil Procedure as applied to the Colony" but provided, by s. 106, that:

> "In every enactment or notification passed or issued before the commencement of this Ordinance in which reference is made to, or to any chapter of section of the Indian Code of Civil Procedure of 1882, or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Ordinance or its corresponding Part, order, section or rule."

As this section had not been referred to in any of the earlier proceedings or by counsel before us, we invited counsel to address us specifically on the relevance and applicability of the section.

Counsel for the respondent made three submissions. The first was that the section must be deemed to have been repealed. He conceded that there had been no express repeal but he argued, relying on s. 10 of the Revised Edition of the Laws Ordinance, 1948 (No. 87 of 1948) that the omission of the section from the revised edition of the laws amounted to its repeal. He sought to reinforce that argument by submitting, on the basis of the maxim *expressio unius est exclusio alterius*, that since s. 5 of the Ordinance saved certain excluded matter, no other excluded matter was or could be saved.

With respect, I am unable to agree. The Commissioner for the purpose of preparing the Revised Edition was given certain prescribed powers and s. 6(2) of the Ordinance makes it clear, if there could ever have been any doubt, that the Commissioner had no power "to make any alteration or amendment in the matter or substance of any enactment". Section 10 of the Ordinance is expressly made subject to s. 6. I think it is quite clear therefore that if the Commissioner inadvertently omitted any matter of substance from the Revised Edition, that omission would not have changed the law and that it would be

necessary and proper to look behind the Revised Edition to the original enactment.

The Commissioner in fact omitted the last five sections of the Civil Procedure Ordinance, that is, ss. 102, 103, 104, 105 and 106. In my view, the omission of ss. 102 to 105 inclusive was proper and within his powers, which included power to omit spent matter and repealing clauses, but I do not consider that he had power to omit s. 106, which was an interpretation section and certainly not spent, and in my opinion that section is still part of the law of Kenya.

Counsel for the respondent's second submission was that the section was in any event irrelevant to this appeal, since it related to the interpretation of "every enactment . . . passed" and he argued that this must mean an enactment passed by the legislature of Kenya, although he conceded that it would include an order in council applying to Kenya and made before independence. He related this submission to his third submission, which was, that it is incorrect to regard the Indian Limitation Act, 1877, as *simpliciter* part of the law of Kenya. It was only applied as qualified and must be regarded as part of a complex of legislation including the Order-in-Council which applied it, s. 34 of the Interpretation and General Clauses Ordinance (Cap. 1) and s. 4 of the Indian Acts (Amendments) Ordinance (Cap. 2). On this ground also he argued that the Indian Act could not be regarded as an "enactment" within the meaning of s. 106.

Again, with respect, I am unable to agree. The word "enactment" has a wide meaning and I think the East Africa Order-in-Council, 1897, must be regarded as an "enactment" for the purposes of s. 106. In applying, *inter alia*, the Indian Limitation Act, 1877, to the East Africa Protectorate, Her Majesty in Council was legislating by reference and I think that the Act must notionally be regarded as embodied in and forming part of the Order-in-Council, just as much as if its terms had been repeated therein. I think, therefore, that s. 106 governs the interpretation of the Act, as part of an enactment passed before the commencement of the Civil Procedure Ordinance and in which reference is made to the 1882 Code.

There can, I think, be no doubt that O. 23, r. 3(1) of the Revised Rules corresponds with s. 365 of the 1882 Code: although worded differently, they are the same in substance, each provides for the personal representative of a deceased plaintiff, where the cause of action survives, on application, being made a party to the suit and these provisions are, so far as I am aware, the only provisions dealing with those circumstances in the respective statutes.

The only other requirement is that it must be "practicable" for the reference to the section of the 1882 Code to "taken to be made to" the later rule, and in my view, in the present instance, there is no practical difficulty whatever.

I have no doubt, therefore, that art. 175A continued to apply after the local repeal of the 1882 Code, and that it is to be read as if the reference to s. 365 of the Code were a reference to O. 23, r. 3(1) of the Revised Rules. There is, therefore, no reason to invoke s. 4 of the Indian Acts (Amendments) Ordinance and in my opinion that section has no relevance to the present proceedings.

I should perhaps add, to obviate any doubt, that in my view, where any rule of the Revised Rules corresponds with a s. of the 1882 Code and it is practicable to read references to the latter in any enactment passed before the commencement of the Civil Procedure Ordinance as references to the former, it is obligatory to do so and it is immaterial whether or not the effect of the rule is similar to that of the section.

It follows, of course, that in my opinion, the learned judge was wrong to allow the application under

O. 23, r. 3, even if it were competent, since it was made

more than six months after the death of the deceased and under art. 175A six months is the period of limitation for such an application.

I have said "even if it were competent" because it seems to me that the applications under O. 23, r. 3, O. 1, r. 10, were mutually exclusive. The former was not competent unless the plaintiff had been the deceased, and if he were, the latter was inappropriate. However, that aspect of the matter was not argued either in the lower court or before us.

I turn now to the cross-appeal. In this, Manilal contends that:

> "if it be held that the learned judge ought not to have made the order which he did under r. 3 of O. 23 of the Kenya Civil Procedure Rules, but not otherwise, then the learned judge ought to have brought the respondent on the record as the correct plaintiff under O. 1, r. 10 of the aforesaid Rules."

The reference to "the respondent" is, of course, incorrect. What had been sought, and is sought in the cross-appeal, was on order that Manilal in his capacity as personal representative be brought on the record.

Counsel for the respondent's argument was that a *bona fide* mistake had been made when the plaint was drafted: the suit should have been brought in the name of the deceased; by the time it was sought to correct the error, the deceased had died and the proper person to be made plaintiff was the administrator. He submitted that the person wrongly named as plaintiff was still alive and therefore the suit had not abated. He relied on *Carswell v. Hyland* (3), and *Hughes v. Pump House Hotel Company* (No. 2) (4), English cases on the equivalent rule, as authority for saying that where there has been a genuine mistake, the court has jurisdiction to order substitution, and that notwithstanding that the person wrongly named as plaintiff had no right of action.

Counsel for the appellant on the other hand, argued that it was the deceased who was at all times the real plaintiff; that when he died, the authority of Manilal as manager died with him; that six months after the death of the deceased the suit abated and the O. 1, r. 10, could not be used as a "subertfuge" to evade limitation. He submitted that the words "any other person" in O. 1, r. 10 (1) mean a person not before the court, not a person already before the court in another capacity. He argued also that the application should not be viewed sympathetically, having regard to the delay in bringing it.

I think there can be no doubt that the plaint ought to have been drawn in the name of the deceased and not of the manager. This is clear from O. 7, r. 1(1) (*d*), O. 31, rr. 1 and 15 of the Revised Rules. The error was of a formal nature and had an early application been made for substitution of the name of the deceased, it would undoubtedly have been allowed. The two questions that have to be considered, however, are, first, whether the death of the deceased caused the suit to abate, in which case, of course, there would have been no jurisdiction thereafter to make an order of substitution and, secondly, if there is jurisdiction, an order ought to be made having regard both to the delay in making application and to the effect which such an order would have in avoiding limitation.

Before attempting to answer those questions, I will deal briefly with counsel for the appellant's submission that O. 1, r. 10, was inappropriate, in that the rule provides for the substitution of "any other person" whereas the application was for the substitution of the same person in a different capacity. I think that a person in a representative capacity must, for this purpose, be regarded as a person other than himself in his personal capacity or in a different representative capacity. I am unable to cite any authority to support that opinion, but I think it accords with the principles underlying the fatal accidents cases (particularly *Hilton v. Sutton Steam Laundry* (5) and *Finnegan v. Cementation Co*.

Ltd., (6)) and I do not think it is in conflict with the judgment in *Buchanan-Michaelson v. Rubinstein* (7).

On the question of abatement, I think Counsel for the respondent's argument must prevail. "Plaintiff" is not defined in the Civil Procedure Act or, so far as I am aware, in the Rules, but I think that in O. 23, r. 3, it must mean the person in whose name the plaint was filed. The fact that the "real" plaintiff, to use counsel for the appellant's expression, was the deceased is immaterial because the very basis of the application is that the person named as plaintiff is not the person by whom the suit should have been brought.

I would hold, therefore, that there was jurisdiction to grant the application and there remains the question whether that jurisdiction ought to have been exercised.

In England, where, until recently, O. 16, r. 2, was substantially equivalent to our O. 1, r. 10, the courts have taken the view that an order of substitution should not be made when it would have the effect of defeating a defence of limitation. The leading case is *Mabro v. Eagle, Star and British Dominions Insurance Co*. (8), in which Scrutton, L. J., said:

> "In my experience the court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The court has never treated it as just to deprive a defendant of a legal defence."

Greer, L. J., in the same case said:

> "Whether the matter is one of discretion or not, it appears to me inconceivable that we should make an order which would have the effect I have mentioned. [That is, that the defendants would be deprived of the benefit of the Statute of Limitation.] It has been the accepted practice for a long time that amendments which would deprive a party of a vested right ought not be allowed."

That is a principle which should, in my opinion, generally be followed. Its application to the present proceedings is, however, more difficult. At first sight, it would seem to preclude the granting of the present application for amendment, since had the plaint been in the name of the deceased, an application to bring the personal representative onto the record would, according to the view I have already expressed, have been out of time and it would clearly be wrong for a party to benefit from his own error. On the other hand, it cannot be said that the appellant had any "vested right", since O. 23, r. 8 (2), of the Revised Rules enables the court to revive a suit which has abated by reason of the failure of the personal representative to apply in time, "if it is proved that he was prevented by any sufficient cause from continuing the suit". I do not think, therefore, that, in principle, it would necessarily be wrong for a court to allow amendment under O. 1, r. 10, when the period of limitation for an application under O. 23, r. 3, has expired, but I think that amendment should not be allowed unless there is a reason for the delay which would have been sufficient to justify allowing an application under O. 23, r. 8.

In the present case, there was certainly a reasonable excuse for delay in applying under O. 23, r. 3, assuming that application under that rule was appropriate, since the law as available to counsel was that contained in the ruling of Mayers, J., that is, that the period of limitation was three years. But while that excuse would undoubtedly make a court sympathetic towards an application, it would not, in my opinion, of itself, satisfy the requirements of O. 23, r. 8.

Even, however, if the court were satisfied that the application under O. 1, r. 10, need not be rejected as depriving the appellant of the defence of limitation, on which in the present case I do not think it necessary or indeed competent for us

to express an opinion, it would still have to be shown that there was a sufficient reason for allowing it.

It is well settled that a person seeking to amend his pleadings should apply without undue delay, yet in this case Manilal delayed for well over a year after the provisions of O. 21 had expressly been drawn to his attention by the appellant, and he only appears to have pursued this course when he saw that his application under O. 23, r. 3, was likely to be rejected.

An application for amendment is always in the discretion of the court and in my view the court would not have been justified in exercising its discretion in a case where there had been negligence and delay and where the effect of allowing the application would have been, if not to defeat a vested right, at least to defeat a *prima facie* defence of limitation.

I would therefore allow the appeal and dismiss the cross-appeal. I would set aside the order of the learned judge and substitute an order dismissing both the application under O. 23, r. 3, of the Revised Rules and that under O. 1, r. 10. I would award the appellant his costs in this court and the court below, with a certificate for two counsel in this court.

Crabbe JA: I have found this a difficult case due to the confused state of the law, but after having the advantage of reading the judgments of my brothers Duffus and Spry, I have also reached the conclusion that the appeal should be allowed. I agree entirely with their reasons and find it quite unnecessary to write an elaborate judgment on the main issues of limitation and substitution. I wish, however, to make some few observations on some of the points argued before us.

It is not disputed in this appeal that the provisions of the Indian Limitation Act, 1877 govern this case; but the real issue between the parties is whether the period of limitation in an application under O. 23, r. 3 is governed by art. 175A or by art. 178 of the Second Schedule to the Indian Limitation Act, 1877. After comparing the provisions of s. 365 and 366 of the old Indian Code of Civil Procedure, (1882) and those of O. 23 r. 3 of the Kenya Civil Procedure Rules, 1948, and then considering the different consequences resulting by such comparison, the learned trial judge held that art. 178 applied. Now, s. 365 of the old Indian Code of Civil Procedure, (1882) read together with art. 175A deals specifically with an application by the legal representative of a sole plaintiff, when the cause of action survives, to bring himself on record. Article 178 governs an application for which no period of limitation is provided elsewhere in the schedule to the Limitation Act, 1877. O. 23, r. 3 (1) corresponds, with a slight variation in language, with s. 365 of the 1882 Code. It is a fair presumption generally that an alteration in the language used in a subsequent statute is an indication of a change of intention on the part of the legislature. But this presumption is easily displaced when it becomes manifest that giving effect to that intention would lead to absurdity, inconvenience and to a defeat of the purpose of the Act. The overriding purpose of all limitation statutes is based on the *maxim interest reipublicae ut sit finis litium*, and it has been the policy of the courts to lean against stale claims. I can see no reason why the legislature in this particular instance should enlarge the time within which the personal representative of a deceased plaintiff should have himself brought on the record. In my view such a construction as canvassed by counsel for the respondent would not only make art. 175A nugatory or redundant in the 1877 Act, but would also operate to the prejudice of a defendant who has been lulled into a false sense of security and who would have lost all evidence for his defence. The Schedules to the Indian Limitation Act, 1877 are “as much a part of the statute and are as much an enactment as any other part”, and in my judgement

they cannot, except by express language, be overridden by a subordinate legislation.

In this case the only article in the schedule to the Indian Limitation Act, 1877 which deals specifically with the question that arises is art. 175A; art. 178 is a comprehensive section which deals with situations where no period of limitation has been provided in the Act. The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply. In deciding therefore the crucial issue in this appeal I think the maxim of interpretation *generalia specialibus no derogant* is a valuable guide, and accordingly I hold, with every due respect, that the learned judge of the court below erred in applying the residuary art. 178 to the particular case before him.

In his order against which this appeal has been brought, the learned judge of the court below appears to have relied on the judgment of Mayers, J. in *R. M. Patton-Bethune v. Ramji Jethabhai* (1), and his own judgment in *H. P. Tajbhai & Co. Ltd. v. Nathalal Kara* (2). Both judgments dealt with the same question of construction now raised in this present case.

The judgment of Mayers, J. has stood undisturbed for 14 years, and I am not aware of any subsequent judgment in which it has been doubted or criticised. It was submitted by counsel for the respondent that the judgment of Mayers, J. in *R. M. Patton-Bethune v. Ramji Jethabhai* (1), though a decision of a court of first instance and therefore not binding upon this court, has stood from 1952 until now, and that the court should be reluctant to disturb it, unless there are compelling reasons. It must be noted that the two judgments relied upon by the learned trial judge are unreported, and counsel for the appellant, submitted that these judgments are unknown, and that they have not changed the practice of considering six months as the period within which a personal representative may apply to the court under O. 23 r. 3 (1). The principle which the court applies in such circumstances was stated with great clarity by Jessel, M. R. in *Ex p. Willey* (9) ((1883) 23 Ch. D. at p. 127):

> "Where a series of decisions of inferior courts have put a construction on an Act of Parliament, and have thus made a law which men follow in their daily dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding. Of course, that requires two things, antiquity of decision, and the practice of mankind in conducting their affairs."

In *Brownsea Haven Properties v. Poole Corporation* (10) Lord Evershed M.R. also said ([1958] Ch. (C.A.) at p. 603):

> "The cases are not, of course, binding upon this court. But there is well-established authority for the view that a decision of long standing on the basis of which many persons will in the course of time have arranged their affairs should not lightly be disturbed by a superior court not strictly bound itself by the decision."

The Master of the Rolls continues at p. 603–604:

> "The matter was recently considered exhaustively in *Robinson Brothers* (*Brewers*) *Ltd. v. Houghton and Chester-le-Street Assessment Committee* (1937) 2 K.B. 445; 53 T.L.R. 609: (1937) 2 All E.R. 298; (affirmed (1938) A.C. 321; 54 T.L.R. 568; (1938) 2 All E.R. 79). In that case the members of this court, having concluded that a decision upon a question of rating pronounced some

> 40 years previously by a Divisional Court was plainly wrong, overruled it accordingly: though the earlier decision had without doubt been frequently acted upon in rating matters in the meantime, and though no judicial doubt had previously been cast upon its correctness."

The longer a precedent has stood unquestioned and unreversed, the more vigour it gains by the lapse of time. Just how long a precedent shall stand to become inviolate depends upon the circumstances of each case. In *Pugh v. Golden Valley Railway Co*. (11) it was thought that a period of twelve years and upwards was sufficient to induce the court to decline to upset its earlier decision in the case of *R. v. Wycombe Railway Company* (12) decided in 1867 on practically the same point.

It is the duty of the courts to maintain as far as practicable a uniform interpretation of a statute, and it should avoid disturbing any previous exposition it has received. But this rule only applies when transactions relating to property have been made, or contractual rights have been created, on the strength of a particular construction placed upon a statute by the earlier decision. Besides, this court is free to interpret a statute afresh if it is convinced that an earlier interpretation was clearly wrong and "productive of inconvenience".

Agreeing as I do with the judgments of Duffus and Spry, JJ.A., I think, with every respect possible, that the interpretation of O. 23, r. 3, by both Mayers, J., and Edmonds, J. was erroneous, and if I may use the words of Lord Sumner in *Pate v. Pate* (13) ([1915] A.C. at p. 1108):

> "(This) is not one of those cases in which inveterate error is left undisturbed because titles and transactions have been founded on it which it would be unjust to disturb . . . nor is it in any case sound to misconstrue a statute for fear that in particular instances some hardship may result. That is a matter for the Legislature, not for the courts."

The appeal is accordingly allowed, and the order of Edmonds, J. is set aside and there will be orders in the terms proposed by Spry, J.A.

I have the authority of my two brothers to draw attention to the unsatisfactory state in which the limitation enactments of Kenya are at the present time. The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand to protect a defendant after he had lost the evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case. It is most desirable that legislation which prejudicially affects the rights of citizens should be readily accessible. In this connection we think that the present limitation enactments which refer to certain archaic Indian legislation should be swept away, and that a clear and comprehensive limitation law best suited to the needs of Kenya should be introduced as soon as practicable.

Duffus JA: I have had the advantage of reading the draft judgment of Spry, J.A. This case is an instance of the complications which may arise over the years by the adoption of the legislation of another country In this case the applicant/respondent applies as administrator of the estate of Mohanlal Karamshi Shah, deceased, to be substituted as the plaintiff in a Supreme Court action between the deceased and some five defendants, including the present appellant, D. V. Mehta.

In the original action the administrator brought this action as manager of the estate of the deceased who was then alive but said to be of unsound mind. The cause of action was founded on a claim for moneys due and owing and it was agreed that the cause of action continued and did not abate on the death

of the deceased. The administrator bases his application on two separate rules of the Civil Procedure (Revised) Rules, 1948, of Kenya, that is (*a*) under O. 23, r. 3, which enables the legal representative of a deceased plaintiff to be made a party to and proceed with the suit and (*b*) under O. 1, r. 10 which gives a court power where a suit had been brought in the name of a wrong person as plaintiff to substitute the correct person as plaintiff.

The motion was opposed and the court below, after hearing submissions by counsel, granted the application under O. 23, r. 3 and substituted the administrator as plaintiff. The court, having granted this application, did not proceed to consider whether the provisions of O. 1, r. 10 would apply. The first defendant, Mehta, appeals against this order; the other four defendants have not appealed and are not parties to this appeal.

There are some eleven grounds of appeal but apart from one ground on the question of costs, all the other grounds aver that the learned judge was wrong in holding that s. 178 of the Indian Limitation Act of 1877 applied and not s. 175A. The appellant asks that the decision be reversed and that this court substitutes a finding that the application by the administrator to be substituted for the plaintiff is barred by limitation There is a cross-appeal asking that this court, if it finds that the judge should not have made an order under O. 23, r. 3, then finds that the judge ought to have substituted the administrator as the correct plaintiff under O. 1, r. 10.

It is agreed that the provisions of the Indian Limitation Act, 1877, apply by virtue of s. 41 of the Limitation Ordinance, Cap 11 of the Laws of Kenya, and the dispute then is whether the provisions of art. 175A or those of art. 178 should apply. Article. 175A states:

> "Under s. 365 of the Code of Civil Procedure, by the legal representative of a deceased plaintiff . . .; six months from the date of the death of the deceased plaintiff. . ."

whilst art. 178 states:

> "Application for which no period of limitation is provided elsewhere in this schedule, or by the Code of Civil Procedure, s. 230; three years from the date when the right to apply accrues."

The provisions of the Indian Civil Procedure Code applied to Kenya until the enactment of the Civil Procedure Ordinance of Kenya in 1924 (No. 3 of 1924). The relevant procedure is at present set out in the Civil Procedure (Revised) Rules, 1948, in O. 23, r. 3. The old procedure was set out in ss. 365 and 366 of the Indian Civil Procedure Code.

The learned judge, following the ruling of Mayers, J. in the case of *R. M. Patton-Bethune v. Ramji Jethabhai* (1) held that the provisions of s. 178 applied and that the application was accordingly within time and he ordered that the action should proceed in the name of the administrator.

The application of the Indian Limitation Act to Kenya has to be considered under three different statutory provisions. There is first the provision of s. 4 of the Indian Acts (Amendments) Ordinance (Cap. 2 of the 1948 Edition), which reads:

> "4. Where any Indian Act is applied to the Colony such Act shall be read with such formal alterations as to names, localities, courts, officers, persons, moneys, penalties and otherwise as may be necessary to make the same applicable to the circumstances."

This was the provision of the law relied on by counsel in their arguments

before us and in the lower court and also by Mayers, J. and Edmonds, J. in their judgments.

There is also the provision of s. 106 of the Civil Procedure Ordinance, 1924, which states:

> "In every enactment or notification passed or issued before the commencement of this Ordinance in which reference is made, to or to any chapter or section of the Indian Code of Civil Procedure of 1882, or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Ordinance or its corresponding part, order, section or rule."

This ordinance came into effect on January 21, 1924, but s. 106 was omitted in the 1948 reprint. This possibly accounted for the fact that it was not referred to by counsel in their submissions before us or by Mayers, J. or Edmonds, J. in their judgments. This court, after hearing the appeal and reserving judgment, re-opened the matter, to allow counsel the opportunity of addressing us on the question as to whether this section was still in force and if so as to its effect on the issue before us. Spry, J.A. has dealt fully with this question in his judgment and I agree with his conclusions that this section was inadvertently omitted by the Commissioners when revising the laws and that the section is accordingly still valid and subsisting.

There are also the provisions of s. 23 (2) of the Interpretation Ordinance which states:

> "(2) Where a written law repeals or re-enacts, with or without modification, any provision of a former written law, references in any other written law to the provisions so repealed shall, unless a contrary intention appears, be construed as references to the provision so re-enacted."

Spry JA: drew this section to the attention of counsel during the appeal and we heard counsel as to its effect on this appeal. Counsel for the respondent, submitted that this section must be construed, together with s. 4 of the Indian Acts (Amendments) Ordinance. I agree that this is so. In deciding this matter due weight must be given to all these various provisions of the law.

It is necessary then to consider and compare the provisions of s. 365 of the Indian Civil Procedure Code and those of O. 23, r. 3 of the Kenya Civil Procedure (Revised) Rules and see whether these sections are "corresponding" sections as referred to in s. 106 of the Kenya Civil Procedure Ordinance. In comparing these sections it will be necessary also to consider, along with those of s. 365, the provisions of s. 366 of the Indian Civil Procedure Code since both of these two sections are replaced by r. 3 of O. 23. I would here set out the provisions of those sections:

> "365. In case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of the deceased may, where the right to sue survives, apply to the court to have his name entered on the record in place of the deceased plaintiff, and the court shall thereupon enter his name and proceed with the suit."
>
> and
>
> "366. If within the time limited by law no such application be made to the court by any person claiming to be the legal representative of the deceased plaintiff, *the court may pass an order that the suit shall abate*, and shall, on the application of the defendant, award to the defendant the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff;

> or the court may, if it think proper, on the application of the defendant, and upon such terms as to costs or otherwise as it thinks fit, pass such other order as it thinks fit for bringing in the legal representative of the deceased plaintiff, or for proceeding with the suit in order to a final determination of the matter in dispute, or for both these purposes."

Whilst the provisions of O. 23, r. 3 read:

> "3 (1). Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff of sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.
>
> (2). Where within the time limited by law no application is made under sub-r. (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff."

I agree with Mayers, J. that for the purposes of this case that ss. 365 and 366 must be read together, especially as O. 23, r. 3, combines the procedure to be followed in the case of the death of a plaintiff, not only by the legal representative of the deceased plaintiff but also by the defendant. In the former Indian Civil Procedure Code applications by the defendant were made under s. 366, whilst under our present r. 3 (1) the application can be made by either the plaintiff's representative or by the defendant, the relevant words in the section being "the court, on an application made in that behalf, shall cause . . .".

The other substantial difference introduced by O. 23, r. 3, is that under the former provisions of s. 365 and 366 the action only abated on an order of the court whilst under r. 3 (2) the action now automatically abates if no application is made for the substitution of the legal representative of a deceased plaintiff within the time prescribed.

I cannot, therefore, agree that the provisions of O. 23, r. 3 (1) are substantially the same as those of s. 365, as r. 3 (1) applies to applications both by the plaintiff's representative and the defendant whilst s. 365 only applies to applications by the plaintiff's representative. I agree though that r. 3 as a whole substantially contains the same provisions as the combined effect of ss. 365 and 366, with the exception of the new provision for the suit to automatically abate and not only on an order of the court.

The question then arises as to the time limit prescribed for applications by the plaintiff's representative under s. 365 and for applications by the defendant under s. 366. The limitation in respect of applications under s. 365 is prescribed by art. 175A of the Indian Limitation Act, whilst that for applications by the defendant under s. 366 is prescribed by art. 175B. This limitation is fortuitously the same as that under art. 175A. Article 175B reads:

> "Under s. 366 of the Code of Civil Procedure, by a defendant, . . .; six months from the date of the death of the deceased plaintiff . . .".

It does not affect the decision in this case but the strange position arose under s. 366 that although the court could not act on its own accord or on the application of the defendant, unless and until the legal representative of the plaintiff had failed to apply within the time limitation, yet any application by the defendant had also to be made within this same period of six months without the defendant at the time in fact knowing whether or not any application was necessary or would lie.

The position then would be whether the six months' limitation imposed by art. 175A and 175B or the three-year limitation under art. 178 would apply to an application made under O. 23, r. 3 (1). It does appear that O. 23, r. 3 would, subject to the differences which I have mentioned, be the corresponding section or rule to the combined provisions of s. 365 and 366 of the Indian Civil Procedure Code and would therefore appear to be within the purview of s. 106 of the Civil Procedure Ordinance of Kenya and that, accordingly, the reference under arts. 175A and 175B of the Indian Limitation Act to ss. 365 and 366 of the Indian Civil Procedure Code would, on the face of it, be a reference to O. 23, r. 3, and this would be a workable proposition as the limitation under both arts. 175A and 175B is exactly the same.

Before, however, applying the time limitation provided by arts. 175A and 175B, I think it is necessary, in order to comply with the words "so far as may be practicable" in s. 106, to consider the substantial differences between the sections and also the general effect of the various provisions and also the rights vested in the plaintiff's estate and in the defendants under the old law and at present.

In his judgment in *R. M. Patton-Bethune v. Ramji Jethabhai* (1) Mayers, J. found that the provisions of art. 175A could not apply because of the difference between the old law where the suit remained alive until the court ordered it to abate and the present law where the suit abates automatically.

There is, however, the consideration that the plaintiff's estate would appear to be no better off with a suit in which no order for abatement had been made under s. 366 than a suit which automatically abates under O. 23, r. 3, for the reason that the plaintiff's representative or the plaintiff's estate can take no further action in a suit unless and until they obtain an order for substitution as plaintiffs, and this they could not do if the period within which to apply had expired.

I would, however, refer here to the provisions of s. 371 of the Indian Civil Procedure Code. This section prevents a fresh action being brought on the same cause of action when an order has been made for the suit to be abated or dismissed. I doubt if this provision would assist the plaintiff's estate as any fresh action brought on the same cause of action whilst the old suit was in existence would be liable to dismissal under section 12 of the Indian Civil Procedure Code or for that matter under the inherent jurisdiction of the court as being an abuse of the court's process. Section 371 then goes on to give the plaintiff's legal representative a right to apply to set aside the order for abatement or dismissal, but the representative cannot make this application until the order for abatement or dismissal has been made and the time within which the application would have to be made does not commence to run until the making of this order. The position is different now where the abatement is automatic and no order has to be made and thus the period of limitation within which to apply to revive the suit starts to run immediately that the time within which the representative had to apply for substitution expired. Formerly the period did not commence until the actual order had been made. This order was made by the court *suo mutuo* and there was no provision made whereby the representative of a plaintiff's estate could apply for this order to be made. The practice in India, however, appears to have been that the legal representative of the plaintiff's estate could, by the same application, ask that an order for abatement should be made and then that a further order be made reviving the suit. I refer to note 9 on O. 22, r. 9 in Chitaley's Code of Civil Procedure, 5th Edn. p. 2721, and to the cases of *Fulvahu v. Goculdas Valabdas* (14) which followed the ruling in *Bhoyrub Dass Johurry v. Doman Thakoor* (15). In this respect, therefore, the plaintiff's estate was in a more advantageous position under the old law than under the present Civil Procedure Code.

On the other hand, under the former law once an order for abatement was made the plaintiff's representatives had, by virtue of art. 171, to apply under s. 371 of the Civil Procedure Code for the suit to be revived within sixty days of the order but now, as Mayers, J. points out in his judgment, this period of a sixty day limitation could hardly be applied to applications under O. 23, r. 8, as at present no order for abatement is made. It does appear, therefore, that the period of limitation for applications under r. 8 would at the present time be three years under art. 178 and not as before, sixty days under art. 171.

Then there is the defendant's position under O. 23, r. 3 (2). A defendant can apply for costs when the period of limitation has elapsed and the suit has automatically abated. It would therefore be impossible for the same period of limitation to apply to an application for the substitution of the legal representative of a deceased plaintiff and for an application for costs under r. 3 (2). The solution would appear to be either for the defendant to make his application for costs before the event giving rise to this took place as would appear to have been the case under s. 366 of the former Indian Civil Procedure Code or else to apply the six months' limitation under arts. 175A and 175B to applications under sub-s. (1) of r. 3 and the three-year limitation under art. 178 to the defendant's applications for costs under sub-s. (2).

It would appear that the most practicable solution here would be to apply the six months' limitation under arts. 175A and 175B to applications to substitute the plaintiff's representative under sub-s. (1) of r. 3 and to apply the three-year limitation under art. 178 to applications for costs under sub-s. (2) of r. 3.

After much consideration I am of the view that the provisions of s. 106 of the Civil Procedure Ordinance would apply. Rule 3 requires that there be a period of limitation within which applications of this nature have to be brought, and it is a fact that both ss. 365 and 366 of the former Indian Civil Procedure Code and the present O. 23, r. 3, deal generally with the position that arises when a plaintiff dies in a suit in which a cause of action survives for the benefit of his estate, and in particular deals with applications to allow the suit to be carried on by the legal representative of the deceased plaintiff. The provisions under O. 23, r. 3, are the provisions at present in existence in Kenya corresponding to the provisions of ss. 365 and 366 in the former Indian Civil Procedure Code, and the six months limitation under arts. 175A and 175B would appear to be practicable and, indeed, more convenient than any other limitation period. This would also mean that the same period of limitation that existed in Kenya in 1924 before the Civil Procedure Ordinance came into force continues and it does not appear that the legislation in Kenya intended to change that period of limitation.

I therefore agree with Spry, J.A. that the period of limitation is that set out in arts. 175A and 175B of the Indian Limitation Act, that is, six months from the date of the death of the deceased plaintiff.

The cross-appeal only arises if this court holds that the action has abated under the provisions of O. 23, r. 3. If the court so holds then the applicant/respondent asks that the court act under the provisions of O. 1, r. 10 of the Civil Procedure (Revised) Rules, 1948, and substitute as plaintiff the applicant as the legal representative of the deceased, M. K. Shah. It is a fact that the suit was wrongly brought by M. M. Shah, as manager of the estate of M. K. Shah "who is unable to manage his affairs due to mental disorder", and that under the provisions of O. 21 of the Rules that the suit should properly have been brought in the name of the person of unsound mind, M. K. Shah, by M. M. Shah as his next friend. This was, however, only an error as to the plaintiff's description and it was very clear from the suit and from the pleadings that the real plaintiff was the deceased, the person of unsound mind, and that the action was being brought by M. M.

Shah on his behalf because he was of unsound mind and unable to act for himself. M. M. Shah was only the "nominal" plaintiff, the real plaintiff was M. K. Shah, the deceased. The debt was due to the deceased, it was not due to the manager, M. M. Shah. The cause of action was vested in the deceased and the suit would, on the death of the deceased, have abated unless, under the provisions of O. 23 r. 1, the cause of action survived. I am, therefore, of the opinion that the plaintiff referred to in O. 23, r. 3, was M. K. Shah, the deceased, the person in whom the cause of action in this suit was vested, and accordingly this suit had already abated when this present application was brought, and therefore no application can now be made under O. 1, r. 10, to substitute another plaintiff.

If this was not so then the court would not allow a party to, by his own mistake or deliberate act, deprive an innocent defendant of a vested right which he would have acquired under the Limitation Act, and this would be the case here if the court now ordered a substitution. The court has a discretion to act under O. 1, r. 10, and in any event this is a case where, in my view, the court would, in the exercise of its inherent jurisdiction and in order to prevent an abuse of its process and a miscarriage of justice, refuse this application.

I agree with Spry, J.A. that this appeal be allowed and the cross-appeal dismissed and I further agree with the order that he proposes, including his order as to costs.

Appeal allowed. Cross-appeal dismissed.

For the appellant:
SC Gautama and *Zool Nimji*
Satish Gautama, Nairobi

For the respondent:
Bryan O'Donovan QC and *IT Inamdar*
Inamdar & Indamdar, Mombasa

Kamrudin Mohamed and another v Hilda Mary Coelho and others

[1965] 1 EA 336 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	12 April 1965
Case Number:	107/1964 (OS)
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Administration of estates – Gift cum onere – Real property mortgaged – Specific devise of whole of property – Will providing for payment of debts from residuary estate – Property mortgaged after

execution of will – Liability of devisee or residuary estate for mortgage moneys – Whether devisee entitled to property free from liability or liable for contribution – Succession Ordinance (*Cap.* 34) *s.* 154 *and s.* 291 (*U*).

Editor's Summary

A testator had executed his will in 1952 under which he had bequeathed certain leasehold property to the first defendant and under cl. 4 of the will he left the residue of his real and personal estate to his trustees, the plaintiffs, upon trust, to pay all his debts and funeral and testamentary expenses and subject thereto on trust for sale and division among the beneficiaries, including the first defendant who was entitled to fifty per cent of the residue. In 1954 the testator mortgaged the leasehold property together with another property by way of an equitable mortgage to obtain a loan from a bank. The testator died in 1960 owing the bank a sum of Shs. 140,857/- and after his death the bank consolidated the estate account into one "Executors Account" which then together with interest due thereon stood at the sum of Shs. 148,026/-2. This sum was repaid to the bank from moneys realised from the testator's life assurance policies and with moneys derived from other assets of the testator. Thereupon the "Executors Account" was discharged and closed and the securities were released. Subsequently the trustees applied to the court for determination of

two questions, (*a*) whether the first defendant was entitled to receive the leasehold property free from obligation to contribute towards the payment to the bank of the sum of Shs. 148,026/92 due to the bank by the estate of the testator and (*b*) if not, what proportion should be borne by the leasehold property? It was submitted for the trustees that having regard to the provisions of s. 154 and s. 291 of the Succession Ordinance, the leasehold property was liable to contribute towards the payment of the testator's debt to the bank since no contrary intention was expressed in the will. For the first defendant it was submitted that by the provisions of cl. 4 of the will relating to the residuary legacy, the testator had expressed a contrary intention since the trustees were therein enjoined to pay the debts from the residuary estate.

Held –

(1) Section 291 of the Succession Ordinance was not applicable to the facts and circumstances of the case as the provisions of that section only apply to a situation in which the property specifically bequeathed had not in any way directly or indirectly been charged with the payment of the testator's debts;

(ii) the testator by depositing with the bank the title deed of the leasehold property, together with other properties real and personal by way of security for advances made to him by the bank, had expressed a desire that all the properties so charged should be subject to the payment of the debt owed to the bank, and accordingly the leasehold property, although not primarily charged with the payment of the debt, ought to make contribution towards the payment of such debt;

(iii) clause 4 of the will did not specifically charge the residue of the estate with payment of the testator's debts but it merely enjoined the trustees to pay the testator's debts, which the trustees were bound to do in any event;

(iv) the testator had not expressed a contrary intention and having regard to the provisions of s. 154 *ibid*. it would be equitable that the leasehold property should contribute towards the payment of the testator's debt owed to the bank;

(v) for the payment of the testator debt to the bank, the trustees should first have recourse to the property of the testator not specifically bequeathed or devised, only resorting to the leasehold property as the last resort.

Order accordingly.

Cases referred to in judgment

(1) *Lipscomb v. Lipscomb* (1868), L.R. 7 Eq. 501.

(2) *Leonino v. Leonino* (1879), 10 Ch. D. 460.

(3) *Re Biss, Heasman v. Biss*, [1956] 1 All E.R. 89.

Judgment

Sir Udo Udoma CJ: This is an application by originating summons by the above named trustees under the Will of Frederick Joachim Paschal Abreo, (deceased). The court is called upon to determine two questions, namely:

1. Whether Mrs. Iris Hilda Mary Coelho, a beneficiary under the will of the deceased, is entitled to

receive the premises known as 11, Cooper Road, Kampala, free from obligation to contribute to the National Bank of India Limited (now National & Grindlays Bank Ltd.) in respect of the sum of Shs. 148,026/92 owing to the said Bank by the estate of the deceased.

2. If Mrs. Iris Hilda Mary Coelho is not entitled to receive 11, Cooper Road, Kampala, aforesaid free from any liability to contribute as aforesaid, what

proportion of the said cum of 148,026/92 should be borne by 11 Cooper Road, Kampala?

In the affidavit supporting this application, the uncontradicted facts and circumstances giving rise to the above questions are set out, and may be summarised as follows:

By cl. 3 of his will dated June or July 1952, the deceased testator bequeathed his leasehold property then known as Plot No. 6, Shop Site, Kololo (now as 11, Cooper Road, Kampala) on the leasehold register Vol. 274 Folio 14 to Mrs. Iris Hilda Mary Coelho, the first defendant herein.

By cl. 4 of the said will, the deceased testator also gave, devised and bequeathed the residue of his real and personal estate whatsoever and wheresoever unto his trustees, the plaintiffs upon trusts to pay thereout all his just debts, funeral and testamentary expenses and subject thereto on trust for sale and division among sundry persons therein named in varying proportions, the first defendant being therein entitled to fifty per cent of the said residue.

Thereafter on September 20, 1954 the testator deposited his duplicate certificates of title to a freehold property on the Register of Titles Vol. 75 Folio 17, and to the leasehold property, 11, Cooper Road, aforesaid with the National Bank of India Ltd. (now known as National & Grindlays Bank Ltd.); executed a promissory note in favour of the Bank for Shs. 200,000/- payable on demand together with interest due thereon; and also lodged with the Bank as further security his life insurance policies Nos. 508742, 527675 and 532368 issued by the National Mutual Life Association of Australasia Ltd.

Then on September 23, 1954 the Bank caused caveats to be lodged claiming an equitable interest as an equitable mortgagee on the Freehold Register aforesaid and on the Register of the leasehold property 11, Cooper Road, aforesaid.

In or about the years 1955/56 the testator caused a building to be erected at 11, Cooper Road, Kampala, the property already bequeathed to the first defendant.

On February 23, 1959 when the testator was owing the bank a total of Shs. 164,285/97; his Nos. 1 and 2 accounts being then overdrawn by the sums of Shs. 233/37 and Shs. 164,238/26 respectively and his savings account being in credit in the sum of Shs. 184/66, he by a memorandum declared that the certificates of title relating to the freehold property aforesaid and to the leasehold property 11, Cooper Road aforesaid had been deposited by him with the Bank to secure all moneys then and thereafter to become owing to the bank.

Then on October 1, 1959 the testator assigned his insurance policies Nos. 1071355 to 1071357 issued by Manufacturers Life Insurance Co. Ltd. upon his life in favour of the bank authorising the said bank to hold the same as security against advances made or to be made to him by way of overdraft on his current account or for any other obligations to the Bank.

The testator died on September 6, 1960, owing the bank the sum of Shs. 140,857/42; his No. 2 account being overdrawn by Shs. 141,304/18 and his No. 1 account and savings account being in credit in the sum of Shs. 431/88 and Shs. 14/88 respectively, and the sum of Shs. 1330/- being the interest accrued due on the amount owed. The total mortgage debt therefore due to the bank and secured as aforesaid on the death of the testator was Shs. 142,187/-.

After the death of the testator, the bank consolidated the estate account into one “Executors Account”, which then together with the interest due thereon stood at the sum of Shs. 148,026/92.

For the payment of that debt, the plaintiff, with the leave of the bank realised the sum of Shs.

67,541/42 from the testator’s life assurance policies and paid

the same over to the bank in satisfaction of the overdraft upon the "Executors Account"; and the balance of Shs. 80,485/50 was paid by the plaintiff/applicants with moneys derived from other assets of the testator not mortgaged to the bank. Thereupon the Executors Account was on February 6, 1962 discharged and closed and the securities upon which the debts were charged were accordingly released and discharged by the bank aforesaid.

Now, in those circumstances the question is; Is Mrs. Iris Hilda Mary Coelho, the beneficiary to whom 11, Cooper Road, Kampala was bequeathed under the testator's will, entitled to take the premises free from any obligation to contribute towards the payment to the National & Grindlays Bank Ltd. of the sum of Shs. 148,026/92 owed to the bank by the testator at the date of his death?

Counsel for the plaintiff, and counsel for the 6th defendant, a residuary legatee, have answered that question in the negative, while counsel for the 1st defendant, answered it in the affirmative.

In support of their contention, counsel for the plaintiff referred the court to *Lipscomb v. Lipscomb* (1) 501, and *Leonino v. Leonino* (2) and in *Re Biss* (3), and contended that having regard to the provisions of ss. 154 and 291 of the Succession Ordinance, Cap. 34, 11, Cooper Road, Kampala, was liable to contribute towards the payment of the testator's debts since no contrary intention was expressed in the testator's will.

For the 1st defendant it was submitted that by the provisions of cl. 4 of the will relating to the residuary legacy, the testator had expressed a contrary intention since the plaintiff were therein enjoined to pay the testator's debts from the residue of his estate.

The provisions of ss. 154 and 291 of the Succession Ordinance are in the following terms:

> "154. Where property specifically bequeathed is subject, at the death of the testator, to any pledge, lien, or incumbrance, created by the testator himself or by any person under whom he claims, then unless a contrary intention appears by the will, the legatee, if he accepts the bequest, shall accept it subject to such pledge or incumbrance, and shall (as between himself and the testator's estate) be liable to make good the amount of such pledge or incumbrance.
>
> A contrary intention shall not be inferred from any direction which the will may contain for the payment of the testator's debts generally."
>
> And
>
> "291. Where there is a specific legacy, and the assets are sufficient for the payment of debts and necessary expenses, the thing specified must be delivered to the legatee without any abatement."

I do not think that s. 291 of the Succession Ordinance is applicable to the facts and circumstances of the instant case. I am of the view that those provisions only apply to a situation in which the property specifically bequeathed had not in any way directly or indirectly been charged with the payment of the testator's debts. On the facts of this case, I find that the testator by depositing with the bank the title deed of 11, Cooper Road, Kampala, together with other properties real and personal by way of security for advances made to him by the bank, had expressed a desire that the property be taken into account with the other properties so charged for the payment of debts owed to the bank. It seems clear therefore that 11, Cooper Road, Kampala, though not primarily charged with the payment of the debt, ought to make contribution towards the payment of such debt.

I think also that it would be wrong to hold that by cl. 4 of the will the testator had specifically charged the residue of his estate with the payment of his debts. The provision of cl. 4 of the will is in the usual terms and merely enjoins the plaintiff to pay the testator's debts, which the executors were bound to do in any event. In any case, I think the provision such as is contained in cl. 4 is expressly excluded by the provisions of s. 154 of the Succession Ordinance. If it was the intention of the testator that 11, Cooper Road be not burdened with the testator's debts that intention cannot be read into cl. 4 but should have been expressed in cl. 3 of the will, the provisions of which are as follows:

> "3. I bequeath my leasehold property registered under Leasehold Register Volume 276, Folio 14 and known as Plot No. 6, Shop Site, Kololo to Mrs. Iris Hilda Mary Coelho wife of James Salvador Walter Coelho, Clerk of the Police Department, Kampala, Uganda."

On a mere matter of construction, it seems apparent that the above provision does not exempt 11, Cooper Road from liability for the payment of the testator's debt. The testator has not therein expressed any contrary intention having regard to the terms of s. 154 of the Succession Ordinance.

In *Re Biss, Heasman v. Biss & Others* (3) 89 it was held that, on the application of s. 35 of the English Administration of Estates Act, 1925, which had replaced the Real Estates Charges Act, 1854, the fact that the testator therein had directed payment of his debts out of his residue was not itself enough to signify contrary intention. The provisions of s. 35 (2) of the English Administration of Estates Act, 1925 are similar to the provisions of s. 154 of the Succession Ordinance.

There the testator in 1950 borrowed £10,000 from a bank and secured repayment thereof with:

(*a*) mortgage of property called Denver Lodge;

(*b*) mortgage of other real property;

(*c*) a charge on shares in a building society; and

(*d*) a guarantee by his wife.

By his will dated November 2, 1951, the testator devised Denver Lodge specifically to the plaintiff absolutely and gave the residue of his property, which included real property mortgaged to his bank to secure repayment of the £10,000 and the building society shares so mortgaged, to his trustees on trust after payment thereout of all his debts, funeral and testamentary expenses, to divide the same equally between two other persons. The testator further provided by his will that if the plaintiff or her successors in title desired to sell Denver Lodge, the purchaser should have an option to buy it for £2,000.

The secured debt due to the bank at the testator's death was about £7,328, and the proportion attributable to Denver Lodge amounted to about £3,700.

On the question what part, if any, of the debts to the bank outstanding should be borne by Denver Lodge, it was held that so much of the property charged to the bank as was comprised in the residuary gifts should be applied towards the discharge of the bank secured debt before property specifically devised, namely Denver Lodge.

In *Leonino v. Leonino* (2) a testator, a merchant, was in the habit of borrowing money from his bank from time to time; depositing securities with them upon the occasion of each advance; and, on March 29, 1876, his total indebtedness amounted to £62,000, for which his bank held various stocks and shares as security. On March 30, 1876 the testator applied for a further advance of £15,000 and executed a memorandum by which he charged that sum upon his freehold property at Caterham, and agreed that the security was to cover any money due from time to time from him to his bank. He at the same time

deposited the title deeds of the Caterham property with his bankers. He received the £15,000 and also further advances at subsequent dates; and he also subsequently deposited with the bankers certain further securities, including the title deeds of freehold and leasehold property, stocks and shares, but no subsequent memorandum was executed. Some of the stocks and shares were sold by the bankers in the testator's lifetime and the proceeds applied in reduction of the debt which at his death stood at £28,625.

It appeared from the memo book kept by the testator and from his ledger that the successive advances and the successive deposits were treated by him as forming one running account. By his will, he devised his Caterham property to certain persons and devised, and bequeathed his residuary real and personal estates in trust for sale and to divide the proceeds, after payment thereout of his debts, among certain other persons.

It was held that the debts due at the testator's death and the interest thereon from that date must be borne by the various properties then held by the bankers' rateably according to their respective values at the date of the death of the testator.

Of the two decisions set out above, I am more attracted to the decision given in *Re Biss* (3) as I am inclined to the view that in the circumstances of the instant case the residue appears to be adequate to meet the debts of the estate, without the plaintiff having recourse to the leasehold property specifically bequeathed to the 1st defendant since on the evidence, the debt has already been fully paid by the plaintiff herein, albeit by the realisation of some of the securities mortgaged to the bank. This court however has no information as to the balance of the residue.

On the other hand there are also other beneficiaries entitled to share in the residue and whose interest cannot be ignored. For, from the will, it seems to have been the intention of the testator that all beneficiaries should benefit from his estate.

This court is of course not bound to adopt and apply the principles contained in either of the decisions in the two cases referred to above, based as they were on the construction of the wills concerned in both cases and the application of English statutes. The decision of this court must therefore be governed by the terms of the testator's will and the application of the Succession Ordinance to the facts established on the evidence.

On a careful examination of the provisions of cl. 3 of the testator's will and the facts and circumstances of the instant case, and having regard to the terms of s. 154 of the Succession Ordinance, I have reached the conclusion that the question whether Mrs. Iris Hilda Mary Coelho, a beneficiary under the will of the deceased, is entitled to receive the premises known as 11, Cooper Road, Kampala, free from any obligation to contribute to the National Bank of India Ltd. (now the National & Grindlays Bank Ltd.) in respect of the sum of Shs. 148,026/92 owing to the said bank by the estate of the deceased, must be answered in the negative. I am inclined to the view that it will be equitable that the property 11, Cooper Road should contribute towards the payment of the testator's debts owed to the bank at the date of the death of the testator. That view would best accord, I think, with the intentions of the testator. For by depositing the title deed of the property with the bank to secure his debts, it must be presumed that it was his intention that the property be also charged with the other properties with the debt, especially having regard to the fact that the deposit was made after the property had been bequeathed to the 1st defendant.

I think the proper order to make in the circumstances should and must be, that for the payment of the testator's debt to the bank, the plaintiff should first

have recourse to the property of the testator not specifically bequeathed or devised, only resorting to 11, Cooper Road as the last resort. Direction accordingly. Costs of this application to be paid out of the estate.

Order accordingly.

For the plaintiffs:
OJ Keeble
Hunter & Greig, Kampala

For the first defendant:
YV Phadke
Parekhji & Co, Kampala

For the sixth defendant:
MK Joshi
MK Joshi, Kampala

Indian Building Contractors Ltd v R B Purohit
[1965] 1 EA 342 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	3 June 1965
Case Number:	34/1964
Before:	Newbold VP, Crabbe and Spry JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Bennett, J

[1] Company – Scheme of arrangement – Contingent liability – Action for general damages against company pending – Court order for compulsory winding-up of company – Meeting of creditors for considering scheme of arrangement – Court order that notice of meeting to be given to each creditor – Notice not given to plaintiff – Plaintiff absent from meeting – Scheme of arrangement approved by meeting – Scheme sanctioned by Court – Appointment of provisional liquidator rescinded – Judgment awarding damages given after scheme sanctioned – Whether scheme of arrangement binding upon judgment creditor – Meaning of "creditor" in Companies Act 1958, *s.* 207 [*U*].

Editor's Summary

In February 1959, the respondent sued the appellant company and another person claiming general

damages for breach of a building contract. In November 1959, a petition was filed for compulsory winding of the company by another creditor and the Official Receiver was appointed provisional liquidator. Subsequently pursuant to an order made by the court under s. 207 of the Companies Act, 1958, a meeting of creditors was called and the statutory majority of them approved a scheme of arrangement. Although the court had ordered that notice of the meeting should be served on each creditor no such notice was sent to the respondent because he was not regarded as a creditor and consequently he did not attend the creditor's meeting. The scheme was later sanctioned by the court and the court rescinded the appointment of the provisional liquidator. In February 1963, judgment was given whereby the appellant company became liable for Shs. 7,935/- for damages and Shs. 7,075/05 as taxed costs. By agreement of the parties a case was then stated to the court under O. 32 of the Civil Procedure Rules for a ruling whether the respondent was entitled to payment in full from the appellant company or whether the respondent was bound by the scheme of arrangement sanctioned by the court. The judge held that by reason of s. 313 of the Companies Act, the respondent was a creditor at the date when the scheme of arrangement was sanctioned by the court, but that the respondent was not bound by the scheme as he had no notice of the meeting and no opportunity to oppose the scheme. The appellant appealed mainly on the ground that, having held that the respondent was a creditor, the judge erred in forming the view that he was not bound by the scheme of arrangement. The respondent cross-appealed on the ground that the judge was wrong in holding that he was

a creditor of the appellant company at the time when notice calling a meeting to approve the scheme of arrangement was issued.

Held –

(i) once a scheme of arrangement is sanctioned by the court under s. 207 of the Companies Act, 1958 it is unimpeachable by any of the creditors whether they were parties to it or not, except in the form of an appeal prescribed by s. 77 of the Civil Procedure Act;

(ii) the object of s. 207 (2) is to enable the specified majority to bind all the creditors and the judge erred in holding that the respondent was not bound by the scheme of arrangement sanctioned by the court; further it was immaterial whether or not the respondent was absent at the meeting and the failure to give notice of the meeting to the respondent did not *ipso facto* entitle him to dissent from the scheme;

(iii) having regard to the development of company law in England the word "creditor" in s. 207 ibid. must be interpreted widely to include every person who has a pecuniary claim against the company, whether actual or contingent and accordingly the respondent was a creditor within s. 207.

Appeal allowed. Cross-appeal dismissed.

[**Editorial note:** Judgment of the High Court reported at (1964) E.A. 281 reversed.]

Cases referred to in judgment

(1) *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co*. (1891), 1 Ch. 213.

(2) *Nicholl v. The Eberhardt Company* (1889), 59 L.J. Ch. 103.

(3) *Re Securities Insurance Co*. (1894), 2 Ch. 410.

(4) *Re Midland Coal Cole & Iron Co., Craig's claim* (1895), 1 Ch. 267.

(5) *Re Anglo-Spanish Tartar Refineries Ltd*. (1924), W.N. 222.

(6) *Re Dynevor, Dyffryn and Neath Abbey Colleries Co*. (1879), 11 Ch. D. 605.

(7) *Devi v. People Banks of Northern India Ltd*. (*in liquidation*) [1938] 4 All E.R. 337.

(8) *Re Pen-y-Van Colliery Co*. (1877), 6 Ch. D. 477.

(9) *Gooch v. London Banking Association* (1886), 32 Ch. D. 41.

(10) *Craig's Executors' Case* (1870), L.R. 9 Eq. 711.

(11) *Re Law Car and General Insurance Corporation* (1913), 2 Ch. 103.

(12) *Mersey Docks v. Cameron* (1865), 11 H.L. Cas. 443.

(13) *Mahumarakalage Edward Andrew Cooray v. R.*, [1953] A.C. 407.

(14) *Re Empire Mining Co*. (1890), 44 Ch. D. 402.

June 3. The following judgments were read:

Judgment

Crabbe JA: This appeal raises very interesting and difficult questions of interpretation on certain sections of the Uganda Companies Act, 1958. The precise points do not seem ever to have been decided by this court.

The undisputed facts of this case are set out in full in the judgment of the learned trial judge as follows:

> "The agreed facts in so far as they are material are these:
>
> On February 16, 1959, one Purohit instituted a suit in the Jinja District Registry (Jinja District Registry Civil Case No. 14 of 1959) against one Dhorajiwalla as 1st defendant and Indian Building Contractors Ltd. as 2nd defendant, claiming damages for breach of a building contract. On March 4,

> 1959, the Plaint was amended by adding a claim for general damages against Indian Building Contractors Ltd. On November 19, 1959, a petition for compulsory winding up of Indian Building Contractors Ltd. was presented by East African Timber Co-operative Society Ltd., a creditor of the company, and on November 27, 1959, the Official Receiver was appointed provisional liquidator of the company.
>
> On December 8, 1959, Indian Building Contractors Ltd. applied to the court for an order that the company be at liberty to convene a meeting of its unsecured creditors for the purpose of considering a scheme of arrangement whereby the unsecured creditors would be paid a composition of 30 *per cent* in full satisfaction of their claims by twelve instalments spread over a three year period. The application was granted by the court on December 11, 1959, and the court ordered that notice of the meeting together with a copy of the scheme and a form of proxy be sent by post or by hand to each creditor of the company, and that the meeting be advertised in the Uganda *Gazette*. In accordance with the court's order, notice of the meeting was sent to the creditors of the company and published in the *Gazette*, but no notice was sent to Purohit because his claim was not admitted. A meeting of creditors was held on January 2, 1960. Purohit did not attend in person or by proxy. At the meeting the scheme was approved by the statutory majority of creditors.
>
> On January 19, 1960, the scheme of arrangement was sanctioned by the court and the order appointing the Official Receiver as provisional liquidator was rescinded. No one instituted any appeal against the order sanctioning the scheme of arrangement.
>
> On February 14, 1963, Keatinge, J. pronounced judgment in Jinja District Registry Civil Case No. 14 of 1959 assessing damages at Shs. 10,000/-, for which Indian Building Contractors Ltd. and their co-defendant were to be jointly and severally liable. He ordered that as between the two defendants, Indian Building Contractors Ltd. should contribute two-thirds of the Shs. 10,000/-, and pay a further sum of Shs. 585/- and costs of the suit. Under the terms of the judgment there was thus a sum of Shs. 7,935/- due by Indian Building Contractors Ltd. to Purohit as damages, and Shs. 7,075/05 as taxed costs.
>
> The question on which the decision of the court is required is whether Purohit is entitled to be paid these two sums in full by Indian Building Contractors Ltd., or whether Purohit is bound by the scheme of arrangement sanctioned by the court and is only entitled to be paid 30 *per cent* of his claims."

At the trial it was contended for the respondent (hereinafter referred to as the plaintiff) that he did not become a creditor of the appellant (hereinafter referred to as the defendant company) until February 14, 1963, when final judgment in the suit was delivered by Keatinge, J. It was further argued on behalf of the plaintiff that not having been served with a notice of the scheme of arrangement, and thereby deprived of the opportunity of being present or represented at the meeting of creditors which approved the scheme, he was not bound by the scheme, even though sanctioned by the court. For the defendant company, it was submitted that a scheme once sanctioned was binding on all creditors, and that since the plaintiff never tried to challenge the court's sanction on appeal he was bound by it. After considering these rival submissions, the learned trial judge held that by reason of s. 313 of the Companies Act the plaintiff was a creditor at the date when the scheme of arrangement was sanctioned by the court. Nevertheless, he held further that the plaintiff was not bound by the scheme for reasons which I think appear in the following passage from the judgment:

> "It will be observed that the court when ordering a meeting of creditors to be held directed that a copy of the scheme and a form of proxy should be sent by post or by hand to *each* creditor of the company. No notice was sent to Purohit because he was not regarded as a creditor. In my judgment he cannot be bound by a scheme of which he had no notice and no opportunity to oppose." The learned judge further made these observations:
>
> "As to the contention that Purohit's remedy was to appeal against the order of the court sanctioning the scheme, if Purohit was not bound by the scheme he was not aggrieved by it and had no reason to appeal against the order approving it."

Against this decision of the learned trial judge the defendant company has appealed mainly on the ground that, having held that the plaintiff was a creditor, the learned judge erred in forming the view that the plaintiff was not bound by the scheme of arrangement. The plaintiff has also cross appealed on the ground that the learned judge was wrong in holding that he was a creditor of the defendant company at the time when the notice calling a meeting to approve the scheme of arrangement was issued.

For the purpose of considering the defendant company's appeal, it would be convenient, I think to assume that the learned trial judge's decision that the plaintiff was a creditor was right. This appeal, in my view, depends upon a proper construction of certain sections of the Uganda Companies Act, 1958. In this case the section of the Act which calls for consideration is s. 207 (1) and (2). The subsections read:

> "(1). Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them, the court may, on the application of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs.
>
> (2). If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company."

The directions given by the court as to the manner in which the creditors of the defendant company were to be summoned to the meeting were to the effect that at least fifteen (15) clear days notice (*a*) in writing be given of the day appointed for such meeting and a copy of the said scheme and a form of proxy be sent by post under a certificate of posting or hand delivery addressed to each creditor of the company at their registered or last known address and (*b*) by advertisement in the Uganda *Gazette*. It was conceded that the terms of the order in (*a*) were not complied with, and it is on this ground that the learned trial judge held that the plaintiff was not bound by the scheme after it had been sanctioned. It has not been suggested in this court, and it does not appear that it was ever conceded at the court below, that the arrangement or compromise was unreasonable or that it was not beneficial to those on both sides who made it. It has also not been contended that the meeting at which the scheme was approved was not properly constituted. The function of the court before which a compromise or arrangement is brought for sanction is to ascertain whether all

the conditions required by the statute have been substantially complied with, and it has further to be satisfied that the scheme was proposed in good faith and that it is at least fair and reasonable, "as that an intelligent and honest man, who is a member of that class, and acting alone in respect of his interest as such a member, might approve of it": see *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co*. (1) ((1891) 1 Ch. at p. 247). Once the court is satisfied about these matters and it sanctions the scheme, the scheme becomes, in the words of s. 207 (2):

> "binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company."

It is unimpeachable by any of the creditors, whether they were parties to it or not, except in the form of appeal prescribed by s. 77 of the Civil Procedure Act (Cap. 6) (see *Nicholl v. The Eberhardt Company* (2) (1889) 59 L.J. Ch. at pp. 105, 106). Thus, *Re Securities Insurance Company* (3) an appeal was presented by a person whose interest was affected by a scheme which was sanctioned by the court. The appellants had not opposed the scheme at the meeting of creditors. It was doubtful whether they were present at the meeting; but they neither appeared before the judge to oppose the application for the sanction; nor did they obtain leave to appeal. During the course of the argument, Lindley, L. J., interposed with this remark:

> "Before the *Judicature Acts*, the practice was pretty well settled that, whether in a petition or an action, a person not a party to the proceedings and not served could not appeal without leave. What is there to alter that?"

The proceedings in *Re Securities Insurance Company* (3) were brought under the Joint Stock Companies Arrangement Act, 1870, and under that Act the same rules apply as under the Companies Act, 1862. The section in the 1862 Act relating to appeal is s. 124 which refers to the old practice of the Court of Chancery. In his judgment, Lindley, L. J., said ((1894) 2 Ch. at pp. 412–413):

> "Now, without having been present upon the petition, they appeal without leave. They are not out of time, for they served their notice of appeal within three weeks after the date of the order sanctioning the scheme; and the question is whether they have any right to appeal without leave. Upon looking at the matter closely, I have very little doubt that they have not."

Lindley L. J. then referred to s. 124 of the Companies Act, 1862, and continued:

> "Now, what was the practice of the Court of Chancery before 1862, and what has it been since? I understand the practice to be perfectly well settled that a person who is a party can appeal (of course within the proper time) without any leave, and that a person who without being a party is either bound by the order or is aggrieved by it, or is prejudicially affected by it, cannot appeal without leave. It does not require much to obtain leave. If a person alleging himself to be aggrieved by an order can make out even a *prima facie* case why he should have leave he will get it; but without leave he is not entitled to appeal.
>
> "In this particular class of cases, it appears to me that that practice ought not to be lightly departed from. It would be in the highest degree inconvenient if, after a Judge had sanctioned a scheme, persons who did not take the trouble to attend the proceedings could without leave embarrass the proceedings by giving notices of appeal within three weeks. It would be a course which

> many people would be very glad to adopt, and we are not disposed to facilitate such conduct. I think the rule under the old Chancery practice is perfectly well settled; and even in the winding-up of companies with which I was once familiar, I do not recollect a case of a person who alleged himself to be aggrieved appealing without leave, unless he had in some way or other made himself a party to the proceedings."

Section 2 of the Joint Stock Companies Arrangement Act, 1870, is in substance identical in terms with s. 207 of the Uganda Companies Act, 1958. I shall later in this judgment deal with the historical background of the relevant English Companies Acts and their bearing on the Uganda Companies Act, 1958.

The main ground on which the learned trial judge held that the plaintiff was not bound by the scheme of arrangement is contained in the following passage of the judgment:

> "It seems to me plain from this passage and from the words of the section itself that before a majority of creditors can make decisions binding upon a minority, the minority must have an opportunity of being heard and of voicing its objections."

The passage referred to in the judgment is in Palmer's Company Law, 20th Edn. at p. 664. The learned judge, feeling fortified in his view by *Re Midland Coal, Coke and Iron Company, Craig's Claim*, (4), said that if the plaintiff was a creditor within the meaning of s. 207, he was entitled to be present at the meeting to voice his assent or dissent to the proposed scheme of arrangement. He continued:

> "It will be observed that the court when ordering a meeting of creditors to be held directed that a copy of the scheme and a form of proxy should be sent by post or by hand to *each* creditor of the company. No notice was sent to Purohit because he was not regarded as a creditor. In my judgment he cannot be bound by a scheme of which he had no notice and no opportunity to oppose."

The question that arises, therefore, is whether the plaintiff was deprived of the opportunity of attending the meeting which approved the scheme of arrangement. If the answer to this question is in the affirmative, it will then be necessary to consider the effect of this lack of opportunity to be present. It is admitted that notice in writing was not given to the plaintiff, but no one denies that there was publication in the *Gazette* as directed by the court. I cannot think of any reason for the court to order that the meeting should be advertised in the *Gazette*, except that information about the meeting should be given to the general public. When sanctioning a scheme under s. 207 (2), one of the matters about which the court has to be satisfied is that a meeting has been in substance, though not precisely, summoned in the manner directed. *Re Anglo-Spanish Tartar Refineries, Ltd*. (5) appears to be a much stronger case than the instant case. There notices were given to all the creditors except one, but there was an omission to advertise the meeting in newspapers as directed by the Master. On an application to sanction the arrangement under s. 120 of the Companies (Consolidation) Act, 1908, Romer, J., said that in his view the meeting had been, though not precisely, in substance summoned in the manner prescribed. He observed:

> "Under the circumstances the matter would be pursued without the serious trouble of convening further meetings."

In my view, therefore, the failure to give the plaintiff notice to attend the meeting of creditors does not ipso facto entitle the plaintiff now to dissent from the scheme. In *Re Dynevor, Dyffryn, and Neath Abbey Collieries Company* (6),

the Court of Appeal said that where an arrangement under the 1870 Act was a fair one and was likely to be beneficial to all parties, the court would not be astute to find technical defects in the proceedings.

One matter which must be considered, but which I think does not very much assist the plaintiff's case, is whether the plaintiff had any opportunity of opposing the application for the order sanctioning the scheme of arrangement. There is no direct evidence on this point. It would appear, however, that on November 27, 1959, the court in Companies Cause No. 5 of 1959, appointed a Provisional Liquidator on the presentation of a petition for the compulsory winding-up of the defendant company. Subsequently, on December 7, 1959, the date fixed for the hearing of the suit between the plaintiff and the defendant company, counsel for the plaintiff informed the court of the appointment of a Provisional Liquidator and applied for the Official Receiver to be substituted in the suit for the defendant company. The court thereupon made an order in the following terms:

> "Official Receiver will be substituted for 2nd Defendant provided a winding-up order is made and leave to proceed with the action is granted. Hearing is adjourned for a fresh date to be fixed. Costs in the Cause."

Subsequent to this order, the court on January 19, 1960, sanctioned the scheme of arrangement, and the order of November 27, 1959, was discharged. The effect of this order was that the Official Receiver dropped from the case. The agreed facts show that the hearing of the substantive case continued before Keatinge, J., on the following dates: 5.12.60, 7.12.60, 8.12.60, 11.10.61, 1.2.61, 2.2.62. On March 16, 1962, Keatinge, J., gave judgment in which he held that the defendant company was liable to the plaintiff, and in another judgment on February 14, 1964, he quantified the damages to be paid by the defendant company to the plaintiff. It must have been obvious to the plaintiff as early as December 5, 1960, that the Official Receiver, who had been substituted for the defendant company at his instance, had been discharged. This must have put him on his enquiry, and if he did not approve of the scheme of arrangement it was his duty to apply to the court to have the sanction set aside. The plaintiff did nothing about it; he preferred to take his chance. But in my view, he appears to have been ill-advised. The order of January 14, 1960, whereby the court sanctioned the scheme of arrangement still stands, and it is impossible now for the Court of Appeal, much less the High Court of Uganda, to disregard it.

Assuming, therefore, that the learned trial judge's approach to this case was right, I have no doubt, with every due respect, that on the authorities of *Nicholl v. The Eberhardt Company* (2), and *Re Securities Insurance Company* (*supra*), he erred in holding that the plaintiff, a creditor of the defendant company, was not bound by the scheme of arrangement sanctioned under s. 207 (2) of the Uganda Companies Act, 1958. Subsection (2) of s. 207 of the Act is satisfied by the sanction of three-fourths in value of the persons present at the meeting, and it is immaterial whether or not a particular creditor was absent at the meeting. The object of the section is to enable the specified majority to bind all. *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co*. (1), North, J., after quoting s. 2 of the Joint Stock Companies Arrangement Act, 1870, and discussing the meaning of the word "compromise" in that section, said ((1891) 1 Ch. at p. 228):

> "If I were to accede to the suggestion, that creditors of a company cannot be bound by any majority, however large, with regard to the amount to be paid to them, or the time when it is to be paid, or the security which is to be held in the meantime until payment – if these matters are outside the Act, I do not see how there can be any compromise with creditors with respect to

> which a majority can bind the minority. It seems to me that these are matters which come exactly within the Act; that it is for the creditors to judge of the proposed scheme, and that the statutory majority of the creditors can bind the minority.
>
> But this can be done only if the arrangement is sanctioned by an order of the court."

The binding character of a scheme sanctioned by the court is such that no variation of, or departure from, that scheme could be validated by the mere acquiescence of the shareholders and creditors (*Devi v. Peoples Bank of Northern India, Ltd*. (*in liquidation*) (7)).

The cross appeal is based on one ground only, and this calls for an interpretation of the word "creditor" in s. 207 of the Companies Act. Much of the difficulty in this case is due to the learned trial judge's finding that the plaintiff was a creditor by virtue of s. 313. That section is only applicable in winding-up proceedings, and on behalf of the plaintiff it has been submitted that the defendant company was never at any time in the process of winding-up. It was further submitted that the word "creditor" is nowhere referred to in s. 313. The section is to all intents and purposes a provision relating to the method of proving debts of all descriptions in a winding-up. Counsel for the respondent asked the court to contrast this section with s. 224 (1) where the word "creditor" is used, and he submitted, if I understood his argument, that the plaintiff could not be a creditor within s. 224 (1), because he could not have presented a petition for winding-up since the defendant company had denied liability for his claim. For this submission he relied on the authority of *Re Pen-y-Van Colliery Co*. (8), in which it was held that a claim against a company for unliquidated damages on account of an alleged fraudulent representation did not constitute the claimant a creditor so as to entitle him to petition for a winding-up order or supervision order; before he could so petition, he must make himself a creditor by changing his claim for damages into a judgment. Counsel for the respondent contended that s. 158 of the Companies Act, 1862, under which that case was decided is identical with s. 224 of the Uganda Companies Act, 1958. Without embarking upon an unnecessary examination of the authorities on the point, I think it is sufficient to say that it is now well established that in petitions under s. 224 (1) of the Uganda Companies Act, 1958, where the debts upon which the petition is based are disputed by the company on substantial grounds, the petitioning creditor should first establish his claim or, if the claim is for unliquidated damages, he must change the damages into a judgment.

If this appeal were being considered under s. 224 (1), I would have no hesitation in deciding in favour of counsel for the respondent's point of view. But, with respect to counsel for the respondent's argument, I think that the question that arises on the cross appeal has to be decided under s. 207 of the Act. This section provides a method by which a compromise or arrangement may be made between (1) a company, or (2) a liquidator (in the case of a company being wound-up), with creditors and members of the company.

Section 207 (1) of the Uganda Companies Act, 1958, is entirely identical in terms with s. 206 (1) of the English Companies Act, 1948, and in order to appreciate fully the construction, which, in my view, ought to be placed upon s. 207, I think it is necessary to consider briefly the historical development of company law in England. It is convenient in this short survey to take as a starting point the Companies Act, 1862, which is generally regarded as the basis of English company law. The section of this Act which appears relevant in this appeal is s. 158, which reads:

> "In the event of any company being wound-up under this Act, all debts payable on a contingency, and all claims against the company, present or

> future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of all such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value."

The wording of the section is very wide indeed, and clearly shows that the intention of the legislature was that every conceivable liability was to be ascertained and taken account of by the person winding-up the company. Under s. 133 of the Act one of the consequences ensuing upon the winding-up of a company was that the property of the company was to be applied in satisfaction of liabilities *pari passu*, and subject thereto, would, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company. The emphasis in this section is on the word "liabilities" which covered every situation that arose within s. 158; the words "debts" and "claims" are not mentioned in s. 133. The effect of this section is that the liabilities of the company had to be satisfied first, and there is nothing in the Act to suggest that after the distribution of the assets the liquidator could make calls on the shareholders. I find myself in agreement with Pearson, J., when he said in *Gooch v. London Banking Association* (9) ((1886) 32 Ch. D. at p. 48):

> "that the intention of the Legislature, as shewn by all the terms of the Act, was to provide once and for all for the winding-up of the company, for the discharge of its liabilities, the distribution of its assets, if there were any to distribute, and then for the dissolution of the company"

Briefly stated, s. 158 provided for the proof of all claims, whatever their nature, against the company, "a just estimate being made, so far as is possible, of the value of such debts or claims". Any liability falling within the ambit of the section which was not a debt at the time of the winding-up was admissible to proof, and the proof was to be of "the value" of the debt or claim, to be estimated whether it was contingent or did not bear a certain value.

One of the earliest cases decided under s. 158 is *Craig's Executors' Case* (10), in which it was held that what was admissible to proof was the value of the claim which, at the date of the winding-up, was contingent and whose value was to be estimated upon a just estimate being made so far as possible, and that the fact that the life had dropped was admissible for the purpose of showing what was at the date of the winding-up the just estimate of the value of the then contingent claim. The claim in that case was that of the holder of a policy of life assurance in a winding-up in which the order was made on September 17, 1869, and a death occurred on November 5, 1869. The court held that the executors were entitled to prove for the amount insured by the policy. Giving the reasons of the court's decision, James, V.-C., said that the dropping of the life before proof, though it would not entitle the policy-holder to full payment, would be taken into consideration by the court as affording evidence of the value of the policy at the time of taking in the claim. Sections 159 and 160 of the Act of 1862 seem to provide that a company, by its official liquidators, with the sanction of the court, was to have powers identical to those which an individual would have in compromising with its creditors and debtors. But one creditor had no right to bind another creditor to accept a compromise, nor did the Act permit one debtor to bind another with respect to paying a composition. It was with the intention of filling this gap in the law that the Joint Stock Companies Arrangement Act, 1870, was passed, and it applied not only to Joint Stock Companies but to other companies which were being wound up. By s. 2 of that Act it was provided as follows:

> "Where any compromise or arrangement shall be proposed between a company which is, at the time of the passing of this Act or afterwards, in the course of being wound-up, either voluntarily or by or under the supervision of the court, under the Companies' Acts, 1862 and 1867, or either of them, and the creditors of such company, or any class of such creditors, it shall be lawful for the court, in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the court shall direct, and if a majority in number representing three fourths in value of such creditors or class of creditors present either in person or by proxy at such meeting shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said company."

In 1900 the Companies Act of that year was passed, and by s. 24 of that Act s. 2 of the Joint Stock Companies Arrangement Act, 1870, was made applicable not only as between the company and the creditors or any class thereof, but as between the members, or any class thereof and the company. Section 24 still applied only when the company was in liquidation.

By s. 38 of the Companies Act, 1907, the Act of 1870 was made applicable whether or not the company was in the process of being wound-up. Section 2 of the 1870 Act had always attached to it some difficulty to be solved by a compromise or arrangement of rights, and before 1907 this situation could only arise in a winding-up. It would appear, therefore, that s. 2 of the 1870 Act was intended to apply to compromises and arrangements in the case of a company not in liquidation. In the following year, all legislative provisions affecting companies were consolidated in the Companies (Consolidation) Act, 1908. Section 120 of the 1908 Act was a re-enactment of s. 2 of the Act of 1870 in a modified form, and s. 206 was in the same terms as s. 158 of the 1862 Act, but there were added words which made the section applicable to insolvent companies. Commenting on s. 158 of the 1862 Act and s. 206 of the 1908 Act in *Re Law Car and General Insurance Corporation* (11) ((1913) 2 Ch. at p. 123) Buckley, L. J., said:

> "The section uses the words 'requiring to be valued'. As I have already pointed out, it was necessary, for the purposes of s. 158 of 1862, while it existed, and it is necessary for the purposes of s. 206 of 1908, as it exists, to find the value of the contingent debt or claim, for that is the amount admissible to proof. Every obligation which is not a debt, but which is by virtue of s. 206 to be provable and to take a dividend although it is not a debt, is a thing requiring to be valued."

Section 261 of the English Companies Act, 1929, is a reproduction of s. 158 of the 1862 Act, and s. 153 re-enacts s. 2 of the 1870 Act. In the current English Companies Act, 1948, s. 206 (1) and (2) is in the same terms as s. 2 of the 1870 Act and s. 316 reproduces substantially s. 158 of the 1862 Act.

The scheme of the Uganda Companies Act, 1958, appears to be modelled on the English Companies Acts of 1908, 1929 and 1948 and s. 207 of the Uganda Act is the same as s. 120 of the English Companies (Consolidation) Act, 1908, and s. 313 of the Uganda Act is also identical in terms with s. 206 of the Act of 1908. It seems to me, therefore, that in construing s. 207 of the Uganda Companies Act, 1958, the interpretation put upon earlier English statutes *in pari materia* by the courts should be followed, unless there are special reasons why such a course should not be taken. In *Mersey Docks v. Cameron* (12) (1865) H.L. Cas. 443 at p. 480, Blackburn, J., said:

> "Where an Act of Parliament has received a judicial construction putting a certain meaning on its words, and the Legislature in a subsequent Act *in pari materia* uses the same words, there is a presumption that the Legislature used those words intending to express the meaning which it knew had been put upon the same words before; and, unless there is something to rebut that presumption, the Act should be so construed, even if the words were such that they might originally have been construed otherwise."

Agreeing as I do with the opinion of the Judicial Committee of the Privy Council in *Mahumarakalage Edward Andrew Cooray v. R.* (13) ([1953] A.C., at p. 419), that in the case of courts of a member of the British Commonwealth of Nations where an enactment has been passed by the legislature in the same terms as an English statute, the construction to be adopted is that put upon it by the English courts, I think that s. 207 of the Uganda Companies Act, 1958, ought to be construed in the light of English decisions on statutes *in pari materia.*

Approaching the matter in this way, I think that great assistance can be derived from the English decided cases. In *Re Empire Mining Company* (14) North, J., considered the scope of the word "creditor" in s. 2 of the 1870 Act and said ((1890) 44 Ch. D. at p. 409):

> "The word 'creditor' in the Act is general. No distinction is made between different kinds of creditors; there is nothing to except any particular class of creditors from the jurisdiction of the court."

In *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co.* (1) a petition under s. 2 of the Joint Stock Companies Arrangement Act, 1870, was presented by a liquidator in order to obtain the sanction of the court to a proposed arrangement or compromise between the company and its creditors. In construing s. 2, Bowen, L. J., made the following observations ((1891) 1 Ch. at p. 243):

> "This section has to be read with the liquidation sections of the Act of 1862, which, in ss. 159 and 160, gave permissive powers to liquidators with regard to compromises and arrangements with creditors. When we come to the Act of 1870, which deals with compromises between the company and the creditors of a company, the word 'creditors' must have as large a meaning, and include every conceivable class of creditors."

In *Re Midland Coal, Coke and Iron Company, Craig's Claim* (4), the decision in the case turned upon the construction of s. 2 of the Joint Stock Companies Arrangement Act, 1870, and in delivering the judgment of the court, Lindley, L. J. said ((1895) 1 Ch. at p. 277):

> "The cases to which we have referred presuppose the existence of assets not yet distributed amongst the shareholders. Until they are distributed he is entitled to be heard in opposition to any scheme for their distribution. Whether the Court is bound to give effect to his opposition is a different question, and depends on the meaning of the word 'creditor' in the Joint Stock Companies Arrangement Act, 1870. Considering that that Act was passed in order to enlarge the powers conferred by sect. 159 of the Companies Act, 1862, we agree with Wright, J. in thinking that the word 'creditor' is used in the Act of 1870 in the widest sense, and that it includes all persons having any pecuniary claims against the company. Any other construction would render the Act practically useless."

It seems to me, therefore, that, having regard to the historical developments in this branch of the law, the word "creditor" in s. 207 of the Uganda Companies Act, 1958, must be interpreted widely to include every person who has a pecuniary

claim against the company, whether actual or contingent. Accordingly, on the facts of this case, I have no doubt that the plaintiff was a creditor within s. 207 of the Companies Act, 1958.

In arriving at the decision that the plaintiff was a creditor, the learned judge felt constrained to invoke s. 229 (2) of the Companies Act, whereby a winding-up is deemed to commence at the time of the presentation of the petition for the winding-up. Accordingly, he said:

> "This being so I am of opinion that notwithstanding that no winding-up order was ever made, Purohit was entitled to the benefit of s. 313 of the Companies Ordinance when the meeting of creditors was held. It is therefore necessary to consider Purohit's right on the footing that he was a creditor of the company at the date of the composition."

A petition for the compulsory winding-up of the defendant company was filed on November 19, 1959, but the order to convene a meeting of creditors was made on the application of the company and not of the liquidator. It is, in my view, unnecessary for the learned trial judge to resort to s. 229 (2) in order to hold that the plaintiff was a creditor, for the word "creditor" in s. 207 bears the same meaning whether the application for an order to convene a meeting is made by a liquidator, or a company, or some other person, provided there is a debt or claim which can be valued.

In the result I would allow the appeal with costs and set aside the judgment and decree of the High Court and would substitute therefor a judgment and decree ordering that the defendant company do pay to the plaintiff only 30 *per cent* of the sums of Shs. 7,251/66 and Shs. 7,075/05 referred to in para. B.1 of the case dated February 18, 1963, and also ordering that the plaintiff do pay to the defendant company the taxed costs of the agreement referred to in paragraph B.2 of the said case and the costs of the suit arising from the said case. I would also dismiss the cross appeal with costs.

Newbold VP: I have had the advantage of reading in draft the judgments of Crabbe, J.A., and Spry, J.A., and I agree with them. The appeal will be allowed and there will be orders in the terms proposed by Crabbe, J.A.

Spry JA: The facts out of which this appeal arises are fully set out in the judgment of Crabbe, J.A., and I do not think it necessary for me to re-state them. I agree with Crabbe, J.A., that this appeal must be allowed and the cross-appeal dismissed and I would only add a few comments.

The learned trial judge referred in his judgment to various sections of the Companies Ordinance, 1958, (No. 1 of 1958) (to which I shall refer as the 1958 Ordinance). Learned counsel agreed that it is immaterial for the purposes of this appeal and cross-appeal whether it is that Ordinance or the Companies Ordinance (Cap. 212 of the 1951 Revised Edition of the Laws of Uganda) (to which I shall refer as the 1935 Ordinance) that is relevant and it is therefore unnecessary for us to decide that question.

I would also mention that the application for the order convening the meeting of creditors was made by the company, which would appear to have been in breach of s. 155 (1) of the 1935 Ordinance, which then applied, and which, in the case of a company in liquidation, requires the application to be made by the liquidator. However, that irregularity would appear to have been cured by the subsequent orders of the court.

To deal first with the cross-appeal, I was at first attracted by counsel for the respondent's submission on behalf of the respondent that a distinction should be drawn between a creditor and a person entitled to prove in a winding-up. He pointed out that the word "creditor" is not used in s. 313 of the 1958 Ordinance

(s. 259 of the 1935 Ordinance), which draws up a clear distinction between claims and debts payable on a contingency, both of which are provable.

The word "creditor" is not defined, so far as I am aware, in either the 1935 or the 1958 Ordinance, or in the Interpretation and General Clauses Ordinance (Cap. 1). In its ordinary commercial sense, it presupposes a debt and s. 340 (2) of the 1958 Ordinance (s. 284 (2) of the 1935 Ordinance), which speaks of creditors and their debts, suggests that the word is used in that sense in the Ordinance. On the other hand, s. 262 of the 1958 Ordinance (s. 208 of the 1935 Ordinance) refers to "creditors" proving "their debts or claims" and then apparently couples these together as "debts", while s. 291 (3) (*a*) of the 1958 Ordinance (s. 236 (3) (*a*) of the 1935 Ordinance) speaks of "creditors" and "the estimated amount of their claims".

I am forced to the conclusion that the words "debts" and "claims" are used somewhat loosely in both ordinances and that the word "creditor" is used to describe persons having claims as well as persons with debts. As a general rule of construction, a word should be given a single meaning throughout a statute, unless there is a good reason to suppose that the legislature intended it to bear different meanings. After considering all the provisions to which I have referred, I have come to the conclusion that the word "creditor" is to be interpreted, as it was by the learned judge, to include any person entitled to prove in a winding-up, and that the cross-appeal must therefore fail.

Incidentally, that interpretation would accord with what was clearly the intention of the legislature, that when a compromise between a company and its creditors has been sanctioned and performed, the company resumes business with a clean sheet.

The appeal itself turns on the interpretation of s. 207 (2) of the 1958 Ordinance (s. 155 (2) of the 1935 Ordinance), which provides that when a scheme has received the support of the statutory majority of creditors and has been sanctioned by the court, it is binding on "all the creditors". The learned judge took the view, with which I respectfully agree, that every creditor must have the right to be present and to voice his opinions at a meeting of creditors. He went on, however, and here with respect I part company from him, to draw the conclusion that a creditor who has been deprived of the opportunity to oppose a scheme is not bound by it.

At the hearing of the appeal, counsel for the appellant company, was prepared to concede that a person who, being undoubtedly a creditor, was deliberately excluded from a meeting of creditors would not be bound by a scheme approved at it. On the other hand, he argued that when a creditor was not given notice of a meeting because the company *bona fide* considered that he was not a creditor, he would be bound. With respect, I can see no logic in that distinction.

It seems to me that the sub-section ought to be read literally, and that when it says that all the creditors will be bound, that must mean all the creditors of the company. Clearly it cannot mean only the creditors present and voting, the only other interpretation grammatically possible.

This may at first sight seem to impose a hardship on a creditor who has not been given notice of a meeting, but I do not think it does so in fact. In the first place, it is in the discretion of the court to sanction or to refuse to sanction the scheme, and it seems clear on all the authorities that, regardless of the wishes of the creditors as expressed at the meeting, the court will only sanction a scheme which it regards as fair and reasonable. Secondly, it would appear that an aggrieved person has the right to move the court, either before or after the scheme has been sanctioned, and where such an application has been made promptly, the court will make such order as is necessary to do substantial

justice. An order sanctioning a scheme will not, however, be refused or set aside, as the case may be, and a winding-up order made on account of any mere technical defect in the proceedings.

If, as I think, the respondent was a creditor of the appellant company and if all creditors of the appellant company are bound, as I think they are, by the scheme sanctioned by the court, it follows that the appeal must succeed.

I think it is clear that the respondent could not avoid being subject to the scheme and only course he could have taken, if there were any grounds justifying it, would have been to move the court not to sanction the scheme, if he was aware of it in time, or, if not, to review its order. I would add, however, that it has not been suggested at any stage of these proceedings that the scheme was other than reasonable and proper and that it would appear, having regard to r. 138 of the English Companies (Winding-up) Rules, 1929, which applied by virtue of s. 356 of the 1935 Ordinance (now replaced by r. 128 of the Companies (Winding-up), Rules, 1960), that the respondent would have had no right to vote at the meeting of creditors, had he attended it, although he could, of course, have voiced any objection he may have had.

Appeal allowed. Cross-appeal dismissed.

For the appellant:
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Wilkinson & Hunt, Kampala

For the respondent:
OJ Keeble
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Jinder Singh v Lukoma Ginners Ltd
[1965] 1 EA 355 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	24 May 1965
Case Number:	91/1961
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Master and servant – Liability of master – Criminal act of servant – Scope of employment – Carriage of goods by servants of transporter – Theft of goods – Claim against transporter for value of goods stolen – Whether transporter liable for value of goods stolen.

Editor's Summary

The plaintiff, who was a transporter, was engaged by the defendants who were cotton ginners, to transport seed cotton and bales of lint from place to place as required. To carry out the transport work the plaintiff provided the defendants with two lorries, two drivers and two turnboys. In addition, for the mechanical maintenance of the lorries, a mechanic who was the son of the plaintiff, was also provided. The drivers, the turnboys, and the mechanic were all accommodated on the premises of the defendants and were permanently stationed at the ginnery together with the lorries. It was the practice of the plaintiff to visit them from time to time for the purpose of ascertaining progress of the work and for supplying spare parts. In the course of his employment one of the two drivers stole a load of seed cotton, valued at Shs. 5,807/20, between the defendant's store and the ginnery. Subsequently the plaintiff sued the defendants for Shs. 13,040/20 being the balance of account for transport work done and services rendered by the plaintiff. The defendants counter-claimed for the sum of Shs. 1,006/96, which took into account the said sum of Shs. 5,807/20. The plaintiff denied that the loss represented by Shs. 5,807/20 fell on him because the defecting driver was under the control of the defendants since he was living in the premises of the defendants and had to work on their instructions. For the defendants it was submitted that the two drivers were the servants of the plaintiff who had engaged them and was responsible for paying their wages.

Held –

(i) even though the lorries were kept on the premises of the defendants and the drivers lodged at the ginnery the drivers and the lorries were in the full charge of the plaintiff's son, who was his agent and representative at the ginnery; the plaintiff had retained with him the power of control and supervision of the work of the drivers while engaged in transporting the goods from place to place, such power of control and supervision being exercised by the son on behalf of the plaintiff;

(ii) the theft of the cotton seed was committed by the driver in the course of his employment, albeit not for the benefit of the plaintiff but for his own benefit, and the plaintiff was liable to make good the loss.

Plaintiff's suit dismissed. Judgment for the defendants for Shs. 345/06 on their counter-claim.

Cases referred to in judgment

(1) *O'Reilly v. Imperial Chemical Industries*, [1955] 2 All E.R. 382.

(2) *Mersey Docks & Harbour Board v. Coggins & Griffiths* (*Liverpool*) Ltd., [1946] 2 All E.R. 345.

(3) *Bontex Knitting Works Ltd. v. St. Johns Garage*, [1943] 2 All E.R. 690.

(4) *United Africa Co. Ltd. v. Saka Owoade*, [1957] 3 All E.R. 216.

(5) *Lloyd v. Grace Smith & Co*., [1912] A.C. 716.

Judgment

Sir Udo Udoma CJ: The claim of the plaintiff is for the sum of Shs. 13,040/20, being the balance of account for transport work done and services rendered by the plaintiff to the defendants. The defendants have denied the claim and counterclaimed the sum of Shs. 1,006/96, being the sum due and payable by the plaintiff to the defendants.

Included in the counterclaim of the defendants is the sum of Shs. 5,807/20, being the value of seed cotton entrusted for carriage to the plaintiff's driver and which the plaintiff's driver converted to his own use, the claim being founded on negligence. Alternatively the sum of Shs. 5,807/20 is being claimed as the value of cotton seeds entrusted to the plaintiff for carriage and which the plaintiff had failed to deliver in breach of his contract.

The plaintiff is a transporter. He undertakes transport work for reward, for which he maintains a number of lorries. The defendants are cotton ginners and proprietors of ginneries. The dispute in the instant case arose out of transport work done by the plaintiff at the request of and for the benefit of the defendants at the defendants' Lukoma ginnery.

In or about January 1960 the plaintiff applied to the defendants to be employed and the defendants accepted the application and employed the plaintiff as a transporter to transport the defendants' seed cotton and bales of lint from place to place as required.

It is the plaintiff's case that before he accepted the work and entered upon his employment the undermentioned rates of charges were agreed by and between the defendants and himself.

For the transportation of:

(1) Seed cotton from the villages to the ginnery: Shs. 1/25 per 100 Ibs. load;

(2) Bales of seed cotton, on tarmac road: 60 cents per ton per mile;

(3) Seed cotton from buying stations or centres to the ginnery: 60 cents per ton per mile;

(4) Bales of lint from the ginnery to booking or railway stations: 60 cents per ton per mile;

(5) Cotton seeds from the ginnery to the oilmill: 60 cents per ton per mile; and

(6) Cotton seeds from the ginnery to dressing stations for plantation: 60 cents per ton per mile.

In pursuance of his contract of employment and in consideration of the rates of charges thus agreed and in order to carry out the work, the plaintiff says it was necessary and agreed between them that he should provide and he accordingly provided the defendants with two lorries, two drivers and two turnboys, one driver and one being in charge of each lorry. In addition accompanying the two lorries and two drivers and turnboys was his son, Diwinder Singh (P.W. 3), a mechanic, whose duty it was to take charge of the mechanical maintenance of the two lorries.

It is the plaintiff's case that during the period of the subsistence of the transport contract which was from January to April 1960 his two drivers, turnboys and his mechanic son, Diwinder Singh (P.W. 3) were all accommodated on the premises of the defendants and permanently stationed at the ginnery and the lorries with them. It was his practice to visit them from time to time at least about two or three times a month for the purpose of ascertaining the progress of the work and also of taking spare parts to Diwinder Singh (P.W. 3) for the repair and maintenance of the two lorries.

It was a term of the contract that he be responsible for the fuelling of the two lorries with petrol and oil, which responsibility he fully accepted and discharged during the period, and in the discharge of which he entered into a working arrangement with the defendants whereby he bought to the total value of the sum of Shs. 1710/- worth of petrol and oil on account from the defendants.

In the course of the performance of his contract, the plaintiff says that he received cash advances on account from the defendants. On one occasion he had received the sum of Shs. 2,000/- on another the sum of Shs. 5,000/- and finally the sum of Shs. 375/-. He did not keep records of the transactions nor of the detailed weight of load carried by his lorries but depended upon the figures supplied by the defendants to him. On his own calculations however, his total charges for the work done by his lorries came to the sum of Shs. 22,125/20, in which sum were included the sum of Shs. 400/-, being the charge for the use of one lorry by the defendants for the shifting of equipment; Shs. 200/- charged by his son for repairing the defendants' lorry and Shs. 150/- charged for towing the defendants' lorry after an accident.

It is the plaintiff's case that the present action is for the sum of Shs. 13,040/20, being the difference between the total sum of Shs. 22,125/20 for work done and services rendered and the total cash advances including the price of petrol and oil taken on credit from the defendants, which had amounted to the sum of Shs. 9085/-.

The plaintiff has denied liability for the sum of Shs. 5,807/20 claimed by the defendants as the value of seed cotton entrusted to the plaintiff for carriage and which the plaintiff had failed to deliver to the defendants. It is the plaintiff's case that the driver who was involved in the theft of the seed cotton was under the direction and control of the defendants since he, with the other driver and turnboys, was living in the premises of the defendants and had to work in accordance with the instructions of the defendants.

On the other hand the defendants say that the two drivers were the servants of the plaintiff who had engaged them and was responsible for paying their wages. Whenever the drivers were required for transport work it was the practice, according to the terms of the agreement with the plaintiff, to pass their instructions through Diwinder Singh (P.W. 3) for transmission to the two drivers.

It is the defendants' case that the plaintiff's son, Diwinder Singh (P.W. 3) was sent specially to protect the interests of the plaintiff as his agent and representative at the ginnery and that the two lorries, drivers and turnboys were directly in his charge and under his direction and control as the plaintiff's agent. It was also the duty of Diwinder Singh (P.W. 3) to keep records of the use of the two lorries and to check the tonnages carried by the two lorries which duty Diwinder Singh (P.W. 3) duly performed during the subsistence of the contract.

In the course of his employment as the driver of the plaintiff, one, Amisi Dhabangi, stole a load of seed cotton with which the plaintiff was entrusted for carriage from the defendants' store to the ginnery. He was prosecuted and convicted of and imprisoned for the theft, but the seed cotton valued at Shs. 5,807/20 was never recovered. The theft, on being discovered and before the prosecution and conviction of Amisi Dhabangi, was duly reported to the plaintiff.

The defendants say that it was the responsibility of the plaintiff, as their transporter, to see that the seed cotton was safely delivered to them, which duty the plaintiff had failed to discharge.

While admitting that for the transportation of bales of seed cotton on tarmac road or of bales of lint from the ginnery to the railway station or of seed cotton from buying centres to the ginnery or of cotton seed from the ginnery to the oil mills the rate of charge agreed by and between the plaintiff and the defendants was at 60 cents per ton per mile, the defendants say that the charge for the transportation of seed cotton from villages to the ginnery was at the rate of Shs. 1/15 per 100 1bs. load, and cotton seeds from the ginnery to dressing stations for plantations at the rate of 45 cents per ton per mile.

It is the defendants' case that during the subsistence of the contract the plaintiff has transported a total of 258,029 lbs. of seed cotton from the villages to the ginnery, for which the plaintiff was entitled to the sum of Shs. 2,967/33 calculated at the rate of Shs. 1/15 per 100 lbs. load. The total cotton seed transported by the plaintiff from the ginnery to the dressing station was 190 tons, for which the plaintiff was entitled to a total sum of Shs. 5,482/24.

It is the defendants' case that during the period of the contract they had sold the plaintiff a total of 464¼ gallons of petrol at Shs. 3/70 per gallon and 420 gallons of Diesel oil at Shs. 2/50 per gallon, amounting in value to the total sum of Shs. 2,944/30, for which the plaintiff had made no payment. In addition to the sum of Shs. 7,000/- admitted by the plaintiff as cash advances made to him, there was a further sum of Shs. 675/- of which the plaintiff has only admitted receiving Shs. 375/-.

The defendants therefore counterclaim against the plaintiff the sum of Shs. 1,006/96, being the difference between the total sum of Shs. 16,081/44 to which it is admitted the plaintiff is entitled, and the total sum of Shs. 17,088/40 alleged to be due to the defendants and made up of cash advances, supply of petrol and oil and the sum of Shs. 5,807/20, being the value of the seed cotton short delivered.

On the evidence this is by no means an easy case, not least the fact that the plaintiff does not seem to know what in fact he is claiming and does not even know how he arrived at the amount he says he is entitled to. He has no idea of the total weight of load carried by his lorries nor of the mileages covered by the two lorries.

In so far as it is possible to make sense out of this almost incomprehensible case, the presentation of which leaves much to be desired, three issues would appear to fall for determination by the court, namely:

(1) What was the rate of charges agreed between the plaintiff and the defendants in respect of the

transportation of seed cotton from villages to the

ginnery over which there is a dispute? Was it at Shs. 1/25 as alleged by the plaintiff; or at Shs. 1/15 per 100 lbs. Load as contended by the defendants?

(2) What was the rate of charges agreed in regard to the transportation of cotton seeds from the ginnery to the dressing station for plantations? Was it at 60 cents per ton per mile, or 45 cents per ton per mile? And

(3) On whom should the loss of Shs. 5,807/20, being the value of seed cotton stolen by Amisi Dhabangi fall?

I turn now to consider these issues. On the first and second issues, namely as to the rates of charges in respect of seed cotton transported from the villages to the ginnery and of cotton seeds from the ginnery to dressing stations for plantations, having seen and heard the witnesses give their evidence and watched their demeanour in the witness box, I have been left in no doubt whatsoever that the evidence of the defendants is to be preferred. It was more convincing and is probably the truth.

I was particularly impressed by the evidence of Nutabhai Chartorbhai Patel (D.W. 3), who, on the admission of the plaintiff, was present though not taking part in the discussion at the defendants office when the terms of the contract were agreed and settled between the plaintiff and the defendants. I am satisfied and find as a fact that the rate agreed by and between the plaintiff and the defendants for the transportation of the seed cotton from the villages to the ginnery was at Shs. 1/15 per 100 lbs. load, and that for cotton seed from the ginnery to the dressing station for plantations was at 45 cents per ton per mile.

I am unable to accept the evidence of the plaintiff when he states that he did not maintain any record of the transactions between him and the defendants. If that were true it would have been impossible for the plaintiff to have remembered the terms of the contract and the rates agreed between them, especially as the rates of charges were calculated on mileages and weight carried from one place to another and the transportation business extended over a long period of time from January to April 1960. It would hardly accord with business prudence not to keep a record of the transactions.

Furthermore, although no evidence has been led by the plaintiff on this, in his particulars of claim the number of trips and mileages purported to have been covered by his lorries are clearly set out in detail. Surely such particulars must have been prepared from some records. Might it not be that his son, Diwinder Singh, (P.W. 3) was in fact making records of the trips as testified to by the defendants?

However that might be, on a careful consideration of the evidence I accept the case of the defendants and find as a fact that one of the reasons for the plaintiff's son, Diwinder Singh (P.W. 3), being stationed at the ginnery with the lorries and the drivers and turnboys was to protect the interests of the plaintiff by keeping account of loads transported from one place to another and mileages covered by the lorries. I am satisfied that the drivers and the lorries were in the full charge of the plaintiff's son, Diwinder Singh (P.W. 3). He it was through whom instructions were usually given to the drivers whenever the lorries were required for transport purposes.

It follows therefore that even though the lorries were kept on the premises of the defendants and the drivers lodged at the ginnery the plaintiff did not in any way divest himself of his authority over the lorries and the drivers, and did in fact exercise that authority through his son, Diwinder Singh, who I find as a fact was his agent and representative at the ginnery. I hold also that the plaintiff still retained with him the power of control and supervision of the work of the drivers when engaged in transporting the goods from one station to another,

such power of control and supervision being exercised by Diwinder Singh on behalf of the plaintiff. For, on the admission of the plaintiff himself, the power or right to reprimand the drivers was exercisable by Diwinder Singh only. The view which I take that the plaintiff did not in any way divest himself of the power of controlling and directing the activity of the drivers is reinforced by the admission of the plaintiff that he alone had the power to dismiss the drivers in the event of disobedience of instructions. That brings me to a consideration of the other issue, namely, upon whom should the loss of Shs. 5,807/20 fall?

It was submitted by counsel for the defendants, that the loss must fall on the plaintiff as the employer of the drivers. The ground for this submission was that the driver Amisi Dhabangi was employed by the plaintiff, and that it was the plaintiff who was responsible to pay him his wages and also to dismiss him in case of misbehaviour. The loss, it was contended, had occurred while Amisi Dhabangi was acting in the course of his employment and therefore the plaintiff must be held liable to make good the loss.

In support of this preposition the court was referred to a number of cases including *O'Reilly v. Imperial Chemical Industries* (1) ([1955] 3 All E.R., at p. 385), *Mersey Docks and Harbour Board v. Coggins & Griffiths* (*Liverpool*) *Ltd*. (2); *Bontex Knitting Works Ltd. v. St. Johns Garage* (3) and *United Africa Co. Ltd. v. Saka Cwoade* (4).

For the plaintiff, counsel contended that the real question to be determined by the court is who was master of the driver, Amisi Dhabangi, in fact and in law at the material time when the loss occurred.

In *Mersey Docks & Harbour Board v. Coggins & Griffiths* (*Liverpool*) *Ltd. and McFarlane* (2), a firm of stevedores had hired from the Mersey Docks & Harbour Board the use of a crane together with its driver to assist in loading a ship lying in the Liverpool Docks. The contract was subject to the Board's Regulations; Regulation 6 of which contained the following clause:

> "The drivers so provided shall be the servants of the applicants."

The driver in question was a skilled workman engaged and paid by the Board and the Board alone had power to dismiss him, but they had no authority to direct how he should work the crane. Owing to the negligence of the driver a checker employed by the forwarding agents who had engaged the stevedores was injured in the course of the employment.

The question was whether in applying the maxim *respondeat superior* the general employers of the crane driver or the hirers were liable for the negligence.

It was held by the House of Lords that:

(1) The question of liability was not to be determined by any agreement between the general employers and the hirers but depended on the circumstances of the case, the proper test to apply being whether or not the hirers had authority to control the manner of the execution of the relevant acts of the driver; And.

(2) The Board as the general employers of the crane driver had failed to discharge the burden of proving that the hirers had such control of the workman at the time of the accident as to become liable as employers for his negligence, since, although the hirers could tell the crane driver where to go and what to carry, they had no authority to give direction as to the manner in which the crane was to be operated. The Board were therefore liable for the negligence of the crane driver.

In *United Africa Co. Ltd. v. Saka Owoade* (4) a transport contractor sought from the appellants employment in carrying goods. He introduced to the appellants two men representing them as his driver

and clerk and stating that when the

appellants had goods to be carried they should be given to the two men. Goods were subsequently according to the request given to one of the two men for carriage. The goods were never delivered and subsequently the two men were convicted of the theft of the goods. The appellants sued the contractor for the value of the goods. It was held by the Privy Council that the contractor was liable because the sole question was Whether the wrong was committed in the course of the servants employment, and the true inference from the facts was that the conversion of the goods was done within the course of the servants employment.

It is to be noted that the decision of the Privy council in *United Africa Co. Ltd. v. Saka Owade* (4) was based on the principle enunciated by the House of Lords in *Lloyd v. Grace Smith & Co*. (5), in which the House of Lords had held that a principal is liable for the fraud of his agent acting within the scope of his authority whether the fraud is committed for the benefit of the principal or for the benefit of the agent.

There a widow, who owned two cottages and a sum of money secured on a mortgage, being dissatisfied with the income derived therefrom, consulted a firm of solicitors and saw their managing clerk, who conducted the conveyancing business of the firm without supervision. Acting as the representative of the firm, the managing clerk induced her to give him instructions to sell the cottages and to call in the mortgage money and for that purpose to give him her deeds (for which he gave a receipt in the firm's name) and also to sign two documents which were neither read over nor explained to her and which she believed she had to sign in order to effect the sale of the cottages. These documents were in fact a conveyance to the managing clerk of the cottages, a transfer to him of the mortgage. The managing clerk then dishonestly disposed of the property for his benefit.

It was held by the House of Lords reversing the decision of the Court of Appeal that the firm were responsible for the fraud committed by their representative in the course of his employment.

In the instant case the facts as established on the evidence are that the plaintiff applied to the defendants to be employed as their transport contractor. He was accordingly employed. In pursuance of that employment he sent to the defendants two lorries accompanied by two drivers and two turnboys for the purpose of doing the transport work. The two lorries were left at the ginnery of the defendants and the two drivers in charge of them were also lodged there during the period of the contract. In addition, the plaintiff put his son, Diwinder Singh (P.W. 3) in charge of the lorries and the drivers and reserved to himself the right of dismissal of the two drivers in the event of misbehaviour and of paying them their wages. The lorries were put at the disposal of the defendants to be sent by them to wherever their goods were to be conveyed, but always to be driven by the drivers as employees of the plaintiff.

It is common ground that in the usual and ordinary course of his employment one of the drivers, Amisi Dhabangi, was entrusted with 11,200 lbs. of seed cotton valued at Shs. 5,807/20 to be conveyed by him from the defendants' store to the ginnery. In the course of the conveyance the driver converted the seed cotton to his own benefit. He was prosecuted for the theft, convicted and imprisoned but the goods were not recovered.

In those circumstances it is quite clear and I hold that the theft was committed by Amisi Dhabangi in the course of his employment, albeit not for the benefit of the plaintiff but for his own benefit. The irresistible inference must be that the plaintiff is liable to make good the loss on the basis of the principle enunciated in *Lloyd v. Grace Smith & Co.* (5) and applied by the Privy Council in *United*

Africa Co. Ltd. v. Saka Owoade, (4) which latter case I hold is on all fours with the facts and circumstances of the instant case.

In sum, accepting the evidence of the defendants as I do, and the defendants having admitted that the plaintiff only entitled to a total sum of Shs. 16,081/44 for transport work and services rendered, and that they had already advanced to the plaintiff cash amounting to the total sum of Shs. 7,675/-, supplied him petrol and oil to the value of Shs. 2,944/30, the balance which ought to be due to the plaintiff must be the difference between Shs. 16,081/44 and the total sum of Shs. 10,619/30 which is the sum of Shs. 5,462/14. But also holding as I do that the plaintiff is liable to the defendants for the loss of Shs. 5,807/20 sustained by them by reason of the fraud of Amisi Dhabangi, I conclude that judgment must be entered for the defendants in their counterclaim for the sum of Shs. 345/06 with costs. Plaintiff's claim is accordingly dismissed with costs.

Plaintiff's suit dismissed.

Judgment for the defendants for Shs. 345/06 *on their counterclaim.*

For the plaintiff:
VY Phadke
Parekhji & Co, Kampala

For the defendants:
CB Patel
Patel & Mehta, Kampala

Kanchanbai Lalji Ramji Raja v Kashibai P R Kataria and another
[1965] 1 EA 362 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	27 April 1965
Case Number:	443/1963
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Damages – Method of assessment – Fatal accident – Various dependants – Value of dependencies – Deductions from damages – Acceleration of benefit of deceased's estate – Assessment of total dependancy as lump sum – Apportionment thereafter among dependants.

[2] Fatal accident – Damages – Method of assessment – Various dependants – Value of dependencies – Deduction from damages – Acceleration of benefit of deceased's estate – Assessment of total dependancy as lump sum – Apportionment thereafter among dependants.

Editor's Summary

The plaintiff claimed damages for herself and her six children for the death of her husband (the deceased) after a collision with a stationary lorry. The judge found that the accident was caused solely by the negligence of the driver of first defendant's husband who was also killed. The deceased owned a shop giving him an average income of £924 per year. The deceased's estate was realised for Shs. 49,000/- which went to the dependants. The plaintiff was 45 years old and the deceased was 50. The six children were aged between 13 and 19. In assessing damages the judge had to consider the amount to be deducted in respect of the acceleration of the benefit of the deceased's estate to the dependants.

Held –

(i) having regard to the anticipated savings which might reasonably have been expected to have been made by the deceased if he had lived the amount realised from the deceased's estate should not suffer a reduction on the ground of accelerated benefit;

(ii) where the court is assessing damages for several dependants it should estimate the total dependancy as a lump sum and then, after making the appropriate

deductions, apportion it among the various dependants: *Kassam v. Kampala Aerated Water Co. Ltd*., [1965] 2 All E.R. p. 875, followed.

Judgment for the plaintiff for £4,525.

Cases referred to in judgment

(1) *Kassam v. Kampala Aerated Water Co. Ltd.*, Privy Council, [1965] 2 All E.R. 875 (P.C.).

(2) *Kampala Aerated Water Co. Ltd. v. Kassam* (*Gulbanu Rajabali*), [1961] E.A. 291 (C.A.).

(3) *Daniels v. Jones*, [1961] 3 All E.R. 24.

Judgment

Sheridan J: The plaintiff claims damages for negligence arising out of a collision which occurred after dark on March 24, 1963 at mile 7 from Jinja on the main Jinja-Iganga road when a Hillman Minx Car Registered No. UFY 971 owned by the husband of the first defendant and driven by his servant Charles Ssempagama (P.W. 1) collided with the back of a stationary Albion Lorry Registered No. UUF 432. The plaint averred that the lorry was owned by the second defendants but as the plaintiff was unable to establish the ownership of the lorry, it was conceded that the claim could not succeed against them. On March 24, 1963 Ssempagama was driving the car from Kisumu. The plaintiffs and the first defendant's husband were sitting in the front with him and an Asian lady and three children were in the back. He was the only survivor of the accident. He gave evidence that as he was driving along the straight uphill road he was dazzled by the lights of an oncoming car which he saw from a distance of 120 yards. Although he dimmed his lights, the other vehicle did not do so, whereupon he slowed down and steered to the left. Then he collided with something and became unconscious. In cross-examination he stated that he started to brake when the other car was 6–7 yards from him. He gave his initial speed as 45–50 m.p.h. He was unable to give his speed at the time of the accident.

Mr. Kersemakers (P.W. 5), an insurance assessor gave expert evidence that the speedometer, which was in working order, had jammed at 70 m.p.h. and he gave it as his opinion, based on reasons, that that was the approximate speed of the car at the moment of impact. It was certainly over 60 m.p.h. I accept this evidence which points to excessive speed. It is supported by the gross damage sustained by the car (see the photographs Exhibits 5 and 6). When he examined the lorry three days after the accident, he found that it had rear reflectors and a rear light but he was unable to say if the light could have been in working order because by then the batteries were flat. While Ssempagama did not see any lights apart from those of the oncoming car his evidence on this is valueless as he did not see the lorry or the silhouette of any obstruction by either set of lights. He failed to keep any proper lookout and he failed in his duty to slow down and even stop when, as he says, he was dazzled by the lights of the oncoming car. Driving at night on the roads of Uganda presents many hazards which impose a high duty of care. The lorry was parked on its correct side of the road. The first defendant has not discharged the onus of proving that it was an unlit obstruction which would give rise at least to a claim for contributory negligence. The collision was solely due to the negligence of the 1st defendant due mainly to the grossly excessive speed at which the car was being driven.

The particulars in support of the claim for damages are that the plaintiff widow is 45 and the deceased was 50. He left five dependant girls aged 13 to 19 and a son aged 14. He had a shop business giving him

an average income of

£924 p.a. After his death the business was sold for Shs. 49,000/-. He had led an abstemious life and had enjoyed good health. In the circumstances and considering his line of business I do not think an expectation of working life of 15 years is unduly high.

Counsel for the plaintiff had made some interesting calculations which would result in an award of £7,054 as damages. He first takes the expenses such as rent, rations, etc. which are not affected by the deceased's death. These amount to £339 p.a. which, being capitalized according to the table in Whitaker's Almanac would produce a sum of £3,519. The balance of the deceased's salary would then be £585 p.a. which should be divided as to ¾ths among the children giving them an average dependancy of 6 years and as to ½ to the widow with her dependancy of 15 years. I am told that this would produce capitalized sum of £7,054. The deceased's estate was realized for Shs. 49,000/- which has gone to the dependants. The question arises whether this sum or part of it should be deducted in respect of the acceleration of the benefit of the deceased's estate to them. The answer to this is to be found in the recent advice of the Judicial Committee of the Privy Council in *Kassam v. Kampala Aerated Water Co. Ltd.* (1) in the following passage ([1965] 2 All E.R. at pp. 879, 880):

> "Their Lordship's view is that this is a highly speculative matter, and having regard to the anticipated savings which might reasonably have been expected to have been made by the deceased if he had lived, no deduction ought to be made on the score of the accelerated benefit, as these two figures very largely cancel out".

This was an appeal from *Kampala Aerated Water Co. Ltd. v. Kassam* (*Gulbanu Rajabali*) (2) where the East African Court of Appeal had reduced a round figure of £6,000 damages to Shs. 35,913/-. In its advice the Privy Council concluded ([1965] 2 All E.R. at p. 880):

> "The question of damages for loss of support is essentially a jury question which must be dealt with on broad lines. Arithmetical calculations can never lead to a precisely accurate estimate of the loss suffered. Dealing with the matter in this way, their Lordships have reached the conclusion that a figure of £3,500 (Shs. 70,000/-) would fairly represent the total loss of dependancy among the eight dependants."

The facts in that case were not dissimilar. The deceased was a shopkeeper aged between 40 and 45. He was given an effective working life of 15 years, which, with respect, I think was on the low side. He left seven dependants, as did the deceased here and in addition his wife and another daughter were killed in the accident. His average income was £744 as opposed to £924 here. He spent £558 on his family as against £889 here, deducting only 1/6th for the deceased's expenses. The Court of Appeal considered each dependant separately and made "some intricate calculations based on a mathematical basis". It reached the conclusion that there were only four dependants and scaled down the total dependancy accordingly. The Privy Council preferred the more usual method of estimating the total dependancy as a lump sum thereafter apportioning it among the various dependants. "In what is essentially a jury question, the overall picture is what matters. It is the wood that has to be looked at and not the individual trees." (*Daniels v. Jones* (3), *per* Willmer, L. J., [1961] 3 All E.R. at p. 30). It was pointed out that the figure of £1,795 awarded by the Court of Appeal represented only about three years purchase on the annual dependancy of £572, an exceptionally low multiplier when it was conceded that on a 15 year working life a multiplier of 10 would not be unreasonable.

At the same time the learned trial judge's award was faulted on the ground that he had allowed for a dependancy of 15 years for all the children although their ages ranged from 23 years to 3 years.

As I understand the law now to be, with so many imponderables, the task of assessing the loss of reasonable expectation of pecuniary benefit is in most of these cases a matter of speculation and conjecture. The mathematical approach is no longer necessarily the most appropriate. Being guided as far as I can by the advice of the Privy Council in the *Kampala Aerated Water Co*. case (1) and allowing for the more affluent circumstances of the family in the present case, I award a round figure of £4,500 as damages. Funeral expenses have been agreed at £25. There will be judgment for the plaintiff against the 1st defendant for £4,525 with interest at 6% and costs. The suit against the 2nd defendant is dismissed with costs. I have not been asked to apportion the damages.

Judgment for the plaintiff for £4,525.

For the plaintiff:
PJ Wilkinson, QC and *HG Gandesha*
Wilkinson & Hunt, Kampala

For the first defendant:
YV Phadke
Parekhji & Co, Kampala

For the second defendant:
G Singh
Singh & Treon, Kampala

Rajabu Salum v The Republic
[1965] 1 EA 365 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	12 June 1965
Case Number:	41/1965
Before:	Sir Samuel Quashie-Idun P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – Reide, J

[1] Criminal law – Trial – Assessors – Great number of questions put to assessors – Opinion of assessors not taken on general issue as to guilt of accused – Questions to assessors should be confined to matters or issues peculiarly within their knowledge – Assessors must be given opportunity to express views on case generally – Criminal Procedure Code s. 283 (1) (*T*).

Editor's Summary

The appellant had failed to establish the defences of intoxication and provocation and was convicted of murder. On appeal the court again rejected these defences. At the trial after summing up to the assessors the judge put a great number of questions to the assessors and the court commented on the procedure adopted by the judge.

Held –

(i) there can be no objection to the trial judge putting questions to the assessors but they should be confined to matters or issues peculiarly within the knowledge of the assessors and in respect of which the trial judge should have their opinion; further the questions and answers should not be of the nature of examination or evidence and the assessors must be given an opportunity to express their views on the case generally;

(ii) several of the questions which were put and the answers given by the assessors did not comply with s. 283 (1) of the Criminal Procedure Code and the last question put to the assessors by the judge did not invite their opinion on the case as a whole or on the general issue of the guilt or innocence of the accused as is specifically required;

(iii) the procedure adopted by the trial judge, though irregular, had not occasioned a miscarriage of justice in view of the evidence led at the trial.

Appeal dismissed.

Cases referred to in judgment

(1) *R. v. Mayi Bin Ruti* (1936), 3 E.A.C.A. 108.

(2) *Washington Odindo v. R.* (1954), 21 E.A.C.A. 392.

(3) *Msaro Galime v. Republic*, [1964] E.A. 488 (C.A.).

(4) *Mdiu Mande v. Republic*, [1965] E.A. 193 (C.A.).

Judgment

Sir Samuel Quashie-Idun P: read the following judgment of the court:

The appellant was convicted of murder by the High Court of Tanzania (Reide, J. sitting at Dodoma) and appealed against the conviction. On April 29, 1965, we dismissed the appeal and now give our reasons for doing so.

The facts of the case are briefly as follows: On August 8, 1964, the appellant, the deceased and other persons, some of whom gave evidence at the trial, were drinking pombe in the house of one Ramadhani Juma (P.W. 5). According to evidence, drinking commenced from noon until about 7 in the evening. An altercation arose between the appellant and Ramadhani Juma who had asked the appellant why he had banged the door. Mohamed Omari (P.W. 3) who was present advised Ramadhani Juma to leave, whereupon the appellant rushed at Omari, stabbed him with a knife, inflicting a serious injury on him and then started to run out of the house. Omari shouted and the deceased who was sitting on a chair near the door attempted to arrest the appellant. The appellant then stabbed the deceased with the knife and ran out of the room. Another person, Toloo, who attempted to arrest the appellant was unable to do so as he was hit by the door which had been pushed by the appellant as he made his escape. On the next morning the deceased died. According to the medical evidence the wound on the deceased had penetrated into the abdominal cavity. On the next day the appellant surrendered himself at the police station. In his evidence at the trial the appellant said that after he had banged the door Rashidi used obscene expressions in abusing him. The words were “Kuma nina” meaning in English “Mother’s vagina”. Omari also abused the appellant by using an obscene and vulgar expression, “Kuma nyoko”. (This expression has the same meaning as the one used by Rashidi). The appellant said Omari then butted him with his head, struck him with his fist and he fell down. The appellant then took his knife from his pocket and threatened Omari with it. He later stabbed Omari. The deceased then abused the appellant, using the expression “Kuma nyoko” and also hit him with a stick. The appellant fell down, then he stood up and stabbed the deceased. At the close of the evidence the appellant relied upon the defence of intoxication and provocation. The assessors and the learned trial judge did not accept the defence and found the appellant guilty of murder.

In this court counsel for the appellant argued the appellant’s grounds of appeal relating to the defence of intoxication and provocation. It was submitted on behalf of the appellant that there was evidence that the appellant and all the other persons who assembled at the drinking party were drunk and that as the learned trial judge himself came to the conclusion that the appellant and the others were drunk, he should have held that the appellant was incapable of forming a specific intention to kill.

The learned trial judge stated as follows in the early part of his judgment:

> “There is no doubt that the accused was drunk, as he himself and the prosecution witnesses have said, and not

much real doubt that the others were too, ...”

Later the learned trial judge stated in his judgment that the assessors expressed themselves as satisfied that though the accused "was in liquor", he knew what he was about when he stabbed the deceased, that he had formed an intent to kill him or do him grievous bodily harm and that he, the trial judge, had no doubt that that was so. He therefore ruled that insofar as the accused relied upon s. 14 (4) of the Penal Code his defence of intoxication failed. We think that the finding of the learned trial judge was justified and we would refer to the evidence given by the appellant at the trial which shows that although he said he was drunk and did not know what he was doing, he was able to remember what happened.

In respect of the defence of provocation the following ground was argued:

> "4. The learned trial judge erred in not holding that the accused stabbed the deceased under provocation as he was abused and struck on the head with a stick by the deceased. This is the first case in which abuses like 'Kuma mayo' and 'Kuma nyoko' have been considered as just vulgar abuse and that they could not amount to legal provocation. The learned trial Judge had no reason to disbelieve the evidence of the appellant on the whole."

It was submitted that the appellant was provoked by the obscene or vulgar expression used by the deceased in abusing the appellant which act was also aggravated by the deceased hitting the appellant with a stick.

It is sufficient to dispose of this ground of appeal by referring to the opinion of the assessors that the expression alleged to have been used by the deceased in abusing the appellant, though obscene, did not constitute provocation in that particular community. The judge found that it was possible that the deceased did strike the deceased with a stick but that if he did so then that it was not a very serious blow and was in any event justifiable as a means of arresting the appellant who had already seriously wounded Omari. We think that both the assessors and the learned trial judge were justified in rejecting the evidence of the appellant that he was provoked. We also think that the facts in the case of *R. v. Mayi Bin Ruti* (1) are clearly distinguishable from the facts in the present case. For these reasons we dismissed the appeal.

There is, however, one matter in this appeal to which we called the attention of the learned State Attorney and in respect of which we think we must express an opinion. After his summing-up to the assessors the learned judge put a great number of questions to the assessors. The questions and the answers which the assessors gave appear in the record of proceedings. We quote a few of the questions and answers:

"Court:	Are you satisfied beyond reasonable doubt that the evidence given by the prosecution eye-witnesses must be true?
1st Assessor:	It is true.
2nd Assessor:	It is true.
Court:	Do you think it possible that the account given by the accused *may* be true?
1st Assessor:	It is not true.
2nd Assessor:	It is not true.

Court:	Do you find that the accused when he stabbed Isaka had formed an intention to kill or to do grievous bodily harm, or are you in some doubt?
1st Assessor:	I think he had a bad intention because he had already stabbed one and run away.
Court:	And what was that bad intention?
1st Assessor:	He had a bad intention of killing because of drink he had taken.

Court:	Did the deceased utter the abusive words ‘kuma nyoko’?
1st Assessor:	None of them abused the accused. Only the accused was saying that in defending himself.
2nd Assessor:	I do not think the deceased abused.
Court:	Supposing that the deceased had said those words, would that be such provocation as to cause a man to lose his self-control?
1st Assessor:	Nothing. (Meaning ‘no’).
2nd Assessor:	That would not be a word for one to lose his life.
Court:	Did the deceased strike–be careful about this–is it possible that the deceased struck the accused with a stick on the forehead?
1st Assessor:	It is impossible.
2nd Assessor:	It is impossible.
Court:	Why do you say it is impossible that the deceased may have struck the accused? He had an abrasion, you know.
1st Assessor:	The deceased was only stabbed and fell down and the accused ran away. At what time did the deceased beat him?
2nd Assessor:	I do not think the accused was beaten. It is impossible. The accused says ‘I was hit on the head by a big stick’, but if he was beaten by a big stick you would have seen the mark caused by the stick. It is not known whether the mark that the doctor saw was caused by a stick or not.
Court:	Do you find the wound which the accused inflicted likely to cause death or grievous harm?
1st Assessor:	Yes, it is likely.
2nd Assessor:	Yes, because it was very big.
Court:	Did it cause death?
1st Assessor:	Yes.
2nd Assessor:	Yes.
Court:	Is he guilty of murder or manslaughter?
1st Assessor:	He intended to kill the deceased.
2nd Assessor:	It is like bad intention.”

We are aware of the decision of this court in the case of *Washington Odindo v. R.* (2) in which this court held that:

(*a*) There is no objection to the trial judge putting specific questions to the assessors after the conclusion of the addresses, but, before so doing, he ought at least, to remind them of the salient points in the evidence before requiring them to answer them.

(*b*) Where the opinion of the assessors is recorded in the form of specific answers to questions they must also be asked to state their opinion on the case as a whole and on the general issue as to the guilt or innocence of the accused person.

This decision, as far as (*b*) *supra* was concerned, was emphasised by this court in the case of *Msaro Galime v. Republic* (3). See also the judgment of this court dated February 11, 1965, in *Mdiu Mande v.*

Republic (4). Section 283 of the Criminal Procedure Code reads as follows:

> "(1) When the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence and shall then require each of the assessors to state his opinion orally as to the case generally and as to any specific question of fact addressed to him by the judge, and shall record such opinion."

We would reiterate that there can be no objection to the trial judge putting questions to the assessors, but, we think that the questions should be confined to matters or issues peculiarly within the knowledge of the assessors and in respect of which the trial judge should have their opinion. The questions and the answers should not be of the nature of examination or evidence. We note that one of the questions put to the assessors was whether or not the use of the words "Kuma nyoko" by the deceased would be such a provocation as to cause a man of this community to lose his self-control. This was a proper question put by the trial judge. Similarly, we think it proper to ask the assessors whether they think a particular witness was truthful or untruthful when the trial judge is in doubt, as their knowledge of local ways may explain what, to an outsider, might seem evasiveness and they may know that a particular expression has a particular local significance. Several of the other questions which were put and the answers given by the assessors, in our view, went beyond the limit within which the learned trial judge should exercise his powers under s. 283 of the Criminal Procedure Code and as laid down in the authority of *Washington Odindo v. R.* (*supra*). It is also our view that the last question put to the assessors by the trial judge did not invite their opinion on the case as a whole or on the general issue of the guilt or innocence of the accused as must be done, but following the previous questions left them merely the alternatives of murder or manslaughter. It is mandatory that the assessors must be given the opportunity to express their views on the case generally.

Another reason why we think the novel procedure adopted is undesirable is that by the answers the assessors gave to the questions put by the learned trial judge in this case, the assessors might have been precluded eventually from giving an opinion other than that the accused was guilty of the offence with which he was charged, particularly as they had expressed the opinion in their answers that the accused had intentionally killed the deceased. We were of the opinion that the procedure adopted by the learned judge, though irregular, has not occasioned a miscarriage of justice in view of the evidence led at the trial.

Appeal dismissed.

For the appellant:
LJ Jani
Dara F Keeka, Dodoma

For the respondent:
UV Campbell and *PC Bakilana* (State Attorneys, Tanzania)
The Attorney General, Tanzania

Haridas Chhaganlal and others v Kericho Urban District Council

[1965] 1 EA 370 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	23 April 1964
Case Number:	246/1962

Before: Farrell J

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[1] By-laws – Local authority – Crown land – Whether by-laws ultra vires in prohibiting building otherwise than in accordance with Kericho Town Plan – Whether binding on Crown or grantee from Crown – Provision for compensation under general law – By-laws purporting to take away rights without compensation repugnant – Changes made by Kenya (*Local Government*) *Regulations* 1960 (*L.N.* 256 *of* 1963) (*K*).

[2] Town planning – By-laws – Whether repugnant to Town Planning Act (*Cap.* 134) (1948) *s.* 23, *s.* 24 *and s.* 31 (*K*) – *S.* 31 *expressly binding on Crown – Compensation – By-laws purporting to take away rights without compensation repugnant.*

[3] Constitutional law – By-laws – Whether repugnant to Town Planning Act (*Cap.* 134) (1948) *s.* 23, *s.* 24 *and s.* 31 (*K*) – *S.* 31 *expressly binding on Crown – Compensation – By-laws purporting to take away rights without compensation repugnant.*

Editor's Summary

The plaintiffs were leasehold owners of a plot of Crown land at Kericho, first granted in 1928, and used as a hotel. A condition in the grant limited the user to business and residential purposes only. At some time subsequent to 1950 the hotel was closed and the plaintiffs constructed shops and residential premises. In 1960 they were refused permission by the defendant council to erect a petrol station on the plot as such user would constitute an offence within by-laws made under the Local Government (County Councils) Ordinance 1960, to enforce the latest duly approved Town Plan. The plaintiffs prayed for declarations that the by-laws in question did not prevent the grantees from the Crown from using the land for the purposes for which it was authorised by the Crown and in so far as they purported to do so they were ultra vires. The Court considered, *inter alia*, the following matters: (1) whether an outright prohibition in a by-law could cut down a statutory discretionary power of the Commissioner of Lands to authorize a departure from a town plan under ss. 23 and 24 of the Town Planning Act (Cap. 134 of 1948). (2) Whether, if the general law provides for compensation when property is injuriously affected, are provisions in by-laws which curtail the user of that property without compensation both repugnant and unreasonable. (3) Whether the by-laws in question were binding on the Crown or its grantees in the absence of express words in the parent Act or by necessary implication.

Held –

(i) Section 24 of the Town Planning Act applied to sub-division which was not here in issue; whether the by-laws were repugnant in fettering the Commissioner of Lands' discretion to permit variation from a development plan did not therefore arise for decision;

(ii) in re-issuing any title the Crown was bound to act in accordance with the proviso to s. 23 (1) of the Town Planning Act. The approval of the Commissioner of Lands under the section was an effective restriction on the prerogative of the Crown to dispose of its land. Consequently the by-laws in question would not

effect any diminution in the value of Crown land which had not already been brought about by the aforesaid approval;

(iii) the by-laws in question were not binding on the Crown either expressly or by necessary implication but it did not necessarily follow that they were not binding on a grantee from the Crown. A necessary implication will not arise where it is shown that legislation will be ineffective unless the Crown is bound;

(iv) if the by-laws on a benevolent construction applied to Crown land, they were ultra vires for unreasonableness in that the defendant council, although having power to bring into operation a town planning scheme subject to the obligation to pay compensation, was in effect seeking by use of other by-law making powers to put into operation a scheme of equal scope without paying compensation;

(v) in the event of being wrong in holding that the by-laws in question were not binding on the plaintiffs it was necessary to consider the sweeping changes made by the Local Government Regulations 1963. Under these regulations the defendant ceased to have any power to make by-laws for town planning and the by-laws here in question lapsed.

Judgment for the plaintiffs.

Cases referred to in judgment

(1) *In re Pratt, ex parte I. R. Comrs. v. Philips*, [1951] 1 Ch. 225.

(2) *Central Control Board v. Cannon Brewery Co. Ltd.*, [1919] A.C. 744.

(3) *Clark v. Downes*, [1931] All E.R. Rep. 157; (1931), 145 L.T. 20.

(4) *Kruse v. Johnson*, [1898] 2 Q.B. 91.

(5) *Province of Bombay v. Municipal Corporation of Bombay*, [1947] A.C. 58.

(6) *Rudler v. Franks*, [1947] K.B. 530.

(7) *Hall & Co. v. Shoreham-by-Sea Urban District Council*, [1964] 1 All E.R. 1.

(8) *Colonial Sugar Refining Co. Ltd. v. Melbourne Harbour Trust Comrs.*, [1927] A.C. 343.

(9) *Mixnam's Properties Ltd. v. Chertsey Urban District Council*, [1963] 2 All E.R. 787.

Judgment

Farrell J: The issue in this case is whether the holder of a Crown grant can validly be prevented from using his land in accordance with the express conditions of the grant by by-laws which purport to render such user unlawful.

The facts are not in dispute and no evidence was called at the hearing. The plaintiffs are successors in title to the original grantee of a plot of land in Kericho. The grant was issued on January 5, 1928, and the plot was originally used for a hotel. One of the conditions of the grant was as follows:

> "8. The Grantee shall use and permit the said land to be used for combined residential and business (excluding factory) purposes only."

At some time subsequent to 1950, the hotel was closed, and the plaintiffs constructed certain shop and residential premises on the plot in accordance with plans approved by the defendant Council and the Commissioner of Lands in October, 1959. They also prepared and submitted plans for the erection of a petrol station. The plans originally submitted were rejected owing to certain technical defects, but these were remedied and revised plans were submitted on August 24, 1960. These plans were duly approved by the County Engineer on behalf of Nyanza County Council and by the Health Officer of the defendant

council. On September 7, 1960, the defendant council under powers conferred by s. 104 of the Local Government (County Councils) Ordinance, 1960, made certain by-laws known as the Kericho Urban District Council (Business and Residential Areas) By-laws, 1960, to which I shall refer as "the 1960 By-laws". These by-laws contain the following provisions:

> "2. In these By-laws–
>
> "council" means the Kericho Urban District Council; "district" means the Urban District of Kericho; "plan" means the Kericho Township Plan No. 29 approved by the Commissioner of Lands under section 24 of the Town Planning Ordinance, together with any subsequent plan approved by him under the said section a copy of which plan is kept at the offices of the council for inspection by members of the public during normal office hours.
>
> "3. Any person who erects or uses any premises as a shop, warehouse, factory, workshop, school, office, church, residential premises or dwelling or for a business of any description in that part of the district to which the plan relates except in an area zoned for such purposes by the plan, shall be guilty of an offence against these By-laws."

The by-laws were approved by the Minister on October 14, 1960. Under the Kericho Township Plan referred to in the by-laws the plot in question was included in a zone restricted to low density residential user. The plan had been approved by the Commissioner of Lands under s. 24 of the Town Planning Ordinance on November 25, 1958. On October 6, 1960, the defendant council resolved to reject the plans submitted by the plaintiffs and in a letter dated November 17, 1960, the plaintiffs were notified of such rejection, the grounds given being that the use of the plot for a petrol station would be contrary to the recently passed by-laws, and also contrary to the Building By-laws, which required all buildings to be constructed in accordance with the general plan of the town. The plaintiffs were subsequently informed that no further development of their land would be permitted except for low density residential user. The plaintiffs submit that the By-laws of the defendant council do not prevent the owner of land under a grant from the Crown from using the land for the purposes for which it was authorised by the Crown, and that in so far as they purport to do so, they are *ultra vires:* and they pray for declarations accordingly.

I am indebted to counsel for the defendant for a full account of the history of local government in the Kericho area. The first enactment bearing on the matter was the Townships Ordinance, 1903, which appears as Cap. 82 of the Laws of Kenya, 1926. Kericho became a township under this Ordinance by proclamation dated March 10, 1906 (1926 Subsidiary Legislation, Vol. 1, p. 330).

Townships General Rules were made under s. 3 in 1904 and applied to all townships proclaimed under the Ordinance. Rule 59 of these rules reads as follows:

> "59. All buildings within the township shall be constructed in accordance with the general plan of the town and on the building line approved by the District Commissioner."

This appears to be the first reference in legislation to any general plan, and it is to be observed that there appear to be no provisions to show how the general plan is to be prepared or requiring approval of the general plan by any particular authority.

Plans were nevertheless from time to time prepared, and the plan in existence at the time of the grant was plan No. 8, which is designated as "Proposed Design for Kericho Township" and was approved by the Township Board on December 3, 1927. On this plan the plot in question is marked "Kericho Hotel"

and is included in an area described as "First Class Residential Reserve". In 1931 the Townships Ordinance (Cap. 82 of the 1926 Edition) was repealed and replaced by a new Townships Ordinance, which appears as Cap. 133 of the Laws of Kenya, 1948. Under this Ordinance Kericho became a Grade A Township. The rules in force under the earlier Ordinance were preserved by section 35 of the new Ordinance. Later in the same year there was passed the Town Planning Ordinance (now the Town Planning Act) which appears as Cap. 134 of the Laws of Kenya, 1948. I shall later have to consider this enactment in some detail. It is sufficient at this stage to mention that in section 23 there occurs a reference to "a development plan approved by the Commissioner of Lands". A similar reference occurs in the following section, which deals with sub-division. Subsequent town plans, including Plan No. 29 referred to in the 1960 By-laws, have been approved by the Commissioner of Lands, apparently in compliance with the requirements of these sections. In 1932 there were passed the Kericho Township (Business Areas) Rules, the operative rule of which reads:

> "2. No person may erect any shop, warehouse, factory or business premises within any of the streets and areas of Kericho Township other than the areas shown as 1st and 2nd class business, garage and wagon works plots, more especially delineated in plan Kericho Township Layout Revised No. 12, or any other authorised plan which may subsequently be issued."

In 1933 were passed the Township Building Rules (Laws of Kenya, 1948. Vol. VI, p. 1540) which were applied to Kericho by proclamation in 1935 (ibid, p. 1615). Rule 44 of these Rules sets out grounds upon which the local authority may disapprove of any plans. There is no specific reference to a general plan, but one of the grounds under paragraph (*a*) is contravention of existing rules or regulations, a description which would be wide enough to include r. 59 of the 1904 Rules which has already been cited. Under the Local Government (County Councils) Ordinance, 1952 (No. 30 of 1952) a scheme of administration for the county of Nyanza was brought into force in 1954, under which the local authority for Kericho became an Urban District Council, and as such a county district council (G.N. 1768/54 and s. 2 of the Ordinance). Under s. 104 a county district council was given power to make by-laws for any purpose for which a municipal council or board might make by-laws under the Municipalities Ordinance (Cap. 136 of the Laws of Kenya, 1948). Under paragraph (*b*) of s. 9 all rules made under the Townships Ordinance (Cap. 133 of the 1948 Revision) were to continue in force for two years (later extended to 4 years) from the coming into force of the scheme. Thus the rules made in 1904 (except such as had in the meantime been repealed) remained in force at any rate until December 16, 1958, i.e., 4 years after the coming into force of the scheme for the Nyanza County Council.

After the expiry of the existing rules there appears to have been a gap when no rules were in force, but on August 19, 1959, the defendant council passed the Kericho Urban District Council (Building) By-laws, 1959 (L.N. 432 of 1959). By-law 8 of these By-laws applies by reference the Nairobi Municipality (Building) By-laws in respect of *inter alia* "siting, design and amenities of buildings". Under the heading "Siting and Amenities" the Nairobi Municipal (Building) By-laws, 1948 (G.N. 313 of 1949) contain the following by-law:

> "11. All buildings erected within the municipality shall be constructed in accordance with the general plan of the town and on the building line approved by the Council."

This by-law mutatis mutandis is in identical terms with r. 59 of the Townships General Rules which had recently expired. I have already set out the material parts of the Kericho Urban District Council (Business and Residential Areas) By-laws, 1960, which were made under powers conferred by s. 104 of the 1952

Ordinance. In this connection reference may be made to s. 77 of the Municipalities Ordinance (Cap. 136 of the 1948 Revision), the general provisions of which read:

> "The Council may from time to time make by-laws in respect of all such matters as are necessary or desirable for the maintenance of the health, safety and well-being of the inhabitants or for the good rule and government of the municipality."

There then follow a series of particular purposes for which by-laws may be made including the following:

> "(11) for defining the streets or areas within which shops, warehouses, factories or business premises may not be erected, or within which specified trades, businesses or callings or street trading may not be established or carried on."

I have now indicated the history of the legislation in this matter up to the date of suit. Since then there have been further changes of a sweeping character resulting from the enactment of the Local Government Regulations, 1963 (L.N. 256 of 1963) the consideration of which I propose to postpone to a later stage. Before dealing with the submissions of the plaintiffs, I must consider in greater detail the Town Planning Act (Cap. 134 of the 1948 Revision). The first 22 sections of the Act deal with the preparation and enforcement of town planning schemes. Under such schemes very wide powers of control are given, and there is full provision for the payment of compensation where land or property is injuriously affected. No town planning scheme has ever been put in force in Kericho under these provisions. There then follow two sections which provide for planned development where no town planning scheme is in force.

Section 23 (1) reads as follows:

> "Where any Crown land, not being situated within a municipality as defined in the Municipalities Ordinance or a township for which a preparatory authority for the purposes of this Ordinance has been appointed under section 2 of this ordinance, has been, or hereafter shall be, made available for alienation for building purposes, such land shall not be sold or leased for a period exceeding one year, until the Minister shall have approved a town planning scheme in respect of such land:
>
> Provided that, wherever a statutory town planning scheme may be considered inadvisable or unnecessary, such land may be sold, leased or otherwise disposed of, in accordance with a development plan approved by the Commissioner of Lands."

Subs. (2) is not material. It is to be noted that this section applies to Crown land in areas where no town planning scheme yet exists, and allows the sale, leasing or other disposal of such land in accordance with a development plan approved by the Commissioner of Lands.

Section 24 applies to all land within a municipality or township, and controls subdivision. Where no town planning scheme has been approved, the section in brief permits subdivision:

> "with reference to a town plan or other plan or scheme (not being a statutory town planning scheme under the Ordinance) for the control of development approved by the Commissioner of Lands."

If this and certain other conditions are not complied with, the express permission of the Commissioner of Lands is required for sub-division. Subs. (3) gives a right of appeal from a decision of the Commissioner of Lands to the Minister.

Section 24 differs from s. 23 in that it applies to all land, and not merely Crown land, and that its effect is limited to subdivision. It is not clear why this should be so, since there are many ways of developing land without resorting to subdivision, as the plaintiffs in this case are seeking to do, and such development does not appear to fall within the scheme of control envisaged by s. 24. It may be further noted that while the development plan referred to in s. 23 and the town plan or other plan or scheme for the control of development referred to in s. 24 both require the approval of the Commissioner of Lands, they are described in different language, and need not necessarily be identical. The last provision of the Act, which requires to be mentioned, is s. 31 which makes the Act binding on the Crown.

I now come to the submissions made by counsel for the plaintiffs. His main object of attack is the 1960 By-laws, as to which he makes four submissions.

First, he says the by-laws are ultra vires inasmuch as they contain an absolute prohibition against the erection or user of buildings otherwise than in accordance with the Kericho town plan. In this they fail to take into account the provisions of s. 24 of the Town Planning Act which gives the Commissioner of Lands discretion to authorise departures from the plan. The provisions of the by-laws and of the section come into collision, and might lead to the result that a person erecting or using buildings with the express permission of the Commissioner of Lands would at the same time be guilty of a criminal offence for doing so under the by-laws.

For his second submission counsel relies on a principle embodied in a paragraph from the judgment of Evershed, M.R., in the case of *In re Pratt* (1). The passage ([1951] 1 Ch. at p. 232) reads as follows:

> ["Counsel] was, therefore, fully justified in urging us to approach this problem of construction on the footing that, since the common-law right was being cut down, it must not be treated as cut down more than was required by the language used. I approach the matter from a somewhat different standpoint from that taken by the Divisional Court: I think that the problems of construction, which are certainly not free from difficulty, should be looked upon bearing in mind always that this paragraph has the effect quoad the Crown of limiting what would otherwise be the much wider right of the Crown."

Counsel in this case points out that the prerogative right of the Crown to issue grants and leases is curtailed by s. 23 of the Town Planning Act. The Crown's disposal of land is subject to the limitations contained in an existing town planning scheme or development plan. It is (counsel submits) unnecessary to read into the section a further restriction that disposal is also subject to any variation which may subsequently be made in the development plan (subject, of course, to the approval of the Commissioner of Lands).

In support of his third submission counsel points out that under the English scheme of legislation, once permission has been granted to erect a building, such permission continues notwithstanding any development plan. The only way to get rid of the permission is by revocation subject to payment of compensation. It would, it is suggested, be unreasonable if by-laws could take away vested rights and rights *in futuro* without compensation. If a business man buys a business plot in a business zone, can a local authority by re-zoning the area for another purpose, take away his right to use the plot for the purpose for which he acquired it without giving him any redress? In support of this line of argument counsel cites from the speech of Lord Atkinson in *Central Control Board v. Cannon Brewery Co. Ltd.* (2). The relevant passage occurs in [1919] A.C. at p. 752:

> "It was not suggested that the above-mentioned Regulations were not intra vires: nor was it contended that the principle recognized as a canon of construction of statutes by many authorities . . . did not apply to the body of legislation under which the board purported to act. That canon is this: that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in un-equivocal terms . . ."

The fourth submission is that the by-laws do not bind the Crown and are ultra vires against the Crown and a lessee from the Crown because they adversely affect the Crown's reversionary interest. Section 81 of the Interpretation and General Clauses Act (Cap. 2 of the Laws of Kenya) makes the following provision:

> "No written law shall in any manner whatsoever affect the rights of the Crown unless it is therein expressly provided or unless it appears by necessary implication that the Crown is bound thereby."

This is no more than a codification of the common law rule under which it has been held for example, that the Rent Restriction Acts in England do not bind the Crown. See *Clark v. Downes* (3) *per* Lord Hanworth, M.R. ((1931), 145 L.T. at p. 21):

> "Before the county court judge the argument was presented on the basis that the Crown was not bound by these Rent Restrictions Acts, and we have dealt with it in this Court upon that assumption. The assumption is made because it is presumed that the Legislature does not intend to deprive the Crown of any right or property unless it expressed its intention to do so in explicit terms or makes the inference irresistible, and so where the language of a statute is general and in its general sense would not deprive the Crown of any right or property the ordinary rule is that the Crown is not so deprived."

On similar reasoning it is submitted that whereas the Town Planning Act is expressly made binding on the Crown, neither the Municipalities Ordinance, nor the Local Government (County Councils) Ordinance, 1952, is so binding. That being so, it is impossible by an enactment not binding on the Crown to take away from the Crown the value of its reversionary interest in property which under its prerogative it has the right to dispose of in such manner as it sees fit. To the extent to which the by-laws purport to do so, they are ultra vires.

For the defendant council it is submitted that by-laws made by elected representative local authorities should be benevolently interpreted and upheld if possible: Halsbury's Laws of England (3rd Edn.), Vol. 24, p. 519, citing *Kruse v. Johnson* (4). The four elements essential to the validity of a by-law are summarised in the same volume at page 515: (*a*) it must be intra vires the local authority who makes it: (*b*) it must not be repugnant to the general law: (*c*) it must be certain and positive in its terms and (*d*) it must be reasonable. All those tests are, so the defendant council submits, satisfied in the case of the 1960 By-laws. (*a*) It is not challenged that they were validly made and within the by-law making powers conferred by s. 104 of the Local Government (County Councils) Ordinance, 1952, and s. 77 of the Municipalities Ordinance (Cap. 136 of the 1948 Revision) whether regard be had to the general provisions of the section or to the particular powers conferred by paragraph (11), both of which have already been cited. (*b*) There is, it is submitted, no substance in the suggestion that the by-laws are repugnant to ss. 23 and 24 of the Town Planning Act. On the contrary they merely give effect to those provisions by clothing with validity the somewhat vague references to a development plan, which in the absence of by-laws would be without effect. In any case the right of appeal

conferred by subs. (3) of s. 24 (which it is argued is rendered nugatory by the by-laws) relates only to subdivision, which is not a relevant issue in this case. (*c*) There is no suggestion that the by-laws in question are lacking in certainty. (*d*) So far from being unreasonable, the by-laws are necessary for orderly and regular planning.

In answer to the submission that the by-laws are not binding on the Crown, counsel for the defendants submits that, even though the Crown is not expressly mentioned in the Municipalities Ordinance or in the by-laws, the Crown is bound by necessary implication. Planning legislation would be largely ineffective if it were not binding on the Crown, in view of the great extent of Crown land in Kenya. The Town Planning Act is expressly binding on the Crown, and legislation under other Ordinances which is linked to the Town Planning Act and gives effect to it must similarly be held to be binding on the Crown by necessary implication. The Crown is in any case fully protected from any prejudice which might otherwise arise by the provisions requiring first of all approval of the Commissioner of Lands to the development plan from time to time in force and secondly confirmation of any by-laws by the Minister.

If I have in any way failed to do justice to the forceful arguments put forward by either counsel it is due to the difficulty of summarising arguments based on general principles and covering such a wide ground. If I have omitted any points of substance it must not be taken that the submissions have been ignored.

I propose first to deal with the submission that the by-laws are void for repugnancy, in so far as they impliedly fetter the discretion conferred on the Commissioner for Lands to permit variation from a development plan. As has been pointed out by defence counsel, s. 24 of the Town Planning Act in terms applies only to subdivision. If it had been intended to apply to development in general, it is reasonable to suppose that less restrictive language would have been used. The provisions of subs. (1) are not easy to construe. There are indications that it was intended to have a wider application, as in the reference to “the suitability of the land for the purpose intended”, and to the “preservation or enhancement of amenities”: but in my view it would be unsafe to extend the provisions beyond the limits to which they specifically refer. It may be noted that the word “development” is used in relation to adjacent areas, but only subdivision in relation to the land to which the section applies. The draftsman and the legislature must be presumed to have had the distinction in mind. If the section had given a discretion to the Commissioner of Lands to permit development in general otherwise than in accordance with the development plan, and the by-laws purported to take away such discretion by requiring absolute compliance with the plan, then it would be arguable that the by-laws were repugnant and ultra vires. But as the section deals only with subdivision, and no question of subdivision arises in the present instance, the issue posed by the submission on repugnancy does not arise for decision in these proceedings, in so far as the repugnancy alleged is repugnancy to s. 24 of the Act.

A much stronger case on repugnancy can, however, be raised in relation to s. 23 (1) of the Act. Section 23 applies only to Crown land, and the proviso to subs. (1) reads as follows:

> “Provided that, wherever a statutory town planning scheme may be considered inadvisable or unnecessary, such land may be sold, leased or otherwise disposed of, in accordance with a development plan approved by the Commissioner of Lands.”

Supposing a lease to have been issued in accordance with the provisions contained in the proviso, containing conditions which permitted user in accordance with an existing development plan, then if the development plan were

subsequently varied so as no longer to permit the user sanctioned by the conditions of the lease, it would appear to me that it could be strongly argued that any by-laws which purported to enforce the development plan as varied so as to prevent the user of the land in accordance with the conditions of the lease would be repugnant to the general law under which the lease was originally granted. It is true that in the present case, though the lease was granted in accordance with the development plan existing at the time, neither the section nor the proviso was then in existence since the enactment did not become law until 1931, and the repealed Ordinance contained no corresponding provisions. But if the by-laws of 1960 are repugnant to the general law as set out in s. 23, I do not think it could be seriously argued that they are nevertheless valid in regard to leases issued before 1931.

So far I have considered the question of repugnancy in relation to the narrow context of ss. 23 and 24 of the Act. It would be possible to put forward a submission on repugnancy on wider grounds, on the basis that where the general law provides for compensation, a provision which takes away any rights without compensation is repugnant. There is recent authority for such a proposition to which I shall refer later, but as this aspect of the matter arises more naturally on the issue of reasonableness I do not propose to say anything more about it at this stage.

I turn now to consider the submission that the by-laws in question are not binding on the Crown. This is the fourth submission put forward by counsel for the plaintiffs, and I have already summarised his arguments, and cited the passage from *Clark v. Downes* (3) setting out the principle on which he relies. The argument is put on the narrow ground that if the by-laws were binding on the Crown, they would have the effect of diminishing the value of the Crown's reversionary interest in property affected thereby, and would fetter the Crown's prerogative right to dispose of its property in such manner as it sees fit. While recognising the correctness of the general principle, I do not think it has any great force in this context, since in reissuing any title the Crown is bound to act in accordance with the proviso to s. 23 of the Town Planning Act (a provision expressly made binding on the Crown), and as soon as the Commissioner of Lands, an officer of the Crown, has approved a development plan for the purposes of that section, he has effectively restricted the right of the Crown to dispose of its land in such manner as it sees fit. So far as the disposal of reversionary interests is concerned, the by-laws would not effect any diminution in the value of Crown property which had not already been brought about under the existing law.

If that is right, the narrow ground on which the plaintiffs base their submission that the by-laws are not binding on the Crown fails. But nevertheless the general principle remains, that legislation is not to be construed as binding the Crown unless by express provision or necessary implication. For the defendant council it must, I think, be conceded that there is no express provision under which either the Municipalities Ordinance or the Local Government (County Councils) Ordinance, 1952, or the particular by-laws under consideration are made binding on the Crown. Nevertheless, it is argued that a necessary implication arises that they are so binding, since a local authority must be able to control the development of the whole of its area, including areas of Crown land, as otherwise the object of planning would be defeated. Such an implication is, it is argued, all the stronger when the by-laws are linked with an enactment, viz., the Town Planning Act, which is expressly binding on the Crown. In fact the town plan would be valueless without by-laws to give it validity.

I do not find any force in the last submission. The only legislative recognition of the town plan is to be found in ss. 23 and 24 of the Town Planning Act.

Neither of these sections if closely examined requires any by-laws to give it effect. Indeed, so far as s. 24 is concerned, there is specific provision in subs. (5) for rules to be made for carrying into effect the provisions of the section. There is no necessity to rely on the rule-making powers conferred by the Municipalities Ordinance. Similarly as regards the main provisions of the Town Planning Act, s. 21 contains detailed provisions for the making of regulations. The Act provides its own rule-making powers and has no need to invoke any other rule-making authority. The argument that, because the Town Planning Act is expressly binding on the Crown it follows that by-laws on the subject of town planning made under other legislation are also binding on the Crown proves on examination to have no force or substance. Nor do I find any greater force or substance in the argument that if control of development is not binding on the Crown, it must be wholly ineffective. In the first place, as the Crown is bound under s. 23 of the Act to give effect to the development plan in issuing titles, it is reasonable to suppose that the greater part of Crown land will continue to be used in conformity with the plan. Whether this is right or not, the contention appears to run counter to the principle laid down in *Province of Bombay v. Municipal Corporation of Bombay* (5) in which it was held (I cite from the headnote) that:

> "to hold that the Crown is bound by 'necessary implication' if it can be shown that the legislation cannot operate with reasonable efficiency unless the Crown is bound, is to whittle down the general principle and is unsupported by authority".

The general principle referred to is that the Crown is not bound by legislation unless expressly named or bound by necessary implication.

Leaving aside the question whether it would be competent for a by-law making authority to bind the Crown under general powers which do not expressly enable it to do so, I can find nothing in the 1960 By-laws which necessarily implies that they are binding on the Crown, and I have no hesitation in holding that they are not so binding. It does not, however, necessarily follow from this that they are not binding on grantees from the Crown in occupation of Crown land. The question in every case is whether the rights or property of the Crown would be affected: *Clark v. Downes* (3). The Rent Restriction Acts were held not binding on the Crown because they operate in rem and not in personam (*Rudler v. Franks*, (6)), and the value of the Crown's reversion would be diminished. In the *Bombay* case (5) *supra*, the question was whether the municipality was empowered by legislation to carry water mains through or under Crown land in the occupation of Government employees. To do so would to some extent affect the right of the Crown to exclusive use and occupation of the land. In the instant case, it is not at first sight obvious that the rights or property of the Crown would be affected in any way if the by-laws were constructed as binding upon grantees from the Crown. I think, however, it is proper to look at the matter in this way. Suppose a grantee bound by the condition of his grant to be precluded by the by-laws from using the land in conformity with these conditions, it would appear to be unconscionable in the Crown to continue to exact quit-rent in accordance with the grant, and the Crown would be morally bound to accept a surrender of the grant and to re-issue it on less favourable conditions and at a reduced quit-rent. The revenue of the Crown would thus be indirectly affected, and the Minister in giving approval to the by-laws is not to be presumed to have agreed to such a result, or that they should be construed as applying to Crown land.

Whether this argument regarded in isolation is valid or not, there are strong grounds for holding that the by-laws under consideration do not apply to Crown land, since it appears to me that if they do so apply they are wholly unreasonable,

in so far as they would in that case take away vested rights without compensation. It is a well-known fact – and the law-making body must be taken to be aware of it – that Crown titles are invariably issued subject to conditions as to user of the property, not only by virtue of s. 23 of the Town Planning Act, but also in cases to which it has no application. It may be assumed that at the time of issue of the grant, conditions will be imposed in conformity with the current development plan. But there is nothing final or immutable about a development plan, and there is nothing to prevent a local authority changing the plan so as, for example, to include in an area zoned for business development land formerly included in a residential area or vice versa. I do not overlook that a development plan requires the approval of the Commissioner of Lands, but that official can only be expected to give a general approval without looking at the plan in detail to see how it might affect individual properties. The result of applying the by-laws under consideration to Crown land in the Kericho area might be that a grantee of land subject to a restrictive condition as to user might find himself precluded by the by-laws from using his land in any way at all. I have put that as a hypothetical case, but in fact it would be the actual consequence of applying the by-laws to the plaintiffs' land. Under condition 8 of their grant, they are restricted to using the land for combined residential and business purposes. On the plan as it was drawn at the time when the grant was issued, their right to use it in accordance with this condition was expressly recognised, though the zone in which it lay appears to have been reserved for residential purposes. Subsequent plans, including that now current, indicate the plot as situated in an area zoned for low density residential purposes. If they use the land in accordance with their grant, they are in contravention of the by-laws and liable to prosecution and on conviction to penalties which include an order to demolish the buildings on their land. Nor has the local authority any power of dispensation from the observance of the by-laws. If on the other hand, they comply with the by-laws and the development plan, they are liable to forfeit their grant for breach of condition. Nor is it relevant to suggest that there is no likelihood that the local authority would prosecute or that the Crown would forfeit the lease, as such considerations are immaterial for the purpose of deciding whether legislation is void for unreasonableness.

I have already referred to the principle that an enactment should not be held to take away private rights of property without compensation unless the intention is expressed in clear and unambiguous terms. Where it is possible to give to a provision of law a reasonable construction, and one which would not have the effect of destroying private rights already acquired, it is the duty of the court to adopt that construction. In the instant case the construction which would save the by-laws to a great extent from unreasonableness would be to construe them as not applicable to Crown land. It may be true that even on such a construction there might remain in relation to land in private ownership some injustice. That, however, is a question with which I am not concerned in this case. It may be that the by-laws are wholly void for unreasonableness. But I am here concerned with their validity in relation to the plaintiffs' land. If they can properly be construed as not applying to Crown land, there is no need to consider whether they are valid or not in other contexts. If they are to be construed as applying to all land, whether Crown land or not, then it would appear that they are unreasonable and void. The court should, however, give a benevolent construction so far as possible, and in accordance with that principle I prefer to hold that the by-laws do not apply to Crown land.

The last and strongest submission made on behalf of the plaintiffs, and one which, I think, underlies the whole of counsel's argument, is that the defendant council which under the Town Planning Act has power to bring into operation a town planning scheme subject to the obligation to pay compensation, is in

effect seeking to put into operation an equally all-embracing scheme without recognising any obligation to pay compensation. By-laws which are the instruments of putting such a scheme into effect may be attacked, as they have been, either on the ground of repugnancy or of unreasonableness. Both lines of attack receive some reinforcement from the judgments of the Court of Appeal in the recent English case of *Hall & Co. v. Shoreham-by-Sea Urban District Council* (7). In that case the issue was whether certain conditions attached to a permission for development granted by the defendant council were valid or ultra vires. One of the conditions would have involved the plaintiffs in the expense of building a road without compensation. If a certain procedure available under the Highways Act, 1959, had been adopted, the respondents would have been liable to pay compensation. After pointing out the results that would follow from the enforcement of the condition, Willmer, L.J., said ([1964] 1 All E.R. at pp. 9, 10):

> "The defendants would thus obtain the benefit of having the road constructed for them at the plaintiffs' expense, on the plaintiffs' land, and without the necessity for paying any compensation in respect thereof. Bearing in mind that another and more regular course is open to the defendants it seems to me that this result would be utterly unreasonable and such as Parliament cannot possibly have intended. In *Colonial Sugar Refining Co. Ltd. v. Melbourne Harbour Trust Comrs*. (8) Lord Warrington of Clyffe, in delivering the judgment of the Privy Council, said ([1927] A.C. at p. 359), in relation to the statute in question in that case:
>
> > 'In considering the construction and effect of this Act, the Board is guided by the well known principle that a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous words.'
>
> I can certainly find no clear and unambiguous words in the Town and Country Planning Act, 1947 (now superseded by the Town and Country Planning Act, 1962) authorising the defendants in effect to take away the plaintiffs' rights of property without compensation by the imposition of conditions such as those sought to be imposed. In these circumstances, although I have much sympathy with the object sought to be achieved by the defendants, I am satisfied that conditions 3 and 4 are so unreasonable that they must be held to be ultra vires."

In that passage the learned Lord Justice stressed the unreasonable nature of the condition. In the following passage from his judgment ([1964] 1 All E.R. at p. 17) Pearson, L.J., appears to have relied in addition on the ground of repugnancy:

> "I agree with Willmer, L.J., that condition 3 is ultra vires because it is 'unreasonable' in the sense which has been explained in *Kruse v. Johnson* (4) and other cases. I should, however, be inclined to say that the element of ultra vires is to be found in the conflict with the general law relating to highways. The general words of s. 14 (1) of the Town and Country Planning Act, 1947, should not be interpreted as authorising a radical departure from the general law relating to highways."

Although the case cited was concerned with conditions and not with by-laws, the same principles have been applied in determining the validity of the one as the other. See *per* Willmer, L.J. ([1964] 1 All E.R. at p. 5):

> "It seems to me that conditions imposed by a local authority, like by-laws, should be benevolently construed, and in this connexion I would venture to

> follow the same approach as that of Lord Russell of Killowen, C.J., in *Kruse v. Johnson* ([1898] 2 Q.B. at p. 99)."

(See also *Mixnam's Properties, Ltd. v. Chertsey Urban District Council* (9) *per* Diplock, L.J., ([1965] 2 All E.R. at p. 799). Nevertheless, the Court of Appeal held that the conditions, though not ultra vires, were void for unreasonableness.

On the same principle I hold that the by-laws under consideration in the present case, if they must be construed as applying to Crown land are void as being unreasonable: if they are not so applicable, *cadit quaestio*.

So far I have dealt with the issues as they stood at the date of filing suit. As I have held that the by-laws were not binding on the plaintiffs, when passed, and it is not suggested that anything which has subsequently happened has made them so binding, it follows that the plaintiffs are entitled to the declaration for which they pray. If, however, I had come to a different conclusion, or if it should be held that my conclusion was wrong, it would be necessary to consider the effect of subsequent legislation. As the matter had been touched on in argument I propose to indicate briefly the matters which it appears would in that case have been relevant. By the Kenya (Local Government) Order in Council, 1963 (L.N. 96 of 1963) the Governor was given power to make provision by regulations for local government in Kenya. In pursuance of this power the comprehensive Local Government Regulations, 1963 (L.N. 256 of 1963) were passed. Under these regulations Kericho became a county division, at first as part of the County of Nyanza and later as part of the County of Kipsigis (L.N. 433 of 1963), and the defendant council became known as the Kericho Urban Council (Reg. 41). Reg. 274 (1) of the Regulations repealed a number of Ordinances, including the Municipalities Ordinance and the Local Government (County Councils) Ordinance, 1952. Sub-regulation 2 (*a*) went on to provide as follows:

> "(2) Notwithstanding the repeal of the aforesaid Ordinances all existing subsidiary legislation made under any of the repealed Ordinances by an existing authority which is deemed to be a local authority established under these Regulations shall, to the extent only that such local authority has itself the power under these Regulations or any amended Ordinance to make such subsidiary legislation be deemed to be subsidiary legislation made by such local authority under these Regulations or the amended Ordinance, as the case may be, and shall continue to be of full force and effect within the area to which it applied until altered or revoked by such local authority."

It is not disputed that under reg. 41 (3) (I refer to the second of two sub-regulations so numbered) Kericho Urban Council was an authority deemed to be a local authority established under these Regulations, and that being so the 1960 By-laws were preserved by reg. 274 (2) (*a*) provided that the Kericho Urban Council had power under the 1963 Regulations to make them.

Regulation 201 of the 1963 Regulations defines the power of a local authority to make by-laws. Sub-reg. (1) reads as follows:

> "(1) Subject to regulation 202 of these Regulations a local authority may from time to time make by-laws in respect of all such matters as are necessary or desirable for the maintenance of the health, safety and well-being of the inhabitants of its area or any part thereof and for the good rule and government of such area or any part thereof and for the prevention and suppression of nuisances therein and, more particularly, but without prejudice to the generality of the foregoing
>
> (*a*) for controlling any of the things which it is empowered by or under these Regulations to do, establish, maintain or carry on; and

(*b*) for controlling or regulating any of the things which, and any of the persons whom, it is empowered by or under these Regulations to control or regulate; and

(*c*) for prohibiting or preventing by prohibition any of the things which it is empowered by or under these Regulations to prohibit; and

(*d*) for requiring or compelling the doing of any of the things which it is empowered by or under these Regulations to require or compel."

Paragraphs (*a*) to (*d*) refer back to the powers of local authorities set out in earlier Parts, of which Parts IX-XI alone appear to be material. Part IX deals with powers and duties of all local authorities, Part X with those of municipalities and counties, and Part XI (according to the heading, at any rate) with those of municipalities and county divisions, i.e., with the powers of municipal councils and urban and area councils. The powers of the defendant council or its successor are accordingly to be found in Parts IX and XI. The only specific reference to "planning" is found in reg. 166 which is in Part XI, and might be expected to confer the relevant powers on municipal councils, urban and area councils, as in the case with the surrounding regulations in this Part. But reg. 166 reads as follows:

> "Every municipal council and county council may, subject to any other written law relating thereto, prohibit and control the development and use of land and buildings in the interest of the proper and orderly development of its area."

It would thus appear that planning powers are by the 1963 Regulations confined to municipal councils and county councils, and that the powers of planning which other local authorities had under the Local Government (County Councils) Ordinance, 1952, are no longer exercisable by such authorities other than municipalities and counties. If that is right, an urban council no longer has any power to make by-laws in respect of town planning, and reg. 274 (2) (*a*) which preserves subsidiary legislation "to the extent only that such local authority has itself the power under these Regulations to make such subsidiary legislation" was ineffective to preserve the Kericho Urban District Council (Business and Residential Areas) By-laws, 1960, which are the subject of these proceedings.

It was urged on behalf of the defendant council that in view of the heading of Part XI of the 1963 Regulations, and the contents of the surrounding regulations, it must be presumed that reg. 166 intended to refer to urban and area councils, and that the reference to counties was a mistake. If there has been a mistake it could in my opinion be equally easy to regard the regulation as having been mistakenly included in the wrong Part. In any case, as the regulation makes clear sense, it would not in my opinion be open to the court to treat it as saying something quite different from what it in fact says. Alternatively, it is argued that the general powers of making by-laws conferred by reg. 201 (1) are wide enough to include planning powers, and that the more specific powers which follow are expressed to be "without prejudice to the generality of the foregoing." There is some force in this argument, but nevertheless it appears to me that if every local authority has the wide powers of making by-laws which the argument asserts, there is little point in the distinctions made in Parts X and XI between the powers of different classes of authorities. In particular, if all authorities equally have power to make planning by-laws, it would be pointless for reg. 166 to specify that certain classes of authority have such power and others (by implication) have not. The regulation would, if the argument is right, be found in Part IX which defines the powers of all local authorities.

In my view planning powers have by the 1963 Regulations been taken away from urban councils, and the 1960 By-laws are now no longer law. It follows that, whatever may have been their validity as against the plaintiffs at the time when they were passed and at the time of filing suit, the plaintiffs are entitled to the declaration for which they pray, since a declaration of existing rights is useless unless it is valid at the time it is made.

For the reasons given there will be judgment for the plaintiffs with costs.

Judgment for the plaintiffs.

For the plaintiffs:
Bryan O'Donovan QC and *RN Khanna*
Khanna & Co, Nairobi

For the defendant:
Mackie-Robertson QC and *WS Deverell*
Kaplan & Stratton, Nairobi

Ooko Otanga v Phillister Marry Nabunjo
[1965] 1 EA 384 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	10 April 1965
Case Number:	613/1963
Before:	Russell J
Sourced by:	LawAfrica

[1] Practice – Setting aside ex parte decree – Defendant acting in person – Appearance entered – No defence filed – No notice of hearing given to defendant – Case heard ex parte – Judgment entered against defendant – Belief that procedure in High Court same as Buganda Courts – No further steps taken after entering appearance because of that belief – Whether defendant prevented by sufficient cause from appearing at trial.

Editor's Summary

The defendant who was acting in person entered an appearance to the sue but did not take any further steps in the matter as she was under the honest but mistaken belief that the procedure in the High Court was the same as in the Buganda Courts and that she would in due course be summoned by the Court to attend the hearing. As no defence was filed the suit was set down for hearing *ex parte* pursuant to O. 9, r. 8A (2), of the Civil Procedure Rules. No notice of the hearing was given to the defendant and judgment

was entered in her absence. Subsequently the defendant applied for setting aside the *ex parte* judgment.

Held –

(i) an additional warning should have been given in the summons of the need to file a defence within the prescribed period and the consequence of default in doing so;

(ii) owing to ignorance of the Rules of Procedure of the High Court, the defendant was prevented by sufficient cause from appearing when the suit was called for hearing and accordingly the *ex parte* judgment should be set aside: *Kanji Devji v. Damodar Jinabhai & Co*. (1934), 1 E.A.C.A. 87, and *Simon Petero Zirabamuzale v. Andrew Corret and Another*, [1962] E.A. 694 (U), distinguished.

Order accordingly.

Cases referred to in judgment

(1) *Simon Petero Zirabamuzale v. Andrew Corret and Another*, [1962] E.A. 694 (U).

(2) *Kanji Devji v. Damodar Jinabhai* (1934), 1 E.A.C.A. 87.

(3) *Jamnadass V. Sodha v. Gordhandas Hemraj* (1952), 7 U.L.R. 7.

Judgment

Russell J: This is a notice of motion by the defendant, Phillister Marry Nabunjo, for an order setting aside the *ex parte* judgment

delivered by Fuad, J. on March 12, 1964. The application was supported by the affidavit of the defendant sworn on November 10, 1964 and was made pursuant to O. 9, rr. 9 and 24, of the Civil Procedure Rules and s. 101 of the Civil Procedure Ordinance. The plaintiff has not filed an affidavit in reply or otherwise. As O. 9, r. 24, specifically provides for an *ex parte* decree being set aside under the various circumstances therein mentioned, s. 101 of the Ordinance is not applicable. All that I have to decide is whether the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing.

The suit was filed on November 30, 1963, and an appearance was entered on December 17, 1963. The defendant in her affidavit has sworn that she did not take any further steps in the matter as she was under the honest but mistaken belief that the procedure in the High Court was the same as in the Buganda Courts and that she would in due course be summoned by the Court to attend the hearing. The defendant did not, therefore, file a written statement of defence and the plaintiff's advocate set the suit down for hearing *ex parte* pursuant to O. 9, r. 8A (2), before Fuad, J., on March 10, 1964.

In accordance with the practice of the Court and the ruling of Bennett, J., in *Simon Petero Zirabamuzale v. Andrew Corret and Another* (1) which was upheld by the Court of Appeal for Eastern Africa a hearing notice was not served on the defendant and she was not present at the *ex parte* hearing. Although O. 9, r. 8A (2), provides for setting down a suit for hearing *ex parte* in the event of the defendant entering an appearance but failing to file a defence within the prescribed period, O. 9, r. 10 (which does not appear to have been considered in *Simon Petero Zirabamuzale v. Andrew Corret and Another* (1)) reads as follows:

> "Where a defendant has entered an appearance under Rule 1 hereof the plaintiff may set down the suit for hearing in Court with notice to the opposite party, after the expiration of the time allowed to the defendant for filing a defence, or the last of the defences."

I can only assume O. 9, r. 10, was not revoked at the time the new O. 9, r. 8A, was made but the fact remains that there are two valid and subsisting rules which are inconsistent. The defendant was not represented by counsel and filed an appearance herself. In the summons served on her on December 2, 1963, she was required to enter an appearance in accordance with O. 9, r. 1, and instructions are printed on the back of the summons as to how an appearance should be entered. In the summons itself it states:

> "Should you fail to enter an appearance on or before the date mentioned, the plaintiff may proceed with the suit and judgment may be given in your absence."

This form of summons may have been sufficient to warn the defendant of the consequences of default prior to the making of the new O. 9, r. 8A (2), as a layman would have been entitled to infer as in fact was (and possibly still is) the case that once an appearance had been entered the plaintiff could not proceed with the suit and obtain judgment in the absence of the defendant unless prior notice of the hearing had been served on the defendant. Once O. 9, r. 8A (2), had been made an additional warning should have been given in the summons of the need to file a defence within the prescribed period and the consequences of default in so doing.

The case was duly heard *ex parte* on March 10, 1964, and judgment given in favour of the plaintiff on March 12, 1964. On July 9, 1964, the plaintiff's advocate filed an application for execution under O. 19, r. 8, and the Court issued a hearing notice addressed to the defendant under O. 9, r. 38, reading:

> "WHEREAS Mr. S. V. Pandit, ... Advocate for the decree holders applied to this Court for your examination as to the assets of the above-named company. You are hereby required and ordered to attend this Court on 30th day of September , 1964 at 10.30 a.m. and to produce the necessary books of account And documents relating to the affairs of the said Company."

The defendant refused to accept service of this peculiar notice although an African employee of the plaintiff's advocate tendered the same to her on August 9, 1964. In his affidavit of service the said employee did not allege that he explained the substance of this most peculiar notice to the defendant or that a decree had been issued against her. The defendant did not appear on September 9, 1964, and a warrant was issued for her arrest. She was brought before the Court on November 4, 1964, and was warned to appear again on November 11, 1964 on which date this notice of motion was filed. If I accept the allegations in the affidavit of the defendant as being substantially true, this application can be readily distinguished from those in *Kanji Devji v. Damodar Jinabhai* (2) and *Simon Petero Zirabamuzale v. Andrew Corret and Another* (1) as in both those cases the defendants were represented by advocates and should have been aware of the consequences of default in filing their defences. If a hearing notice had been filed on the defendant in this suit and she had appeared at the hearing in person and stated that she had a good defence and explained the reasons for not having duly filed a written statement of defence, I have no doubt she would have been granted time to do so even if the costs of the day had been granted to the plaintiff in any event.

There is no reason why I should not accept the allegations in the defendant's affidavit as being true and on that basis I find myself in very much the same position as Ainly, J., in *Jamndass V. Sodha v. Gordhandas Hemraj* (3) in which he held that:

> "(i) Where a defendant has entered an appearance but failed to file a statement of defence, he is wholly at the discretion of the Court as to whether he may be heard in the case.
>
> (ii) Where a defendant who has appeared, but not filed a statement of defence, and has a good defence on the merits, unless the defendant is simply trying to delay the action, the Court should normally exercise its discretion in favour of the defendant and let him put forward a defence, but penalise the defendant severely by way of costs."

Admittedly that judgment was prior to the making of O. 9, r. 8A (2), in 1960, but the facts are similar.

I find that owing to her ignorance of the Rules of Procedure of the High Court, the defendant was prevented by sufficient cause from appearing when the suit was called on for hearing. No facts have been put forward by the plaintiff which would justify me in finding that he would suffer any undue hardship by the decree being set aside or which could not be compensated by the award of costs.

The decree is, therefore, set aside pursuant to O. 9, r. 24. The defendant shall have leave to file and deliver her defence within 21 days from today and the plaintiff may set the suit down for hearing at the expiry of that time. The defendant shall have the cost of this application in any event and the costs of hearing the suit before Fuad, J., shall be costs in the case.

Order accordingly.

For the plaintiff:

Abu Mayanja
Mayanja Clerk & Co, Kampala

For the defendant:
SV Pandit
SV Pandit, Kampala

Hassam Kassim Lakha v The Voi Sisal Estates Ltd
[1965] 1 EA 387 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	21 April 1965
Case Number:	69/1964
Before:	Sir Samuel Quashie-Idun P, Newbold Ag V-P and Sir Clement de Lestang JA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Sheridan, J

[1] Income tax – Undistributed profits – Shareholder – Profits deemed to have been distributed – Notice of deemed distribution served on company – Shareholder assessed on his proportion of deemed distribution – Election by shareholder – Tax to be paid by company – Shareholder ceasing to be member of company – Cesser prior to notice of deemed distribution and assessment – Agreement by shareholder to pay income tax on profits accrued until shareholder ceased to be a member – Whether company entitled to reimbursement of income tax paid.

Editor's Summary

The respondent company sued the appellant, a former shareholder, for the refund of income tax paid by the respondent company in respect of the appellant following service upon the company of a notice under s. 22 of the East African Income Tax (Management) Act 1952. The claim arose out of an agreement made in 1952 between the company and two main groups of shareholders to divide the assets of the company between certain continuing and certain departing shareholders who would transfer their shares to the continuing shareholders. The appellant was one of the departing shareholders. Clause 9 of the agreement provided that the liability for income tax and other taxes on profits accrued due up to June 30, 1952, should be the joint responsibility of both groups and their members in proportion to their shareholding. Clause 19 provided that both groups should pay their respective shares of the income tax or any other tax assessed as and when the same should become due and payable. In 1953 the shares were transferred by the departing members to the continuing shareholders but the income tax due for 1952 was not finalised until 1958. As no profits for 1952 were distributed to the shareholders, the Commissioner of Income Tax, in 1959, acting under the powers given by s. 22 of the East African Income Tax (Management) Act 1952, ordered that 60% of the total income of the company for the accounting period ending June 30, 1952,

should be deemed to have been distributed as dividends amongst the shareholders as at December 30, 1952. The appellant's share was assessed at Shs. 33,267/- and under s. 22 (4) of the Act he elected that the tax should be paid by the company. The trial judge held that the appellant was under a duty to reimburse the company with the tax paid. On appeal,

Held –

(i) the tax payable on any dividends deemed to have been distributed under s. 22 of the East African Income Tax (Management) Act 1952 is payable on the income of a shareholder and it does not matter who pays the tax, whether it be the shareholder or the company;

(ii) clauses 9 and 19 of the agreement related to tax upon the profits of the the company and had no application to any tax which the company, by reason of the provisions of s. 22 ibid., had been called upon to pay in respect of the income of a shareholder;

(iii) the appellant was not liable to reimburse the company the amount of the tax paid by the company under s. 22 ibid.

Appeal allowed.

[**Editorial Note:** Decision of the High Court of Uganda, reported at [1964] E.A. 532, reversed.]

No cases referred to in judgment

April 21. The following judgments were read:

Judgment

Newbold Ag V-P: This appeal involves the construction of a somewhat unusual agreement made in 1952 between a company and groups of the shareholders therein, one of those shareholders being the appellant. In effect, the main purpose of the agreement was to divide the assets of the company between shareholders who would continue to be shareholders in the company (the "continuing shareholders") and shareholders who would leave the company (the "departing shareholders") and who would transfer their shares to the continuing shareholders. The appellant was one of the group of departing shareholders and the suit is in the nature of a test case. The agreement provided that final accounts of the company should be taken as at June 30, 1952, that the assets to be transferred by the company should be transferred to a nominee of the departing shareholders, that the company should declare a dividend of a specified amount and that, on such dividend being declared, the departing shareholders should on the request of the company transfer their shares to the continuing shareholders. The assets of the company which were to be transferred to the departing shareholders were duly transferred, the dividend was duly declared by the company in November, 1952, in respect of the year 1951, but for some unexplained reason the departing shareholders did not transfer their shares to the continuing shareholders until 1953. Some years later, in 1959, the Commissioner of Income Tax, acting under the powers given by s. 22 of the East African Income Tax (Management) Act, 1952, ("the Act") ordered that 60% of the total income of the company for the accounting period ending June 30, 1952, should be deemed to have been distributed as dividends amongst the shareholders as at December 30, 1952. As the appellant was still a registered shareholder of his shares on that date, even though he was under a duty to transfer those shares to the continuing shareholders and was thus in effect a trustee of the shares, his proportionate share of the deemed dividend was included in his income and he was assessed to tax on such share in an amount of Shs. 33,267/-. In accordance with his rights under subs. (4) of s. 22 of the Act, the appellant gave notice to the Commissioner of Income Tax that such tax should be recovered from the company; thereupon the Commissioner called upon the company to pay this tax, which it duly did. The amount of the profits of the company which had been deemed to have been distributed as dividends on December 30, 1952, a proportionate share of which formed part of the income of the appellant and was assessed on him, was in fact subsequently distributed in 1962 to the then shareholders; and this amount would, in accordance with subs. (5) of s. 22 of the Act, have been distributed free of any liability to pay tax in the hands of the recipient. The company, which is the respondent in this appeal, brought this action against the appellant to recover various amounts, including the amount of Shs. 33,267/-, which it alleged the appellant was under a duty to reimburse to it, and judgment was given in the High Court in its favour. This appeal is against the decision of the High Court insofar as it affects the amount of Shs. 33,267/-; and no issue arises on this appeal other than the issue whether the company is entitled to recover from the appellant this sum which, in the circumstances set out, it had paid in respect of the tax assessed on the appellant.

The company, both before the trial judge and on appeal, rested its case almost entirely on clauses 9 and 19 of the agreement. These clauses read as follows:

> "9. It is further agreed and declared that the liability of payment of income tax and other tax (if any) on profits accrued due up to the accounting period up to 30th day of June 1952 shall be the joint responsibility of both the major groups and its members in proportion of their shareholdings.
>
> 19. The company shall call upon the two major groups aforesaid to pay their respective share of the income tax or any other tax assessed by the authority as and when the same shall become due and payable and both the said major groups hereby undertake to forthwith pay the same upon request being made by the company."

The submissions on behalf of the company were that these clauses placed a liability on the appellant to reimburse the company for any tax, including the tax payable under s. 22 of the Act, paid by the company. These submissions were accepted by the trial judge who stated in his judgment:

> "The shareholders, members of the two groups, accepted liability for income or any other tax on the profits of the company which, for 1952, were assessed at some £175,000 under the 'deeming' provision."

The point at issue in this appeal is a perfectly short and simple one involving the construction of the two clauses to which I have referred in the light of the provisions of the Act relating to income tax and the tax on dividends deemed to have been distributed. With respect to the trial judge, I have come to the clear conclusion that he erred in his decision; and it would seem from the sentence to which I have referred that he fell into error by reason of thinking that the tax on dividends deemed to have been distributed was a tax upon the profits of the company.

It is necessary first to appreciate precisely the position which arises on the application of s. 22 of the Act. Under subs. (1) of that section where a company to which the section applies has in respect of any period made profits (which profits would have paid income tax at the company rate) but has failed to distribute 60% of the total income of the company, then the Commissioner may make an order declaring that the undistributed portion of 60% of such income shall be deemed to have been distributed as dividends amongst the shareholders; and the proportionate share thereof forms part of the income of each of the shareholders. This section only applies to companies which, in effect, are companies controlled by a very few persons. The reason for this section is to force profits, which have already paid tax at the company rate when they were income of the company, into the income of the shareholders of the company so that they would then bear tax at the individual rate, which rate would normally, in the case of shareholders of such a company, be a rate considerably in excess of the company rate. On becoming part of the income of the shareholders credit would, of course, be given for any tax which the dividends had borne at the company rate. It will thus be seen that where 60% of the income of the company is deemed to have been distributed as dividends, it is no longer the income of the company and chargeable under s. 8 (1) (*a*) of the Act, but becomes the income of the shareholder, chargeable under s. 8 (1) (*e*) of the Act, and, by reason of being the income of an individual shareholder, becomes liable to the individual rate. It would obviously be unfair to require the shareholder to pay tax upon income which he has only notionally received and which remains in the company and is used by the company. For this reason under subs. (4) of s. 22 the shareholder can elect that the tax be paid by the company. Thereupon

the Commissioner can recover the amount of such tax from the company, that amount, of course, being the difference between the amount of tax which the gross dividends had borne when they were taxed at the company rate as income of the company and the amount which such gross dividends bore at the individual rate when they became the income of the shareholder. On payment by the shareholder or the company, as the case may be, of the tax on the dividends, the amount representing the dividends still remains in the hands of the company and available for distribution amongst the shareholders at some later date. Clearly when that amount is subsequently distributed as dividends it should not be required to bear tax at the individual rate a second time; accordingly by subs. (5) of s. 22 the amount which was deemed to have been distributed as dividends and in respect of which tax has been paid by or on behalf of the shareholder is franked in the hands of the company and on subsequent distribution as dividends to the then registered shareholders is received by them as income which is not liable to pay tax in their hands. Equally clearly as the company on such distribution would have parted with the amount which had previously been deemed to have been distributed it should be entitled to reimburse itself if it had paid the tax thereon; accordingly provision to that effect is made in the latter part of subs. (4) of s. 22. In the light of what I have set out above, it is perfectly clear that the tax payable on any dividends deemed to have been distributed under s. 22 of the Act is tax payable upon the income of the shareholder. It matters not who pays the tax, whether it be the shareholder or the company; it is, as I say, a tax on the shareholders' income.

As s. 22 only gives to the company a right of recovery of any such tax paid by the company on the subsequent distribution, the company' can only recover from the appellant the sum of Shs. 33,267/- if it has a contractual right to do so under the agreement, which in effect means either clause 9 or 19 thereof. Clause 9 deals with the "payment of income tax and other tax (if any) on profits accrued due up to the accounting period up to 30th day of June 1952". This can clearly be nothing other than income tax on the profits of the company; it is fantastic for a number of reasons to suggest that the word "profits" can have any reference to the income of the shareholders, one of such reasons being that dividends on shares are not profits. This being so, the clause cannot apply to income tax on the income of the shareholder. Equally clearly clause 19, which enables the company to call upon the shareholders "to pay their respective share of the income tax or any other tax assessed by the authority" can only refer to tax assessed on the profits of the company for the reason that no shareholder could be said to have a "respective share of the income tax or any other tax" on the income of any other shareholder. It is, in my view, manifest that clauses 9 and 19 relate, and can relate only, to tax upon the profits of the company and, therefore, can have no application to any tax which the company, by reason of the provisions of s. 22 of the Act, has been called upon to pay in respect of the income of a shareholder. There are other reasons, based on the capacity in which the appellant held the shares on December 30, 1952, why in my view there is nothing in the agreement which would entitle the company to recover from the appellant the sum which it paid, but I find it unnecessary to go into the matter.

For these reasons I consider that this appeal should be allowed with costs and that the judgment and decree of the High Court should be varied so as to exclude therefrom any requirement that the defendant do pay to the plaintiff the sum of Shs. 33,267/- with interest thereon. As the plaintiff would have succeeded in only a very minor part of its claim, I would also vary the judgment and decree of the High Court so as to provide that the defendant should only be required to pay to the plaintiff one-half of the taxed costs of the suit. As regards this appeal, I would give a certificate for two counsel.

Sir Clement De Lestang JA: Under an agreement made in 1952 between the respondent company and two main groups of shareholders therein to divide up the assets of the company, the first group, of which the appellant was a member, took over part of the assets at a valuation and transferred their shares in the company to the second group. Although the company had made considerable profits for its trading year 1951/1952, it did not declare any dividend for that year. In 1959 the Regional Commissioner of Income Tax, acting under s. 22 of the East African Income Tax (Management) Act, 1952, ordered that 60% of the profits of that trading year should be deemed to have been distributed to the shareholders. The appellant was accordingly assessed at Shs. 33,267/-tax on his notional share of that deemed distribution. Under s. 22 (4) of the Act he elected that his tax should be paid by the company and it was duly paid. Subsequently the company brought an action against the appellant in which it sought *inter alia* to recover this payment. As the appellant did not in fact receive any dividend, the dividend for the year in question being distributed in 1962 long after he had ceased to be a shareholder, the company had no statutory right to obtain repayment from the appellant. Its right to do so arose, if at all, under the agreement. The learned trial judge held that clauses 9 and 19 covered the company's claim. Those clauses read as follows:

> "9. It is further agreed and declared that the liability of payment of income tax and other tax (if any) on profits accrued due up to the accounting period up to 30th day of June 1952 shall be the joint responsibility of both the major groups and its members in proportion of their shareholding.
>
> 19. The company shall call upon the two major groups aforesaid to pay their respective share of the income tax or any other tax assessed by the authority as and when the same shall become due and payable and both the said major groups hereby undertake to forthwith pay the same upon request being made by the company."

Before dealing with those clauses, it would be convenient to refer to two matters which influenced the learned judge's decision. The first is a letter written by the appellant's advocates which the learned judge thought constituted an acknowledgment, albeit not conclusive, of liability. In point of fact that letter related to the repayment by the appellant and his group of their share of the income tax assessed on and paid by the company on its profits, for which they now concede they are liable under the agreement. It had nothing to do with the tax on the deemed dividends which the appellant had required the company to pay under s. 22 (4) of the Act. It did not, therefore, support the company's claim at all. The second is the acceptance by the learned judge of the argument of counsel for the respondent that

> "the sale of these shares was on the basis of a valuation which was to be free from tax. The sellers would get a better price if there was an indemnity against tax."

With respect, it is not correct to say that the first group of shareholders sold their shares at a valuation. A valuation was indeed made of the assets for the purpose of the sharing, but the shares themselves were merely transferred to the second group as a result of the partition without reference to their market value.

Having disposed of these two matters, the position is that the company's right to repayment depends entirely on the true construction of the agreement, in particular clauses 9 and 19. For the appellant it is contended that those clauses relate to tax due and payable by the company on its profits, that profits and dividends are two distinct sources of tax (vide s. 8 (1), East African Income Tax (Management) Act, 1952), that tax on dividend is a tax neither on profits

nor on the company and consequently is not covered by the clauses. For the company, it is argued that under the agreement the parties contemplated that

(*a*) the first group would take certain assets,

(*b*) the second group would take over the company, together with the remaining assets, and

(*c*) everything else would be for the joint account of both groups up to the date of take-over and that in fixing the price of the assets the appellant had the benefit of the profits undiminished by the liabilities.

I pause here to remark that such benefit, if any, was enjoyed equally by the shareholders of the second group. It is contended that construed in that light, clauses 9 and 19 impose a liability on the members of both groups for all taxes so long as they relate to profits made at the stated date. It is further contended that where a shareholder, assessed on deemed dividends, requires a company to pay the tax, it becomes a tax due by the company on its profits which it is bound by law to pay.

This was a very complex and detailed agreement which made specific provisions for specific subjects. Apart from a reference to income tax in clause 6, which has no bearing on the present case, provision for income tax is contained in clauses 9 and 19. In construing those clauses I can derive no real assistance from the rest of the agreement. Clause 9 appears to me to be the more important of the two; it is that clause which imposes liability for tax on the shareholders, clause 19 doing nothing more than providing for the settlement of that liability. The liability in clause 9 is in respect of "income tax and other tax (if any) on profits". The tax here is not a tax on profits as such. It is a tax on dividends. It is, of course, true that since dividends are declared from profits, a tax on dividends is indirectly a tax on profits. Nevertheless, the two taxes are quite different. They are classified under different heads in the taxing section of the income tax law; a tax on profits is assessed on the company, which alone is liable for its payment; a tax on dividends is assessed on the shareholders and the company only becomes liable to pay the tax in certain prescribed circumstances. It seems to me, therefore, that the appellant's contention is the correct one and that the income tax referred to in clause 9 is income tax assessed on and payable by the company on its profits. Were it intended that the liability should comprise tax on deemed dividends for which the shareholders would not otherwise be liable, clear and express provision ought to have been made therefor. It would, I think, be inequitable in the present case to require the shareholders of the first group to pay tax in respect of dividends which not only they did not get, but which in fact have been distributed to the shareholders of the second group. I would be loath so to decide and would only do so if compelled by the language of the agreement. I do not think that clause 9 compels this construction. I would accordingly allow this appeal and I agree with the order proposed by the learned Acting Vice-President.

Sir Samuel Quashie-Idun P: I have read the judgments of my brothers Newbold, Ag. V.-P., and de Lestang, J.A., and I agree that the appeal should be allowed with costs. It is accordingly so allowed and the judgment and decree of the High Court whereby the defendant was ordered to pay to the plaintiff the sum of Shs. 33,267/- with interest thereon set aside. The order and decree of the High Court as to costs are also varied and the defendant is hereby ordered to pay to the plaintiff one-half of the taxed costs of the suit. The appellant also to have costs in this court for two counsel.

Appeal allowed.

For the appellant:
PJ Wilkinson, QC, K Bechgaard, QC and *HG Gandesha*

Wilkinson & Hunt, Kampala

For the respondent:
Bryan O'Donovan, QC and *CB Patel*
Patel & Mehta, Kampala

The Attorney General of Uganda v The Kabaka's Government
[1965] 1 EA 393 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	4 May 1964
Case Number:	462/1963
Before:	Sir Udo Udoma CJ, Bennett and Slade JJ
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[1] Constitutional law – Uganda – Independence – Financial relationships between the Kabaka's Government and the Uganda Government – Uganda (*Constitution*) *Order in Council* 1962 *– Uganda* (*Independence*) *Order in Council* 1962, *s.* 107 *and s.* 108 *and Schedule* 9.

[2] Statute – Construction – Ambiguity – Aids to discovering intent of legislative authority – Textual changes to schedule to an Order in Council to give effect to the legislative intention – Uganda (*Independence*) *Order in Council* 1962, *Schedule* 9.

Editor's Summary

The plaintiff sought declarations in the alternative as to the true construction of Schedule 9 of the Uganda (Independence) Order in Council 1962, which concerned financial relationships between the Government of Uganda and the Kabaka's Government. The defendant counter claimed for declarations urging an opposite construction. Schedule 9 was in the form of an agreement the wording of which was capable in paragraph 1 of three possible constructions followed by ambiguities of expression in paragraphs 2 and 4. In discovering the intention of the legislative authority the plaintiff proposed to adduce as aids to construction letters and the records of the Constitutional Conference, including that of its Fiscal Committee, which preceded the Order in Council containing the constitution. The defendant opposed the admission of the majority of the documents tendered on the ground that it was the intention of the legislator and not that of the parties to the agreement that was material. The Court admitted certain extraneous evidence in order better to ascertain the surrounding circumstances and the historical background. Under the Uganda (Independence) Order in Council 1962, the defendant became a Federal State with legislative and executive functions and duties imposed on it by existing legislation. The Protectorate Government had up to mid-1962 virtually complete control over revenues and expenditures of all subordinate governments. A feature of this control was a system of specific recurrent grants. On the approach of Independence control was relaxed and a system of block grants to all authorities including the defendant was adopted as from July 1962. The Uganda (Independence) Order in Council 1962,

obliged the Uganda Government to carry on making contributions to all the Federal States yet those to Buganda were made subject to Schedule 9 while those to the other states were subject to s. 108 which retained the control of the Uganda Government. It was contended for the defendant that under Schedule 9 it should receive a contribution equal to the sum of "Buganda's financial requirements". The plaintiff contended that the size of the contribution should be calculated as if it were a block grant.

Held –

(i) in construing Schedule 9 the Court would observe the rules of statutory interpretation although the schedule was in the form of an agreement; the schedule was ambiguous and the task of the Court was to discover the intention of the legislative authority;

(ii) extraneous evidence was admissible but restricted to that relating to the surrounding circumstances and the history of the financial relationship existing

between the parties up to the commencement of the enactment in dispute; other aids to construction such as the opinions of those who instructed the draftsman were rejected;

(iii) having taken into account evidence extraneous to the legislation in dispute as to the surroundings circumstances and the historical background the Court found that the legislative intention of Schedule 9 was to change the method of supply of aid rather than the method of calculation of its amount; the Court then made textual changes to the Schedules to give effect to the legislative intention with a minimum of violence to the words used.

Declarations accordingly.

Cases referred to in judgment

(1) *Cooke Sons & Co. v. New River Co*. (1889), 14 App. Cas. 698.

(2) *Katikiro of Buganda v. Attorney General of Uganda*, [1959] E.A. 382 (C.A.); [1960] E.A. 784 (P.C.).

(3) *Eastman Photographic Co. v. Controller-General of Patents*, [1898] A.C. 571.

(4) *Assam Railways and Trading Co. Ltd. v. Inland Revenue Comrs*., [1935] A.C. 445 (P.C.).

(5) *In re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54.

(6) *Ladore v. Bennett*, [1939] A.C. 468; [1939] 3 All E.R. 98.

(7) *Pillai v. Mudanayake*, [1953] A.C. 514; [1955] 2 All E.R. 833.

Judgment

Slade J: read the following judgment of the Court:

In this suit, which has been heard by three judges of the High Court in accordance with the provisions of the Constitutional Cases (Procedure) Act, 1962, the plaintiff, on behalf of the Uganda Government, sues the defendant, the Government of the Kingdom of Buganda, claiming a declaration that Schedule 9 of the Constitution of Uganda is properly to be implemented in accordance with certain contentions set forth in extenso in his amended plaint, or alternatively asking that this Court do declare the manner in which that Schedule is to be implemented. The defendant, by its amended defence, denies that the plaintiff's contentions regarding the manner of implementation of Schedule 9 to the Constitution of Uganda are in accordance with its true meaning, and in turn seeks a declaration that the Schedule falls to be interpreted in accordance with certain contentions set out in extenso in the defence, or alternatively that this Court declare the true meaning of the Schedule. A further declaration is sought by the defendant that the Government of Uganda is legally bound to make payments to the defendant in accordance with the declaration made.

It will, we think, be convenient if in this judgment, we refer to the Uganda (Constitution) Order in Council, 1962, and the Constitution of Uganda contained in the Second Schedule to that Order as "the March Order" and "the March Constitution" respectively, to the Uganda (Independence) Order in Council, 1962, and the Constitution of Uganda contained in the Schedule to that Order as "the Independence Order" and "the Independence Constitution" respectively, and to Schedule 9 to the Independence Constitution as "the Schedule".

It is appropriate at this stage briefly to examine the constitutional position of Buganda under the provisions of the Independence Constitution. By s. 2 of

that Constitution Uganda is declared to consist of Federal States, Districts and the territory of Mbale, and Buganda is one of the Federal States named in that section, with a separate constitution contained in Schedule 1 to the Constitution. Buganda, as a Federal State, possesses the legislative and executive powers and functions contained in Chapter VII of the Independence Constitution and the latter powers are either those vested by virtue of s. 77, or, to use a convenient term, delegated under the powers contained in ss. 78 and 79 of the Independence Constitution. Executive functions may not be entrusted to any of the defendant's officers or authorities, nor may powers be conferred or duties imposed on them under s. 78 of the Independence Constitution without the defendant's consent, and somewhat similarly, before the administration of any service within the executive authority of the Uganda Government may be undertaken by the defendant an arrangement for such administration must be entered into between the two Governments concerned. By the provisions of s. 14 of the Independence Order the defendant is declared to be responsible for the administration in Buganda of certain services for the administration of which provision had been made in the Buganda Agreement, 1961 (with which we are not concerned in these proceedings), as if an arrangement under s. 79 of the Constitution had been made between the two Governments. It is therefore clear that the defendant is responsible for the exercise of certain powers and functions and for the discharge of certain duties conferred or imposed upon it by virtue of the Independence Constitution, and that those powers, functions and duties may be enlarged in the future with the defendant's approval. In addition, under existing Uganda Government legislation there may be other powers, functions and duties conferred or imposed upon the defendant, an example being the administration of courts recognised or constituted under the Buganda Courts Ordinance (Cap. 77, 1951 Revised Edition of the Laws). Obviously, unless the defendant is able to make financial provision from its own revenues for the exercise and discharge of its constitutional and statutory responsibilities, it must receive assistance from sources beyond its own revenues, and s. 107 of the Independence Constitution and its dependent Schedule provide for such assistance, the amount and nature of such assistance depending entirely on the proper interpretation of the Schedule.

Before turning to the questions raised in this suit, there are a number of preliminary matters which are to be considered; first, the principles which we should follow in attempting to interpret the Schedule, and secondly, and arising from that consideration, the historical background and surrounding circumstances from which the Schedule itself emerges.

It is trite law that the Independence Order, the Independence Constitution and the Schedules to that Constitution, including the Schedule, are to be interpreted in accordance with the same rules of construction as those which govern the interpretation of statutes. If the words of the Schedule were clear and unambiguous, it would be unnecessary to look beyond those words to discover their meaning or intention. Regrettably, however, that is not the case, and our task, as we see it, is to endeavour to ascertain the intention of the legislative authority (in this case Her Majesty the Queen in Council) with relation to the Schedule, as part of the Independence Order and the Independence Constitution. The provisions of the Schedule are in the following terms:

"Schedule 9 to the Constitution of Uganda

Agreement between the Uganda and Buganda
Government Delegations on the financial
relations between the Government of Uganda
and the Kabaka's Government

1. The Delegations of the Central and Kabaka's Governments have agreed that Buganda's financial requirements, in addition to her independent sources of revenue (including graduated tax), and calculated on lines similar to the figures for local authorities block grants, should be provided as follows:

 (*a*) fifty per cent. by assignment of certain revenues raised in Buganda (with minimum yield guaranteed) – it is intended that these should be from petrol and diesel duty and the items mentioned in paragraph 3 below; and

 (*b*) fifty per cent. by an annual statutory contribution from general revenue (not to be reduced without consultation with the Kabaka's Government).

2. At intervals of from three to five years there will be a review of these arrangements, not only to consider the rate of annual statutory contribution, but also to consider – in the light of actual yields – whether there should be any change in the revenues selected for assignment.

3. Revenue from stamp duty on mailo transfers and from licences on powered two-wheeled vehicles will be included in the assignments above. As to the other recommendations in paragraph 67 of the Fiscal Commission's Report, it is now agreed that the Kabaka's Government should be able to levy entertainment tax on entertainments for which it is the licensing authority. The Buganda Delegation, however, reject the proposal that Buganda should raise revenue from the licensing of unpowered bicycles or unmanufactured 'black' tobacco.

4. Additional sums which may be required in respect of further services for which the Kabaka's Government assumes financial responsibility will be made available by increasing the amount of the statutory contribution.

5. As, in accordance with its own wishes, the Kabaka's Government is excluded from the local authorities grant structure, it will not be eligible for deficiency or 'catching up' grants, nor for grants to assist with the cost of salary increments."

It is to be observed that the words of paragraph 1, far from being plain and unambiguous, are capable of at least three widely differing interpretations, and in addition there are certain ambiguities of expression in paragraphs 2 and 4 of the Schedule. The language used in this singularly ill-drawn Schedule, particularly in paragraph 1, does not, to say the least, attain to that degree of precision desirable of being attained by the Parliamentary draftsman, and its style, the mode of punctuation adopted, and the lavish use of parentheses all tend to create the impression that whatever the original purpose for which the so called "Agreement" was prepared may have been, it was not for the purpose of incorporation with the other parts of an Order in Council which had been drafted and made in terms with which the Courts in suits of this nature are more familiar. We think it not inappropriate to adopt the remarks of Lord Herschell who, when commenting on a similarly obscure piece of legislation in the case of *Cooke, Sons & Co. v. New River Co*. (1), said "if the object had been to render [the statute] as difficult of construction as possible, success could hardly have been more complete." That comment is singularly descriptive of the Schedule with which we are concerned.

In consequence of the ambiguities and obscurities to which we have referred we are unable to have regard only to the words of the Schedule in order to ascertain its meaning. As an aid to interpretation, learned counsel for the plaintiff submitted that he was entitled to rely on and tender in evidence certain letters and records of meetings which were held, principally in London in June, 1962 at the time of the Constitutional Conference which preceded the grant of

independence to Uganda, such meetings being variously of delegations attending the Conference, of the Fiscal Committee of that Conference, and of the full Conference itself. The full list of the documents on which he proposed to rely forms the third Annexure to the amended plaint, and the purpose for which it was proposed to introduce such documents was, as we understand the position, to set out the history of the financial relationship between the two Governments, the circumstances surrounding the making of the financial provisions contained in the Independence Constitution, and, so far as the Schedule is concerned, the intention or the two Governments with regard to the financial relationship to subsist between them after independence. Learned counsel for the defendant submitted that this Court was not concerned to interpret the intentions of the two parties to an agreement, if indeed the Schedule could properly be so termed, but its task was to interpret the intentions of the legislator in making the Independence Order which in turn incorporated the Schedule, and he opposed the admission in evidence of the majority of the documents tendered for reasons which he argued with his customary skill and tenacity.

A number of authorities were cited during the course of submissions and after giving consideration to the matter we were unanimously of the opinion that the only extraneous evidence admissible in these proceedings was such as relates to the historical and factual position of the financial relationship existing between the two Governments for the period leading up to and including the date on which the Independence Order came into operation, namely immediately before October 9, 1962 (a date stated, per incuriam, in our ruling on admissibility, delivered on April 15, as October 10, 1962), and as to the meaning of certain terms of art which had not been defined in the Independence Constitution, including the Schedule. Following that principle we announced that we were prepared to admit in evidence one letter, written prior to the Independence Constitutional Conference of June, 1962, and an appendix to a report of the Constitutional Conference which preceded the March Constitution, together with such other evidence as was necessary to introduce and explain the manner in which block grants to local authorities were and are calculated and the financial relationship existing between the two Governments at all material times. The remaining documents were rejected, and at the request of counsel for the plaintiff were so marked. We announced that we intended to express the reasons which led us to our decision at the time of delivering judgment and we now proceed to do so.

In *Katikiro of Buganda v. Attorney-General of Uganda* (2) the Court of Appeal for Eastern Africa considered the interpretation to be placed upon a Schedule to the Buganda Agreement, 1955, which Schedule had been given the force of law and accordingly was justiciable as part of the municipal law of Uganda. The appellant relied, in part, on a White Paper which included the proceedings of a Constitutional Conference which had earlier taken place at Namirembe. O'Connor, P., in dealing with the question of the White Paper in the course of a lengthy judgment, in which the remaining members of the Court concurred, had this to say ([1959] E.A. at p. 397):

> ". . . what we are here interpreting is legislation. Under the ordinary rules for the construction of statutes the reports of commissioners are not admissible for the purposes of directly ascertaining the intention of the Legislature, though they may perhaps be looked at as part of the surrounding circumstances for the purpose of seeing what was the evil or defect which the Act under construction was designed to remedy: see the speech of Lord Halsbury, L.C., in *Eastman Photographic Co. v. Controller-General of Patents* (3), [1898] A.C. at pp. 573–576); as explained by Lord Wright in *Assam Railways and Trading Co. Ltd. v. Inland Revenue Comrs*. (4), ([1935]

A.C. at p. 458). I assume that this rule would apply also to the report and recommendations of a conference such as the Namirembe Conference.

The statement of the objects and reasons for a bill is not admissible to aid in its construction; neither may reference be made to the proceedings of the Legislature which resulted in its passing. By analogy it would seem that H.M. Government's statement of intended policy presented to Parliament in the form of a White Paper would be equally inadmissible as an aid to construction of the resulting legislation.

Lord Wright said in *Assam Railways and Trading Co. Ltd. v. Inland Revenue Comrs*. (4):

> 'It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible and the report of commissioners is even more removed from the value as evidence of intention, because it does not follow that their recommendations were accepted.'

By analogy, although the recommendations of the Namirembe Conference and of the Governor as set out in the Appendices to the White Paper were accepted by H.M. Government in, or prior to, November, 1954, when the White Paper was presented to Parliament, there is no evidence to show whether the Governor's proposal that there should be no major changes in his recommended constitutional arrangements for six years was accepted by Parliament and, if so, whether the proposal remained unchanged during the eleven months which elapsed before the 1955 Agreement was made and the Second Schedule given the force of law. Since, during that time, there was the change mentioned in the Sixth Schedule, it is clear that the recommendations contained in the White Paper were not immutable. I incline to the view that the White Paper is inadmissible for the purpose of construing the Second Schedule to the 1955 Agreement."

The matter was considered briefly by the Privy Council (see [1960] E.A. 784) on an appeal from the Court of Appeal for Eastern Africa and agreement was expressed with the decision of that Court on the question of admissibility of evidence. It is true that in delivering the Privy Council's judgment Lord Morton of Henryton, after expressing agreement with the decision of the Court of Appeal on the question of admissibility, went on to say: "[Their Lordships] find no ambiguity in the Second Schedule which would justify the admission of extraneous evidence", and for the plaintiff it was argued that there being ambiguity in the Schedule with which we are concerned, such evidence as he tendered was admissible, not only for the purpose of ascertaining the historical background to the legislative provision made, but in order better to ascertain the intention underlying the provision. In support of his submissions counsel for the plaintiff cited three Privy Council decisions which had apparently not been cited to or considered by the Court of Appeal or the Privy Council in the *Katikiro* cases (2) and invited us to follow the principles laid down in these cases. The cases were *In re Regulation and Control of Aeronautics in Canada* (5), *Ladore v. Bennett* (6), and *Pillai v. Mudanayake* (7); in the first the Board was concerned with the interpretation of statutory provisions relating to air navigation and had before it an international convention on the subject of aerial navigation which had been ratified and created certain obligations; in the second the Board was deciding the question whether certain Acts of a provincial legislature in Canada in relation to certain municipal affairs were intra vires under the British North America Act, 1867, and had before it the report of a Royal Commission appointed by Order in Council for the specific purpose of inquiring into those affairs

while the third concerned the question whether certain measures of the Ceylon Parliament were ultra vires the Constitution of Ceylon and consideration was given to the report of a Royal Commission which preceded the enactment of those measures.

With respect to the arguments of counsel for the plaintiff, we do not think that any of these cases provided authority for the proposition which he advanced, namely that we should receive evidence as to what any or all the delegations to the 1962 Constitutional Conference intended, prior to the enactment (to use a convenient expression) of the Schedule, the financial relationship between the two Governments should be after Uganda became independent. We were prepared to admit, and have admitted, certain evidence of historical background to that financial relationship, we have examined such portions of existing legislation as are relevant to the consideration of such relationship and the manner in which the financial relationship between the Uganda Government and the defendant differs from that subsisting at all material times between the Uganda Government and the other Federal States; we have admitted evidence regarding the meaning of certain technical expressions relating to financial assistance by the Uganda Government to local authorities which are not defined in the Independence Constitution, and of the meaning of which we were not aware although apparently they are commonly used and understood in the financial branches of the Governments and authorities concerned. It is well settled that the opinion of the draftsman with regard to the underlying intention of the legislation he has drafted is irrelevant, and that being so, the opinions of those who have instructed the draftsman are, in our view, equally irrelevant, whether those opinions are expressed in records of meetings or otherwise. Similarly, letters and other communications which may pass between persons affected by enacted legislation and which may relate to the de facto effect of that legislation, or which may declare the understanding of those persons of the intention underlying that legislation are equally irrelevant, in our opinion, and have therefore been rejected in common with the records and reports tendered in evidence.

It was not in dispute that up to and including the year 1961 the Protectorate Government controlled the expenditure of all Governments, administrations and other authorities in Uganda, and that, with certain exceptions with which we are not immediately concerned, all revenues were collected by the Protectorate Government. Financial provision in aid of the activities of the Governments, administrations and other authorities to which we have referred was made by the Protectorate Government by means of recurrent grants made for specific purposes which, generally speaking, were to be applied only for those purposes. Broadly, it may be said that the Protectorate Government had therefore complete control over the revenues and expenditure of all subordinate Governments and administrations. The Buganda Government, no less than the other governments, was subject to that control. In September and October, 1961, a constitutional conference was held in London which preceded the conferment of internal self-government on Uganda early the following year in accordance with the March Constitution. At that time the financial year of the Uganda Government commenced on July 1 in one year and ended on June 30 in the following year, and it is a matter of common knowledge that in those circumstances the amount of financial assistance to be provided by the Uganda Government for the year ending June 30, 1962, would necessarily have been determined by the time the Conference to which we have referred took place. The future fiscal policy of Uganda was not determined by that Conference and pending its future determination certain proposals advanced by the Governor of Uganda were adopted as the basis of financial arrangements on which Uganda could proceed to the stage of internal self-government without

prejudice to such future financial arrangements as might be considered desirable. These proposals were embodied in the Report of the Conference as Appendix G (Ex. B) (hereinafter referred to as "the Appendix") by the terms of paragraph 147 of the Report (Ex. B1). The March Constitution contains no reference to the financial relations between the Uganda Government and the defendant relevant to the issues in these proceedings. It appears from the written statement prepared by Mr. J. G. Huddle, a former senior Treasury official, which was admitted in evidence by consent (Ex. C) that, with effect from the commencement of the financial year beginning on July 1, 1962, the former system of specific recurrent grants to which earlier reference has been made was replaced by the block grant system as recommended in the Appendix and that new system applied to all authorities, including the defendant. We learn that a block grant is a grant made as one payment to assist the recipient in carrying out a variety of functions which it is required to perform and is not subject to adjustment in light of the actual expenditure of the recipient. The Appendix makes proposals for deficiency grants and expansion grants for which authorities might become eligible in certain circumstances.

The system of block grants having been adopted, and it is important that we emphasize that it was adopted in relation to the financial aid to be afforded to the defendant by the Uganda Government during the financial year commencing on July 1, 1962, the method of calculating the block grants next falls to be considered. After considering the Appendix, the Treasury letter (Ex. A), and Mr. Huddle's statement (Ex. C), we find that the block grant is to be calculated by adding to the amount of the recurrent grants paid for the financial year 1961/62 the total net cost, for the previous year, of transferred services, and deducting from the resulting total the additional revenue accruing to the recipient authority by virtue of the levy of graduated tax on persons not previously liable to that tax and of the receipt of other revenue previously accruing to the Uganda Government. Control of estimates by the Uganda Government was still envisaged. In March, 1962, after the March Constitution came into operation, the Uganda Government Ministry of Finance by letter (Ex. A) addressed to the Omuwanika, the defendant's Minister of Finance, provided a detailed statement of the block grant which it estimated would be payable in the ensuing financial year, and drew the Omuwanika's attention to the relevant parts of the Appendix and to certain matters of detail which affected the calculation of the amount due.

From the examination of these matters we conclude, and it is not, as we see it, in dispute, that the block grant system was applied in its entirety to the defendant from the time of its introduction. Having considered the manner in which, first, the Protectorate Government provided financial assistance to the defendant prior to internal self-government under the March Constitution, how control over the defendant's revenues and expenditure was maintained, and the method by which, after the March Constitution came into operation, financial assistance was to be provided until further arrangements were made, and having observed that at that period of time the defendant was, in effect, in no different position from the point of view of financial dependence, from the other Kingdoms and districts of Uganda, we are able to turn to the consideration of the position arising under the Independence Constitution, including the Schedule.

Section 107 of the Independence Constitution, which by virtue of s. 3 of the Independence Order was expressed to come into force on July 1, 1963, the date of the commencement of the financial year next following the date on which the Independence Order came into operation, is in the following terms:

"107. (1) The Government of Uganda shall make payments to the Kabaka's

Government in accordance with the provisions of the Agreement set out in Schedule 9 to this Constitution.

(2) The amounts required for making payments under this section shall be a charge on the Consolidated Fund",

and clearly imposed an obligation upon the Uganda Government to make certain payments to the defendant. Separate provision for the remaining Federal States is made by s. 108 of the Independence Constitution which is in the following terms:

"108. (1) Subject to such terms and conditions as may be prescribed by Parliament, the Government of Uganda shall pay to the Government of each Federal State (other than the Kabaka's Government) an annual contribution towards the cost of services administered by the Government of that Federal State in pursuance of arrangements entered into under s. 79 of the Constitution of such amount as the Government of Uganda, after consultation with that Government, may determine.

(2) The amounts required for the making of contributions under this section shall be a charge on the Consolidated Fund."

So far as we are aware no provision similar to s. 107 or s. 108 is contained in the Independence Constitution with regard to the other administrations and authorities in Uganda, and we assume that it was intended that payments and financial contributions to those administrations and authorities should continue to be made under such legislation as the Local Administrations Ordinance, 1962, which had replaced the earlier African Local Governments Ordinance (Cap. 74, Revised Edition of the Laws) and District Administration (District Councils) Ordinance, 1955. We observe that the terms and conditions subject to which payment of the annual contribution to Federal States other than Buganda are to be made under s. 108 of the Independence Constitution have been prescribed by Parliament in the Administration (Western Kingdoms and Busoga) Act, 1963.

The financial relationship between the Uganda Government on the one hand and each of the Federal States on the other, is thus clearly expressed to differ from that intended to subsist between the Uganda Government and the other administrations and authorities in Uganda from the date on which the Independence Constitution came into operation; similarly it is clear that the relationship between the Uganda Government and the defendant differs from that expressed to exist between the former and the Governments of the other Federal States in Uganda. That latter distinction is to some extent emphasized by the fact that while by virtue of the terms of s. 19 of the Independence Order transitional provision is made for the payment of a monthly contribution towards the cost of services administered by the defendant for the remainder of the financial year which ended on June 30, 1963, no such provision is made in respect of the other Federal Governments. The principal distinction, as we see it, is that while in respect of the Federal States the Uganda Government retains some control over the amount of the contribution to be made towards the cost of services administered by the Governments of those States, and may through Parliament prescribe terms and conditions subject to which payment of such contribution shall be made, no such control exists in respect of, and no such terms and conditions may be prescribed for, Buganda. The interpretation of the Schedule in general and of paragraph 1 of the Schedule in particular therefore assumes great significance, more particularly as the Uganda Government is not required to review under the provisions of s. 20 of the Independence Order the provisions of s. 107 of the Independence Constitution until June 30, 1966. It is clear, as we said earlier, that there are at least three widely differing meanings

of which paragraph 1 of the Schedule is capable. Whichever of the meanings is to be adopted, in order to ascertain and give effect to the intention underlying the financial provisions of the Independence Order in relation to the Kingdom of Buganda, some violence must be done to the language of that paragraph.

We think we can reject at once the possibility that paragraph 1 of the Schedule means nothing more than that a calculation had been made of Buganda's financial requirements at the date on which the Independence Order was made and that the sum thus calculated was to be provided by the Uganda Government in the manner described in the two subparagraphs of the paragraph in question. Had such a calculation been made, as it may have been made in relation to the financial contribution for which provision was made by s. 19 of the Independence Order, we have no doubt that detailed financial provision for the period commencing on July 1, 1963, the date on which s. 107 of the Independence Constitution came into operation, would have been in express terms and set out in the same or a similar manner to that adopted for the transitional period ending on June 30, 1963.

The defendant contends that the intention underlying s. 107 of the Independence Constitution and the Schedule is that as the defendant is expressly excluded from the local authorities grant structure, and it is conceded that exclusion is by its own wish, then the calculation to be made for the purposes of paragraph 1 of the Schedule is a calculation of the amount of money required by the defendant for the performance of such of its functions, the discharge of such of its duties and the exercise of such of its powers as stem from the provisions of the Constitution or of statute, and which it is thus under a, constitutional or statutory obligation to perform, discharge or exercise; the amount so calculated is the sum of "Buganda's financial requirements" and that sum, without any deduction whatsoever, is to be provided in the manner described in subparagraphs (*a*) and (*b*) of paragraph 1 of the Schedule. If we understood the submissions of counsel for the defendant correctly, he conceded that the formula provided by paragraph 10 of the Appendix should be used, in part, for calculating "requirements", but he argued that the effect of paragraph 10 as a whole was that having first calculated "requirements", the amount of the block grant is to be ascertained by deducting from those "requirements" the amount of additional revenue estimated to accrue to it from the proposals earlier set out in the Appendix with regard to taxation and non-tax revenue. We trust that we are not oversimplifying counsel's arguments when we put it in this way. Following that argument, and again we trust that we are not oversimplifying the matter, counsel submitted that what paragraph 1 of the Schedule envisaged was a calculation of Buganda's financial requirements and not of the amount of a block grant which would be payable to the defendant if the local authorities grant structure had been applied to it, and that therefore in calculating requirements the deduction of additional revenue should not be made. In further support of his submissions, counsel for the defendant invited us to direct our minds to the question what benefit would accrue to the defendant if, having elected not to be one of the authorities eligible for full assistance from the local authorities grant structure as a whole, the amount of the financial assistance to be provided under s. 107 of the Independence Constitution was only that amount which would be payable as an initial block grant under that structure. Where, he inquired, is the "quid pro quo"? We think we can deal with that particular point quite shortly by saying that we are not dealing with the interpretation of an agreement inter partes and so with the question of consideration. We could, if necessary, have discovered a number of aspects of the new constitutional financial relationship between the Uganda Government and the defendant which might have been thought to be of advantage to the defendant, but as we are not required to do so for the purposes of this suit, we decline to be drawn

into speculation and render our task, at no time simple, even more difficult of performance.

The plaintiff's case is that the amount of aid to be provided to the defendant under paragraph 1 of the Schedule is to be calculated in the same manner as if it were a block grant under the local authorities grant structure. The method of calculation of a block grant having been reviewed earlier in this judgment, it is, we think, unnecessary to go into the matter in any great detail. Such an interpretation necessarily requires certain textual changes in paragraph 1 of the Schedule, but as textual changes must inevitably be made if we are to interpret paragraph 1 at all, we are of the opinion that provided we can ascertain the intention of the legislator from the rest of the Independence Order and Constitution, aided by a consideration of the surrounding circumstances and historical background, we should not hesitate to modify the language used in order to give effect to the intention.

After considering all matters proper, in our judgment, to be considered, we have come to the conclusion that the intention underlying s. 107 of the Independence Constitution and its dependent Schedule, which, as we have seen, makes provision for the Kingdom of Buganda different from that made for the other Federal States, is not so much to alter a method of calculation of the amount of aid to be supplied, a method which had been applied to the defendant in common with the other Federal States, as to effect changes in the method by which that amount of aid is to be supplied to the defendant. There is, we think, no dispute that the intention underlying subparagraphs (*a*) and (*b*) of paragraph 1 of the Schedule is that once the amount of money to be provided to the defendant has been calculated, one half of that sum is to be provided by the assignment of certain revenues, the Uganda Government ensuring that the revenue so derived does not fall below that amount, while the remaining half is to be paid annually by the Uganda Government. We think that the use of the word "statutory" occurring in subparagraph (*b*) implies no more than that the amount required for making payment to the defendant is to be a charge on the Consolidated Fund as provided by s. 107 (2) of the Independence Constitution.

Having reached our conclusion as to the intention underlying the Schedule, we think it desirable to endeavour to rewrite paragraph 1 in such a way as to preserve its essential features, to do the minimum violence to the words occurring in it, but nevertheless to express what, in our opinion, that underlying intention is. We claim no particular virtues for our revised version of paragraph 1 other than to suggest that it may be a little more grammatical and perhaps possesses rather more clarity than it does in its existing form. This, then, is what we suggest:

> "1. The Delegations of the Central and Kabaka's Governments have agreed that in order to make provision for Buganda's financial requirements over and above the revenues raised from her own independent sources (including graduated tax), an amount, calculated in accordance with the formula adopted by the Central Government for the purpose of ascertaining the amount of the block grant payable to local authorities, will be provided by the Central Government in the following manner:
>
> (*a*) as to one half of such amount, by the assignment of certain revenues raised in Buganda, it being intended that such revenues should be raised from petrol and diesel duty and the items mentioned in paragraph 3 below, the Central Government guaranteeing that such assigned revenues will yield not less than the sum required to be provided under this subparagraph; and
>
> (*b*) as to the remaining half of such amount by an annual contribution

> from general revenue which shall not be reduced without consultation with the Kabaka's Government."

It will be noted that we have construed the words "on lines similar to" as "in accordance with". We do not consider, for reasons which we have endeavoured to express, that we are departing from the intention of the legislator in so doing. While conjecture concerning the reason for including an imprecise expression such as "on lines similar to" is probably idle, it may be that the defendant for reasons not unconnected with national pride in its ancient institutions, considers it inappropriate to be classified as a local authority and accordingly, as we are informed by a typical piece of descriptive surplusage in paragraph 5 of the Schedule, was excluded from the local authorities grant structure by its own wish. It is possible, therefore, that the use of the words "on lines similar to" was an attempt to avoid repugnancy with the provisions of paragraph 5 and to suggest that in making the calculation required by the provisions of paragraph 1 of the Schedule the provisions of the Appendix should be applied by analogy. Another possible explanation may lie in the fact that paragraph 10 of the Appendix refers to a calculation made "on the. . . lines" therein set forth, and the use of the words "on lines similar to" may be an attempt to achieve consistency with paragraph 10.

We next turn to consider whether the amount to be paid or provided to the defendant under paragraph 1 of the Schedule should be calculated in respect of each financial year after s. 107 of the Independence Constitution came into operation. We are of the opinion that it is not to be so calculated. If our opinion as to the construction of paragraph 1 of the Schedule is valid, then the calculation of the amount of financial assistance to be afforded to the defendant is a calculation to be made, in accordance with the principles we have endeavoured to define, at the time when s. 107 of the Independence Constitution came into operation; part of that financial assistance is certainly to be provided by an annual payment from the revenues of the Uganda Government, but that fact does not mean that an annual calculation is to be made. Our opinion is, we think, fortified by the provisions of paragraph 2 and of paragraph 4 of the Schedule. Paragraph 2 provides for "a review of these arrangements" and we are of the view that that expression, read in conjunction with the remainder of the paragraph in question means a review of the proportion which the annual statutory contribution is expressed to bear to the total amount of the financial assistance to be provided, and of the revenues selected for assignment. That may well necessitate a review of the amount of assistance to be provided under the terms of paragraph 1, but as we have not been asked to pronounce on that matter we refrain from doing so. Paragraph 4 of the Schedule makes provision for an increase in the statutory contribution to be made by the Uganda Government in the event of the assumption by the defendant of financial responsibility for "further services", and it is thus clearly the intention of the legislator that the Uganda Government's contribution from general revenue may be increased if further responsibilities are undertaken by the defendant. Thus, if there is to be a review of the whole scheme of assistance to be afforded to the defendant (and it is to be recalled that by s. 20 of the Independence Order that review must be undertaken not later than June 30, 1966) and if further costs are to be met under the terms of paragraph 4 of the Schedule, it seems unlikely that the legislator intended that Buganda's financial requirements should be reviewed annually except to such extent as might be necessary for the purpose of paragraph 4 of the Schedule.

We conclude our examination of the Schedule by considering what meaning is to be given to the words "further services" occurring in paragraph 4. A reference to a note of the submissions made by both learned counsel reveals that there is, in effect, no dispute on the question of what is meant by the expression,

and both are agreed that the expression relates to functions, powers and duties entrusted, conferred or imposed under s. 78 of the Independence Constitution, or services administered under an arrangement made pursuant to s. 79 of that Constitution. Even if the agreement of the learned counsel on that matter had not been forthcoming, we should have reached that conclusion, but as it now appears to be common ground there is no necessity for us to state our reasons. Similarly there is no dispute that the Uganda Government is bound by the provisions of the Constitution to make payments to the defendant in accordance with the true meaning of the Schedule.

Although the point did not arise directly from the pleadings, we were asked to pronounce on the question whether on a proper construction of paragraph 5 of the Schedule, the defendant is excluded from the benefits of any of the specific grants for which the local authorities grant structure makes provision and which are not expressly excluded by the terms of paragraph 5. It appears to us that there is no dispute between learned counsel on the matter, nor indeed did it appear that any such dispute exists between the Uganda Government and the defendant. A grant known as an expansion grant was one form of relief which was expressly mentioned in argument. We are reluctant to pronounce on a question which does not arise on the pleadings, except incidentally, but in order to assist counsel and the parties, and possibly to avoid further litigation, we are of the opinion, without expressly so deciding, that the defendant is not excluded by the provisions of paragraph 5 of the Schedule from applying for a grant available to local authorities under the grant structure and which is not a block grant or a grant to which paragraph 5 of the Schedule applies.

It will, we think, be convenient if we summarise our views on the manner in which the Schedule is to be implemented as follows:

(1) As to paragraph 1:

(*a*) the amount for which provision is required to be made under paragraph 1 is to be calculated by adding together:

(i) the total amount of the recurrent grants made by the Uganda Government to the defendant in the financial year ending on June 30, 1962, and

(ii) the total net cost to the Uganda Government for the year preceding transfer of any service or services transferred to the defendant on or prior to June 30, 1963, and

by deducting from the resulting total the amount of additional revenue estimated to accrue to the defendant during the financial year ending on June 30, 1963, as a result of the implementation of the proposals contained in paragraphs 2 to 6 of the Appendix;

(*b*) the amount so ascertained shall be provided to the defendant in the manner specified in subparagraphs (*a*) and (*b*) of paragraph 1 of the Schedule, the Uganda Government being under an obligation to make good any deficiency if the amount received from the assigned revenues is less than than one-half of the amount so ascertained;

(*c*) the amount for which provision is required to be made under paragraph 1 having been ascertained in the manner described in subparagraph (*a*) hereof, it remains unchanged until such time as it may be altered upon a review, and is not to be recalculated each year.

(2) As to paragraph 4:

(*a*) the words “further services” mean functions, powers and duties which may after July 1, 1963, be entrusted, conferred or imposed under s. 78 of the Independence Constitution with the consent of the defendant

and services which after July 1, 1963, are administered by the defendant in pursuance of arrangements made between the Uganda Government and the defendant under the provisions of s. 79 of the Independence Constitution;

(*b*) if any additional expenditure is incurred by the defendant by virtue of its assumption of responsibility for further services as thus defined, the Uganda Government will pay to the defendant such amount as may be agreed at the time the consent required under s. 78 is given or the arrangement required under s. 79 is made, as the case may be, and in default of any such agreement as to finance, the Uganda Government will pay to the defendant an amount calculated in the manner set out in paragraph 4 (2) (*b*) of the plaint, and any such amount shall, by virtue of the provisions of s. 107 (2) of the Independence Constitution, be a charge on the Consolidated Fund.

(3) The Uganda Government is under an obligation by virtue of the Independence Constitution to make financial provision to the defendant in accordance with our interpretation of the Schedule.

There will be declarations accordingly. The plaintiff will have his costs of this action, and we give our certificate for two counsel.

We end by expressing our appreciation of the assistance we have received from learned counsel for both parties in these proceedings. Their industry and the manner in which their submissions have been made have greatly facilitated our task of endeavouring to interpret a part of the Constitution on the inadequate drafting of which we have earlier made adverse comment.

Declarations accordingly.

For the plaintiff:
Neil Lawson, QC (of the English Bar) and *Nkambo Mugerwa* (State Attorney, Uganda)
The Attorney General, Uganda

For the defendant:
EFN Gratiaen, QC (of the English Bar), *Walter Jayawardena* and *Paul Jayarajan*
Paul Jayarajan, Kampala

Burton Mwakapesile v Republic
[1965] 1 EA 407 (HCT)

Division:	High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	16 October 1964
Case Number:	351/1964
Before:	Weston and Reide JJ and Platt Ag J
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[1] Criminal law – Charge – Theft of money by public servant – Whether committed from employer's

constructive possession – Rates paid to servant stolen by him – Whether sufficient animus furandi from employer – Penal Code s. 262 *and s.* 265 (*T*).

[2] Criminal law – Theft by public servant – Money taken from ratepayers when under a duty to account to master – Whether sufficient animus furandi from employer – Penal Code s. 262 *and s.* 265 (*T*).

[3] Criminal law – Sentence – "Omnibus" sentence unlawful when unrelated to each conviction on each count.

[4] Criminal law – Sentence – Compensation recoverable as a civil debt and not by distress – Minimum Sentences Ordinance, 1963, *s.* 6 (1) *and s.* 6 (2) (1).

[5] Criminal law – Sentence – Consecutive or concurrent sentences for several prosecutions – Criminal Procedure Code (*Cap.* 20), *s.* 12 (2) (*a*) (*T*) *– Penal Code s.* 36 (*T*).

Editor's Summary

The appellant in one case (No. 307) was charged with theft by a public servant on five counts all of which related to the stealing by the appellant as an employee of the Rungwe District Council of money paid to him as rates by specified ratepayers. He was convicted and sentenced by the Rungwe District Court to two years imprisonment on each count to run concurrently, and to 24 strokes under the Minimum Sentences Act, 1963. He was also ordered to compensate the Council "or distress in default". Six days later in a second case (No. 355) the appellant was charged with twelve counts of a like nature and was later convicted on seven counts and sentenced by the same court (but another magistrate) to an "omnibus" sentence of two years imprisonment and to 24 strokes and was ordered to compensate each of the ratepayers from whom he had received the money. On the same day that the second conviction and sentence were given the appellant in a third case (No. 464) was charged with a further twelve counts of a like nature and was later convicted on all counts and sentenced by the same court (but yet a third magistrate) to another "omnibus" sentence of two years imprisonment with 24 strokes and ordered to compensate the Council. No direction was given in any of the three cases that the sentence should be executed concurrently with that imposed in either of the other two cases. The appellant appealed against conviction and sentence in the second case and against sentence in all three cases. At the hearing the point was raised as to whether the appellant should have been convicted as charged, or whether he should have been charged with unaggravated thefts from the ratepayers because he intended to steal the money at the very moment or before he received it.

Held –

(i) on the correct interpretation of s. 262 of the Penal Code, an agent may both receive monies on behalf of another and intend to appropriate them to himself at one and the same time, and such person should not be heard to say that he did not receive on behalf of his principal monies it was his duty to receive in that behalf because when he received them he had the intention to convert the monies to his own use; accordingly the conviction was correct (dicta in *Rajabu Mbaraku v. R.* (1) and *Yusufu Kondo v. Republic* (2) doubted);

(ii) compensation ordered under s. 6 (1) of the Minimum Sentences Act, 1963, is recoverable as a civil debt (s. 6 (2) ibid.) and an order for distress in default of payment of such compensation is bad in law;

(iii) such compensation should be ordered to be paid to "the owner of the property" within s. 6 (1) of that Act, which here was the District Council not the ratepayers;

(iv) there must be separate sentence for each count on which a conviction is made and accordingly an "omnibus" sentence is unlawful;

(v) s. 12 (2) (*a*) of the Criminal Procedure Code has no application to concurrent sentences and there is no limit to an inferior court's power to impose any number of concurrent terms of imprisonment provided each such term does not exceed the court's powers (*R. v. James William Mhina* (5) doubted);

(vi) where there is a single complex of offences connected in kind and time it is undesirable although not unlawful for the accused to be arraigned on separate occasions before different magistrates;

(vii) the lower court should have had regard to the other cases and convictions against the appellant when fixing sentence.

Appeal against conviction dismissed. Appeals against sentence in Case No. 307 allowed in part, and in whole in cases Nos. 355 and 464. Sentences of two years imprisonment on each count substituted and to be served concurrently. Recommendation that the accumulation of 72 strokes be considered by the President in exercise of his prerogative of mercy.

Cases referred to in judgment

(1) *Rajabu Mbaruku v. R.*, [1962] E.A. 669 (T).

(2) *Yusufu Kondo alias Kugu v. Republic* (reported in the Tanganyika High Court Bulletin No. 18 of 1964).

(3) *R. v. Cullum* (1873), L.R. 2 C.C.R. 28.

(4) *Mohamed Warsama v. R.* (1956), 23 E.A.C.A. 576.

(5) *R. v. James William Mhina*, [1954] 2 T.L.R. (R) 9.

(6) *Henry Julius v. R.*, [1951] 1 T.L.R. (R) 356.

October 16. The following judgments were read:

Judgment

Weston J: On June 4 last in the District Court of Rungwe District at Tukuyu in Criminal Case No. 307 of 1964 the appellant was convicted on his pleas on five counts of stealing by servant contrary to ss. 265 and 271 of the Penal Code. The counts were in common form and the particulars of offence in each alleged that the appellant being a person employed by the Rungwe District Council as an Assistant Divisional Executive Officer stole a sum specified "local rate money", the property of the Council which came into his possession on account of his employer and which was paid to him by a person named. He was sentenced to two years' imprisonment on each count, the terms to run concurrently, and the sentence

carried with it twenty-four strokes of corporal punishment. The court ordered the appellant to pay Shs. 225/- to the Rungwe District Council by way of compensation, this being the aggregate of the five several sums which it had found him guilty of stealing from the Council, "or distress in default". Six days later, in the same court, in Criminal Case No. 355 of 1964, the appellant was charged on twelve counts of a like nature and on July 31 he was tried by the court – presided over, however, by another magistrate – and convicted on eleven of these counts. The court passed one "omnibus" sentence of two years' imprisonment and twenty-four strokes of corporal

punishment and ordered the appellant to compensate each of the eleven ratepayers concerned in an amount equal to that which the court had found the appellant had received from him. On the same day as he was convicted and sentenced in Criminal Case No. 355 of 1964 the appellant, in the same court, in Criminal Case No. 464 of 1964, was charged with a further twelve counts of a like nature and on August 24 he was convicted on his pleas on all counts by the court – presided over by yet another magistrate – and in this case also the court imposed one "omnibus" sentence of two years' imprisonment and twenty-four strokes of corporal punishment. The appellant was ordered to pay to the Rungwe District Council Shs. 171/- by way of compensation, the aggregate of twelve several sums which it had found him guilty of stealing from the Council. In Criminal Case No. 355 of 1964 the court did not direct – as it might have done under s. 36 of the Penal Code – that the sentence of imprisonment imposed by it in that case should be executed concurrently with the sentence of imprisonment imposed in Criminal Case No. 307 of 1964 or any part of that sentence. In Criminal Case No. 464 of 1964 the court similarly gave no such direction in relation to the sentence of imprisonment imposed by it in that case and the sentences of imprisonment imposed in the two previous cases. In the result, the appellant stands liable to remain in prison for a period of six years and some two months and to receive seventy-two strokes of corporal punishment.

The appellant now appeals against his conviction and sentence in Criminal Case No. 355 of 1964, and by a further appeal, against sentence in all three cases. The appeals are consolidated and it will be convenient first to deal with the appellant's appeal against conviction in Criminal Case No. 355 of 1964.

The Treasurer to the Rungwe District Council testified that the appellant was at all material times employed by the Council as an Assistant Divisional Executive Officer and that it was his duty, or one of his duties, to collect the local rate payable to the Council. He was required to issue a receipt in respect of any monies paid to him by a ratepayer and the procedure was for the appellant to account for such monies by handing them in to the Treasurer every Friday. In relation to each of the counts on which the court found the appellant guilty there was evidence which the court accepted, as it was fully entitled to do that the ratepayer mentioned in the particulars of offence had paid the appellant the sum of money specified on account of rate due to the Council, and each of these ratepayers testified that the appellant had not issued him with a receipt despite repeated demands for one. The Treasurer to the Council further testified that the monies so collected by the appellant had not been accounted for. The appellant on oath denied that he had received money on account of rates or at all from any of the ratepayers called and asserted that "they felt they would cook a story versus me" because he was already in disgrace, as indeed he was. This story was rejected by the court, in my view rightly, and for my part I see no merit whatsoever in the appeal against conviction and I would dismiss it.

Learned Senior State Attorney supported the conviction, but very properly – since the appellant had chosen not to be present and was not represented – Mr. Konstam, I say, very fairly invited attention to certain decisions of this Court on which it might have been argued that the appellant was wrongly convicted as charged, that is, of stealing monies being the property of his employer, a District Council – offences which attracted the penalties provided for by the Minimum Sentences Act 1963 – and that he should have been convicted, if at all, of stealing monies being the property of the individual ratepayers, which would be unaggravated theft only.

In *Rajabu Mbaruku v. R.* (1), the appellant had been convicted on two counts of stealing by a person employed in the public service contrary to ss. 270 and 265 of the Penal Code. The particulars of each count alleged that the appellant being a person employed as a motor driver by the East African Railways

and

Harbours Administration stole money the property of his employers which came into his possession by virtue of his employment. It would appear that the appellant was under orders to drive a railway bus from Korogwe to Tanga with a number of passengers who had arrived from Morogoro and were going to Tanga, and that he had no instructions to carry any other passengers. Contrary to his orders, however, he did pick up passengers "en route" and received payment from them for the service, and it was the amount of these payments that he was charged with stealing from his employers. Spry, J., (as he then was) had little difficulty in holding that the appellant had been wrongly convicted as charged, because picking up the passengers was in breach of his duty and the monies obtained from them had not therefore come into the appellant's possession "by virtue of his employment". The learned judge, however, went on to say ([1962] E.A. at p. 672):

> "There remains the question whether it would be proper to substitute a conviction for the lesser offence of stealing, contrary to s. 265, calling in aid the provisions of s. 262. There is, so far as I am aware, no English equivalent of s. 262 and I am not aware of any authority, English or East African, on the meaning of the words 'receives . . . any money on behalf of another'. The plain meaning of the words seems to demand that at the moment when he receives the money the receiver must be acting on behalf of another. What is relevant is what is in the mind of the receiver, not what is in the mind of the payer. On this point the learned magistrate was satisfied that the appellant took the money for his own purposes. In other words, the money did not constructively come into the possession of the administration".

The relevant part of s. 262 of the Penal Code referred to by the learned judge in this passage from his judgment reads as follows:

> "When a person receives . . . any money on behalf of another, the money is deemed to be the property of the person on whose behalf it is received . . ."

In *Yusufu Kondo alias Kuga v. Republic* (2), the appellant had been convicted on one of two counts, of simple theft contrary to s. 265 of the Penal Code, the particulars being that he stole Shs. 54/- the property of one Athumani s/o Selemani. The Shs. 54/- which was admittedly the property of Athumani was paid over by his mother acting on his behalf to the appellant, who was a tax clerk, in discharge of a tax liability. The appellant thereupon wrote a tax receipt in her presence on a piece of paper and not in a receipt book and then handed it to Athumani, at the same time releasing Athumani from custody in which he had been placed for non-payment of the tax. The receipt issued by the appellant was later found to be a false one, and the appellant never accounted to the Government for the Shs. 54/- in respect of which it had been issued. It was argued for the Republic that the appellant ought to have been convicted not of simple theft but of theft by a public servant, on the ground that the money stolen must be deemed to have been the property of the Republic, on whose behalf the appellant received it, by virtue of s. 262 of the Penal Code. The learned Chief Justice, rejecting this argument and allowing the conviction for simple theft to stand, said:

> "Now s. 262 of the Penal Code is not a very easy section to construe. At first sight it might seem that, by virtue of its provisions the Shs. 54/- of Athumani's which the appellant misappropriated (as he manifestly did) must be deemed to have been the property of the Tanganyika Republic even if the appellant formed the intention to misappropriate it at the moment when Athumani's mother handed it to him, and not at some later time. But such is not the construction which has been placed on the section by this court.

> I would refer to *Rajabu Mbaruku v. R.* (1), in which Spry, J., in considering the reverse case, where it was sought to substitute a conviction for simple theft for one for theft by a public servant, said this . . .”

The learned Chief Justice cited the passage from Spry, J.’s judgment which I have quoted and continued:

> “I respectfully agree with the construction placed on s. 262 by my learned brother Spry, J. Applying it to the instant case, such evidence as there was, relevant to the question at what moment the appellant decided to keep the money for himself, and relevant therefore to the question whether when he received it he was acting on behalf of the Tanganyika Republic, would seem strongly to indicate that he formed that intention immediately upon receiving the money; for he made out, on the spot, a false receipt in respect of it. Certainly there was no evidence to establish positively that he only formed the intention at a later stage, after having received the money honestly. And in order to convert his offence from one of simple theft to the more serious offence of theft by a public servant (to which offence the statutory minimum sentence attaches) such positive evidence would be necessary.”

Thus, it is suggested, in the instant appeal it might be argued for the appellant who, like the appellant in *Yusufu Kondo’s* case (2), was under a duty to collect the monies taken by him, that since the evidence was consistent with an intention on his part to misappropriate such monies the moment they came into his hand they “did not constructively come into the possession” of the Council and the offence committed was simple theft from the ratepayers and not aggravated theft from his employers. It is, I think, a sad commentary on the confusion into which this most important branch of the law has fallen that it is not possible to reject such a suggestion summarily by stating shortly that such an argument would be manifestly untenable. I agree with learned Senior State Attorney that it is necessary for this Court to state clearly the reasons why this is so.

In *Rajabu Mbaruku’s* case (1) the learned judge was as we have seen unable to find in the terms of s. 262 of the Penal Code anything constraining him to hold that the monies taken by the appellant were to be deemed to be the property of the Administration, and with this result I respectfully agree. A phrase in the learned judge’s reasons for coming to his conclusion however, has proved to be the fount and origin of the confusion to which I have referred. Perhaps it would be as well if I repeated the learned judge’s words:

> “. . . I am not aware of any authority, English or East African, on the meaning of the words ‘receives . . . any money on behalf of another’. The plain meaning of the words seems to demand that at the moment when he receives the money the receiver must be acting on behalf of another. What is relevant is what is in the mind of the receiver, not what is in the mind of the payer. On this point the learned magistrate was satisfied that the appellant took the money for his own purposes. In other words, the money did not constructively come into the possession of the administration”.

In this passage, the sentence “The plain meaning of the words seems to demand that at the moment when he receives the money the receiver must be acting on behalf of another” has been taken to mean that at the moment when he receives the money the receiver must be acting as an *agent*. The context however, makes it clear that what the learned judge meant was that at the moment when he receives the money the receiver must be *receiving* it on behalf of another. Clearly, the appellant with whom he was concerned was not at the moment he received the fares from the unauthorised passengers receiving those fares on behalf of the Administration. He was engaged in a private enterprise on his own account.

He was using the Administration's bus for his own purposes and was doubtless laying himself open to disciplinary action by his superiors. There could be no question that he was pocketing monies in which the Administration had any sort of property which would have made him liable in criminal proceedings – cf. *R. v. Cullum* (3). It was not a case of the appellant not acting on behalf of the Administration because he intended to keep the monies for himself; it was a case of the appellant intending to keep the monies for himself because he was not acting on behalf of the Administration. Thus, the learned judge was not addressing his mind to the case of a person who was an agent with a duty to receive monies on behalf of a principal and the dictum "what is relevant is what is in the mind of the receiver, not what is in the mind of the payer", did not fall from his lips with any such person in contemplation. The words therefore cannot be prayed in aid as authority for the proposition that the effect of s. 262 of the Penal Code is that such person does not receive monies on behalf of his principal where he had at the moment of receipt the intention to convert them to his own use.

For my part, I fail to see any philosophical or semantic bar to the conception that such a person, i.e. an agent, may both receive monies on behalf of another and intend to appropriate them to himself at one and the same moment in time. On the contrary, I find it repugnant to elementary legal principle that such person should be heard to say that he did not receive on behalf of his principal monies it was his duty to receive in that behalf because he had when he received them the intention to convert the monies to his own use. As for authority, any case of embezzlement in the books will serve to show that a servant misappropriates property that constructively came into possession of his master upon receipt by the servant despite the servant's intention to keep it for himself. Indeed, without such intent there is no embezzlement. It follows that I must respectfully dissent from the learned Chief Justice's interpretation of s. 262 of the Penal Code in *Yusufu Kondo's* case (2), though I hasten to add that in allowing the appellant's conviction on the count of simple theft to stand he undoubtedly came to the right conclusion. I confess I find it difficult to understand what useful purpose the Director of Public Prosecutions intended to serve in that appeal by asking the Court to alter the appellant's conviction from one for simple theft contrary to s. 265 to one of aggravated theft contrary to ss. 265 and 270 of the Penal Code. The appellant had been charged with simple theft and the Court had no jurisdiction to substitute a conviction for a graver offence than that with which he had been charged, even if the evidence showed that he might have been properly charged with the graver offence. The most the Court could have done would have been to substitute a conviction for the simple theft of Shs. 54/- the property of Government for the conviction of simple theft of Shs. 54/- the property of Athumani s/o Selemani. This would no doubt have pleased the purist. What is questionable is whether it would have gladdened the heart of the appellant, or anybody else. For these reasons any such argument as it was suggested might have been advanced on behalf of the appellant here would have had no effect on the outcome. He was charged with stealing local rate monies alleged, unnecessarily I may say – see s. 271 of the Penal Code – to be the property of the Council and to have come into his possession on account of his employer. The evidence established both averments, where, I apprehend, evidence establishing either would have been sufficient. In my view, the appellant was properly convicted. I turn now to deal with the appellant's appeal against sentence.

In Criminal Case No. 307 of 1964, it will be recalled, the appellant was sentenced in respect of the five counts on which he was convicted to two years' imprisonment on each count, the terms to run concurrently. The sentence carried with it twenty-four strokes of corporal punishment, and the court

ordered the appellant to pay Shs. 225/- to the Rungwe District Council by way of compensation "or distress in default". The sentence is unobjectionable. The appellant was then a first offender, none of the sums obtained by the appellant exceeded Shs. 100/-, and the magistrate very properly considered whether there were any special circumstances within the meaning of s. 5 of the Minimum Sentences Act but found that there was none. The direction however, that distress was to be levied in default of payment of the compensation ordered is bad in law. Compensation ordered under s. 6 (1) of the Act is recoverable by the person to whom it is awarded as if it were a civil debt: see s. 6 (2) of the Act. Accordingly, I would dismiss the appeal against sentence in this case, but would strike out from the order made the direction relating to distress. The order as so amended should stand.

In Criminal Case No. 355 of 1964, it will be remembered, the court passed one "omnibus" sentence of two years' imprisonment which carried with it twenty-four strokes of corporal punishment in respect of the eleven counts on which it had convicted the appellant and ordered him to compensate each of the eleven ratepayers concerned in an amount equal to that which the court had found the appellant had received from him. An "omnibus" sentence is unlawful and the compensation order is misconceived. As to the former, there must be a separate sentence for each count on which a conviction is had – see *Mohamed Warsama S. T. Musa Aboker Bab Majelo v. R.* (4). As to the latter, the "owner of the property" obtained by the appellant within the meaning of s. 6 (1) of the Minimum Sentences Act was the Rungwe District Council and not any ratepayer. Accordingly, I would allow the appellant's appeal against sentence in this case, set aside the sentence imposed, and would substitute for it a sentence of two years' imprisonment in respect of each of the eleven counts on which the appellant was convicted, the terms to run concurrently, and this sentence would carry with it twenty-four strokes of corporal punishment. I would set aside the compensation order made and would substitute for it an order that the appellant pay to the Rungwe District Council the sum of Shs. 394/60, this being the aggregate of the eleven several sums which the court found him guilty of stealing from the Council.

In Criminal Case No. 464 of 1964 again, the court imposed one "omnibus" sentence of two years' imprisonment which carried with it twenty-four strokes of corporal punishment in respect of the twelve counts on which it had convicted the appellant, and ordered the appellant to pay to the Rungwe District Council Shs. 171/- by way of compensation, being the aggregate of the twelve several sums which it had found him guilty of stealing from the Council. For the reasons mentioned, I would allow the appeal against sentence in this case, set aside the sentence imposed, and substitute for it a sentence of two years' imprisonment in respect of each of the twelve counts on which the appellant was convicted, the terms to run concurrently, and this sentence would carry with it twenty-four strokes of corporal punishment. The compensation order is unobjectionable and should stand.

I am aware that as regards the sentence which I have suggested in Criminal Case No. 355 of 1964 – eleven terms of two years' imprisonment each to run concurrently – and Criminal Case No. 464 of 1964 – twelve terms of two years' imprisonment each to run concurrently – I am aware, I say, that these might be thought to be ultra vires the lower court having regard to the terms of paragraph (*a*) of the proviso to subs. (2) of s. 12 of the Criminal Procedure Code as interpreted by Lowe, J. (as he then was), in *R. v. James William Mhina* (5). The interpretation of this section as a whole has caused this Court graver anxiety than perhaps any other provision of the Criminal Procedure Code, and views have been expressed as to its meaning in a number of decisions which I confess I find it extremely difficult to reconcile, and to which fortunately it

is not necessary for me to refer. I have no intention of adding any view of mine here, except in so far as it is necessary to justify the sentences I recommend. I need say no more then, than that as I read the subsection it applies as a matter of plain English to cases "of constructive sentences" imposed by all courts inferior to the High Court, and to no other sentences; and applying the relevant elementary rule of construction of statutes, paragraph (*a*) of the proviso to the subsection cannot be anything but an exception to the general rule laid down in the subsection. It follows that whatever the subsection may mean, it has no application to the concurrent sentences which I have suggested should be imposed in the two appeals here. I know of no legal provision which limits the power of courts inferior to the High Court to impose any number of concurrent terms of imprisonment, provided each such term does not exceed the court's powers, and I would add my voice to that of Knight, J., who as far back as 1951 in *Henry Julius v. R.* (6) ((1951) 1 T.L.R. (R) at p. 357); in a cri de cœur suggested that the Legislature might usefully apply its mind to the amendment of this section.

So much for the sentences in these appeals considered singly. I must now turn finally to the effect of the sentences regarded collectively. Paragraphs 6 and 7 of the appellant's petition read as follows:

> "That the learned magistrate would accordingly have understood the proceeding that this case was a merely single case against me altogether and not three cases as what it is now.
>
> That I am highly grieved by the so imposed sentences of six years' imprisonment plus 72 strokes of corporal punishment."

I am in no doubt that the appellant has a legitimate grievance. Let it not be thought that this Court has any sympathy with persons such as he who are placed in positions of trust by the public institutions of this country and abuse that trust in the systematic and blatant manner in which the appellant here clearly has done. At the same time the appellant was not caput lupinum to be dealt with without regard to what for want of a better word I would call the decencies that do or should hedge the exercise of executive power. Doubtless there is nothing in law which made it bad to arraign the appellant on three several occasions before three different magistrates for what was a single complex of offences connected in kind and time, but the hustling of the appellant from one court to another as this appellant was – on one day indeed new charges were preferred the moment others had been dealt with – was not in my view a seemly spectacle or one calculated to inspire in the onlooker any great respect for the administration of justice. There is, I think, something ridiculous about a person who takes three bites at a cherry. Nor did the court below, seemingly, advert to its powers under s. 36 of the Penal Code which would have enabled it, if not to view the charges against the appellant as, to use his own words, "a merely single case against me altogether and not three cases as what it is now", at least as three cases so connected that it would be error in principle not to take into account in fixing sentence in the two cases last tried the sentence imposed in the previous case or cases.

Accordingly, I would direct that the terms of imprisonment imposed in all three cases should be executed concurrently. The effect would be that the appellant will serve a period of two years and some two months in prison but he will remain liable to suffer seventy-two strokes of corporal punishment. In this connection, this Court is powerless to mitigate the rigour of the law, but I cannot conceive that a position such as has arisen here was ever in the contemplation of the Legislature. We here can only apply the law. The power to temper it with mercy resides in higher authority. I would direct that these

papers be sent to the Honourable the Minister for Justice with the request that the matter be put to the final arbitrament of His Excellency the President.

Reide J: I have had the advantage of reading the judgment just delivered by my brother Weston. I too find no merits in the appeal against conviction in Criminal Case No. 355 of 1964 and would also dismiss it. The observation of Spry, J., in *Rajabu's* case (1), "What is relevant is what is in the mind of the receiver, not what is in the mind of the payer", must be afforded a narrow interpretation. No doubt what is in the mind of the receiver may be in some circumstances highly relevant, but the observation clearly cannot be construed to mean and was never intended to mean that an agent who is authorised and under a duty to collect monies on behalf of his principal can, merely by the possession of an animus furandi divest himself of his status or duties as such an agent. As the learned Senior State Attorney put the matter, it is not what is in the mind of the receiver that is the sole criterion as to whose behalf he is acting on. That depends on the facts of the particular case, and the real question for decision is whether the receiver is a duly appointed agent and whether payment to him would be a defence to an action against the payer for non-payment, and these are matters which are independent of the receiver's state of mind. I also concur with my brother Weston's findings as to the appeals against sentence in these three consolidated cases, and with his suggestion to forward these papers for the consideration of His Excellency the President in the exercise of his prerogative of mercy.

I would add two short observations. It is indeed true that the interpretation of s. 12 of the Criminal Procedure Code has from time to time given trouble both to this Court and to subordinate courts. With the greatest respect to Lowe, J., I must confess that I have found difficulties with the judgment in *Mhina's* case (5). Those difficulties spring I think from two causes; first the fact that the learned judge has analysed subs. (2) with reference to concurrent as well as consecutive sentences, although the opening words of the subsection, "In the case of consecutive sentences', appear to limit its application to such sentences only; and secondly the necessity involved in the judgment of endeavouring to distinguish between the phrases "sentenced to imprisonment" in the first proviso and "aggregate punishment" in the second. I believe that the learned Senior State Attorney for whose lucid and careful exposition the Court is much indebted, has hit upon the reason why these two phrases appear in the section. He points out that s. 12 is substantially identical in wording with s. 35 of the Indian Criminal Procedure Code, which was framed in order to deal with circumstances which apply in India, or applied at the time when s. 35 was framed (but which have never applied in this country) in relation to "specially empowered magistrates" who might be given an extended jurisdiction entitling them to impose a sentence of seven years' imprisonment on one count. It seems at least possible that when the text of s. 35 was embodied into s. 12 its partial inapplicability and incongruity were not realised, and that is, I think, the more likely, since on the face of it there seems no reason, and I have never heard one advanced, why a court's powers of imposing concurrent sentences of imprisonment should be limited to the arbitrary total of fourteen years or to any other total.

I entirely concur with the strictures passed upon the three-fold arraignment of the appellant. Whether the idea of so arraigning him, before three different magistrates in the same court, originated with the prosecution I cannot say, but I find it difficult to believe that the court did not know what was being done or was intended to be done, so that on the face of it these three separate trials for one complex of offences, which should have been tried together, look like "snatching jurisdiction" as Knight, J., described it in *Henry Julius*' case (6).

Weston J: I have been asked by my brother Platt, Ag.J., who is unable to be present today, to state that he concurs with the views which have been expressed.

The Court makes the following Order:

(1) The appeal against conviction in Criminal Case 355 of 1964 is dismissed.

(2) The sentence in Criminal Case 307 of 1964 is varied by striking out from the order for compensation the direction relating to distress, but the order will otherwise stand. Save to this limited extent the appeal against sentence is dismissed.

(3) The sentence in Criminal Case 355 of 1964 is set aside, and concurrent sentences substituted of two years' imprisonment on each of the eleven counts on which the appellant was convicted. This sentence carries with it twenty-four strokes of corporal punishment. The compensation order is set aside and there is substituted an order that the appellant pay to the Rungwe District Council the sum of Shs. 394/60.

(4) The sentence in Criminal Case 464 of 1964 is set aside, and concurrent sentences substituted of two years' imprisonment on each of the twelve counts on which the appellant was convicted. This sentence carries with it twenty-four strokes of corporal punishment. In this case the compensation order will not be disturbed.

(5) The terms of imprisonment imposed in these three cases will be served concurrently under the provisions of s. 36 of the Penal Code.

(6) The papers in this case are to be forwarded to the Honourable the Minister for Justice for the consideration of His Excellency the President in the exercise of his prerogative of mercy.

Appeal against conviction dismissed. Appeals against sentence in case No. 307 *allowed in part, and in whole in case Nos.* 355 *and* 464. *Sentences of two years imprisonment on each count substituted and to be served concurrently. Recommendation that the accumulation of* 72 *strokes be considered by the President in exercise of his prerogative of mercy.*

The appellant did not appear and was not represented.

For the respondent:
MG Konstam (Senior State Attorney, Tanganyika)
The Director of Public Prosecutions, Tanganyika

Yowana Mudola v Erifazi Lubowa
[1965] 1 EA 417 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	18 January 1965
Case Number:	21/1962
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Land – Native tenure – Decisions of native tribunals relating to such land – When should not be disturbed by appellate court.

[2] Practice – Appeal from native tribunal in case relating to land held under native tenure – Principles to be applied by appellate court.

Editor's Summary

This was the latest in a series of appeals in a case concerning the ownership of a piece of land held under native tenure. This appeal raised several questions of fact and law, but this report is limited to the learned Chief Justice's observations on the main point.

Held – the decisions of a native tribunal on matters peculiarly within their knowledge arrived at after a fair hearing on relevant evidence should not be disturbed without very clear proof that they are wrong.

Appeal allowed.

Cases referred to in judgment

(1) *Abakah Nthah v. Anguah Bennieh*, [1931] A.C. 72.

Judgment

Sir Udo Udoma CJ: In this case the petitioner, Yowana Mudola, has applied to this Court for a revisional order setting aside a judgment of the District Commissioner, Busoga, who, in exercise of his powers as a Magistrate, had reversed the decision of the District Native Court of Busoga given on October 9, 1959, on appeal from a decision of the Saza Court, Butembe-Bunya, dated May 26, 1959, in which the latter had itself set aside on appeal a decision given by the Mutuba I's Court Butembe-Bunya on March 19, 1959.

[The Chief Justice dealt with the history of the case and then continued:]

Counsel for the petitioner has invited this Court to restore the judgment of the Court of Mutuba I, Butembe-Bunya on the principal ground that the findings of that Court and of the Busoga District Native Court should not have been disturbed by the Magistrate. I think this is a proper case in which the now famous dictum of Lord Atkin, which was first enunciated in the Privy Council case of *Abakah Nthah v. Anguah Bennieh* (1) ought to apply. In the judgment of the Board in that case Lord Atkin had said ([1931] A.C. at p. 75):

> "By Colonial legislation all suits relating to the ownership of land held under native tenure are placed within the exclusive original jurisdiction of native tribunals, unless satisfactory reason to the contrary is shown. It appears to their Lordships that decisions of the native tribunal on such matters which are peculiarly within their knowledge, arrived at after a fair hearing on relevant evidence, should not be disturbed without very clear proof that they are wrong."

On the principle above stated, on a careful examination of the judgment of the Court of Mutuba I, Butembe-Bunya, in this case, this Court fails to find any

proof that that judgment was wrong. And holding as I do that the judgment of the Court of the District Commissioner, Busoga, given on August 22, 1960 in the exercise of its appellate jurisdiction as a Magistrate, was based on a serious misconception of the nature, purport and effect of a documentary evidence, Exhibit A, and on a misconstruction thereof, I have reached the conclusion that this application succeeds. The judgment of the District Commissioner dated August 22, 1960 is therefore set aside, and the judgment of the Court of Mutuba I, Butemba-Bunya, of March 25, 1959, which was confirmed by the judgment of the Busoga District Native Court dated October 9, 1959 is restored and confirmed. Order accordingly.

Appeal allowed.

For the petitioner:
JWR Kazzora
JWR Kazzora, Kampala

The respondent appeared in person.

The Universal Cold Storage Limited v Sabena Belgian World Airlines
[1965] 1 EA 418 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	5 May 1965
Case Number:	130/1962
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Sale of goods – Action for price by unpaid seller – Undisclosed principal bought through carrier – Onus on carrier as bailee to show that facilities for carriage of perishable goods were adequate – Undisclosed principal not liable to indemnify carrier.

Editor's Summary

The defendant, an airline operating frequently between Usumbura, in Ruanda Urundi, and Entebbe, in Uganda, was requested by the principal, joined as third party to the proceedings, to arrange at Entebbe for the supply to the third party of meat and to carry and deliver the meat to the third party at Usumbura. The defendant accordingly ordered the meat by a radio message, which was sent in flight and received by East African Airways at Entebbe Airport. The plaintiff duly delivered the meat, in the belief that it was dealing with East African Airways, and the meat on delivery was inspected and weighed by the staff of the airport, and then loaded into the defendant's aircraft in the presence of the defendant's pilot. The plaintiff invoiced East African Airways with the price of the meat, but, after the invoices had remained

unpaid for some seven months, the plaintiff was for the first time informed by the defendant that the meat had been ordered at the request of the defendant as agent for the third party and not at the request of East African Airways. The plaintiff then sued the defendant for the price of the meat. The defendant admitted having taken delivery of the meat but merely as the agent of the third party; that if it were liable it should be indemnified by the third party as its principal; and further that the meat was not of merchantable quality or fit for the purpose for which it was bought, being unfit for human consumption on arrival at Usumbura.

Held –

(i) when it delivered the meat the plaintiff did not know that the order derived from the third party through the defendant and not from East African Airways;

(ii) in ordering the meat through East African Airways and in taking delivery of it the defendant became personally liable;

(iii) the plaintiff honestly believed it was dealing with East African Airways and its responsibilities ceased immediately the meat was delivered to East African Airways at Entebbe Airport;

(iv) the meat was in good condition and of merchantable quality at the time when it was delivered to East African Airways at Entebbe Airport;

(v) the defendant had inspected and failed to reject the meat so it could not be heard to complain about the quality of the meat after acceptance;

(vi) the defendant had failed to prove to the satisfaction of the Court that it had exercised that degree of care which it was bound to exercise in the performance of its agency, both in the purchase of the goods and the carriage thereof and accordingly the claim for indemnity against the third party failed.

Judgment for the plaintiff. Third party action dismissed.

Cases referred to in judgment

(1) *In re Southampton, Isle of Wight & Portsmouth Improved Steam Boat Co. Ltd*., 4 De G.J. & S. 200.

(2) *Basma v. Weeks*, [1950] A.C. 441; [1950] 2 All E.R. 146.

(3) *Dramburg and Another v. Pollitzer* (1873), 21 L.T. 470.

(4) *Duncan v. Hill* (1873), L.R. 8 Ex. 242.

(5) *Morrison, Pollexfen & Blair v. Walton* (unreported).

(6) *Joseph Travers & Sons Ltd. v. Cooper*, [1915] 1 K.B. 73.

(7) *Brooks Wharf & Bull Wharf Ltd. v. Goodman Bros*., [1937] K.B. 534; [1936] 3 All E.R. 696.

Judgment

Sir Udo Udoma CJ: This is a claim by the plaintiff, The Universal Cold Storage Ltd., against the defendant, Sabena Belgian World Airlines, for the sum of Shs. 31,130/-, being the price of meat sold and delivered. The defendant has admitted having taken delivery of the meat but denies liability to the plaintiff for the price. It alleges that in taking delivery of the meat it did so as the agent of and carrier for a third party, Société Elakat of Usumbura, Ruanda Urundi, and that the goods were not of good and merchantable quality. Originally the defendant had also pleaded in paragraph 5 of its defence that the price charged was unreasonable and unfair. But at the hearing paragraph 5 of the defence was by leave of the Court withdrawn. It was struck off.

On the application of the defendant, Société Elakat (hereinafter to be referred to as the third party) was joined as a third party to the suit. Thereafter by its defence the third party, while admitting having requested the defendant for a supply of meat, averred that the defendant was negligent in the carriage of the said meat, as a result of which on arrival at Usumbura, Ruanda Urundi, the meat was found to be at an advanced stage of putrefaction and unfit for human consumption. It was condemned and destroyed by the Veterinary Authorities in Usumbura, Ruanda Urundi. By an order of this Court on the application of the defendant, a letter of request was issued and directed to one, Mr. Paul Muller-Vanisterbeck, Notary Public, of No. 52 rue Aux Laines, Brussels, Belgium, commanding him to examine on oath M. Demetre

Adamantidis, Director of the Ruanda Urundi Veterinary Service and M. Robert Marsboom, Deputy Director of Veterinary Services of the Government of Ruanda Urundi, and to record such evidence and thereafter to transmit to this Court the record thereof. The order was duly complied with and the evidence of M. Demetre Adamantidis and M. Robert Marsboom in French, the English translations thereof being translation documents Nos. 1 and 2 respectively, form part of these proceedings.

In substance the evidence of both M. Demetre Adamantidis and M. Robert Marsboom is to the effect that when the meat shown and covered by copies of certificates of seizure Nos. 5810 and 5812 arrived from Entebbe at Usumbura, it was found to have been carried loose in the hold of the aircraft without any wrappings whatsoever. It was unfit for human consumption because of putrefaction and dirt. It was therefore condemned by the Veterinary Authorities at Usumbura, Ruanda Urundi, seized and destroyed.

The third party, Société Elakat, is normally resident in Usumbura, Ruanda Urundi. It appears that in July 1960 the defendant's aircraft were operating frequently between Usumbura, Runda Urundi and Entebbe, Uganda. In the course of those flights the third party requested the defendant to arrange at Entebbe, Uganda, for the supply to it of a quantity of meat and to carry and deliver the same to it at Usumbura, Ruanda Urundi. On July 12, 1960 whilst still in flight and before arriving at Entebbe airport in Uganda, in compliance with the request of the third party aforesaid, the defendant ordered by radio message which was received at the Control Tower of the East African Airways, Entebbe, Uganda, for the supply of meat to be delivered to it on arrival at the Entebbe airport. The East African Airways, immediately on receiving that order, contacted the plaintiff and ordered for the meat to be supplied and delivered to it at the Entebbe airport. In compliance with the order of the East African Airways and in pursuance thereof, the plaintiff in the belief that it was at the time dealing with the East African Airways, sold and delivered to the East African Airways at Entebbe airport meat on three different occasions as hereunder set forth:

(1) On July 12, 1960 at about 3 p.m. 3,500 lbs. of beef valued at Shs. 8,750/-;

(2) On July 13, 1960 at about 9 a.m. 5,952 lbs. of beef valued at Shs. 14,880/-;

(3) On July 13, 1960 at about 4 p.m. 3,000 lbs. of beef valued at Shs. 7,500/-.

On the meat being delivered at the Entebbe airport, it was inspected and weighed by the staff of the airport, and, at the request of the East African Airways, it was on each occasion loaded into the defendant's aircraft then at the airport in the presence of the pilot of the said aircraft. Thereafter the plaintiff debited the East African Airways with the price of the three lots of beef supplied, and accordingly issued and forwarded to the East African Airways invoices or bills Nos. 7997, 7998 and 7999 marked Exhibits B.1 to B.3 respectively in these proceedings. For a considerable time, the bills, Exhibits B.1 to B.3, remained unpaid, despite repeated demands for the settlement thereof by the plaintiff. Then by its advocate's letters dated February 1, 1961, and December 13, 1961, respectively, apparently in reply to one by the plaintiff's advocate, the defendant disclosed for the first time that the East African Airways was in no way concerned with the order for the supply of the meat, the subject-matter of the bills, Exhibits B.1 to B.3; that the meat was supplied at the request of the defendant, acting as an intermediary of and carrier for Elakat Cold Storage Company; and that the meat on arrival at Usumbura, Ruanda Urundi was found unfit for human consumption and condemned. In consequence of the admission that the order for the meat had issued from the defendant, the plaintiff has brought this action claiming the price of the goods sold and delivered.

Counsel for the defendant has submitted that since the defendant had ordered for and taken delivery of the meat as agent of and carrier for Société Elakat, it cannot be held liable for the price of the meat. If the Court should hold otherwise, then it was contended that the defendant was entitled to be indemnified by the third party as its principal.

I turn now to consider these submissions regarding the liability of the defendant on the contract before dealing with the issue of indemnity by the third party. On the evidence before the Court, there is nothing to show that at the

time when the meat was sold the plaintiff knew that it was being sold to either the defendant or the third party at Usumbura. The evidence, which I accept and the point which I am satisfied has been established on the evidence, is that the order for the supply of meat was received from the East African Airways by the plaintiff; and, in pursuance of that order, the meat was delivered to the East African Airways at the Entebbe airport. It was loaded on to aircraft on the instructions and at the request of the East African Airways. It is thus clear that at the material time of the sale of the meat, the plaintiff did not know nor was it brought to its notice that the order was from, and that it was selling the meat to, the defendant or the third party at Usumbura. I am satisfied and find that the plaintiff at the time believed that the meat was being sold to, and that it was then dealing with the East African Airways. I find also that after the meat had been loaded on to the aircraft the plaintiff did immediately thereafter deliver to the East African Airways its bills, Exhibits B.1 to B.3 for the price of the meat, which, in my view, goes to confirm the belief that it was at the time dealing with the East African Airways. The bills were addressed to the East African Airways.

It is a matter for surprise that on receiving the bills, Exhibits B.1 to B.3, the East African Airways appeared to have done nothing about them. It failed to settle the bills; and there is no evidence that it at any time did directly or indirectly repudiate liability or disclose to the plaintiff the true purchaser of the meat. It was only in February, 1961, a period of about seven months after the sale and delivery of the meat, that it was brought to the notice of the plaintiff that neither the East African Airways nor the defendant was the purchaser of the meat; and that the defendant, in taking delivery of the goods had done so as an agent of and carrier for the third party in Usumbura, Ruanda Urundi. That the defendant did order for the meat through the East African Airways; that it was the staff of the East African Airways which had arranged with the plaintiff to deliver the meat at the airport; that in consequence of that arrangement the plaintiff did deliver the quantity of meat required at the airport; and that at the time of the said delivery the plaintiff was never informed that the meat was intended for the third party or even for the defendant – all these facts have not been disputed.

In these circumstances and subject to consideration being given to the issue of warranty pleaded and argued, it is difficult to see the ground for the submission that the defendant cannot be held liable to the plaintiff for the price of the meat because it had acted as the agent of the third party. By its letter, Exhibit A, the defendant has clearly exculpated the East African Airways from liability. By its pleadings, it admitted having taken delivery of the goods. Nowhere has it been suggested that at the time of the contract the defendant did disclose either to the East African Airways or to the plaintiff that it was acting as the agent of and carrier for the third party.

On the evidence, I hold that the defendant, in ordering for the meat through the East African Airways and in taking delivery of the same at the airport, had contracted in its own name, and must therefore be held bound by its contract. It is personally liable on the contract.

In law, where a person makes a contract in his own name without disclosing either the name or existence of a principal, he is personally liable on the contract to the other contracting party though he may in fact be acting on behalf of a principal. He does not cease to be liable on the discovery of the principal by the third party unless the third party unequivocally elects to look to the principal alone for the performance of the contract. In *Re Southampton, Isle of Wight & Portsmouth Improved Steam Boat Co. Ltd.*, (1), a director of a company applied for and subscribed an agreement to take additional shares. He was entered upon

the register in respect of the additional shares but none were actually allocated to him. The company being wound up, it was held that his name was properly on the register and ought also to be placed on the list of contributories for such additional shares notwithstanding his allegation that he had applied for and subscribed the agreement to take the additional shares as the agent only for another person, there being no evidence that at the time of his application and subscription he had communicated the alleged fact to the company. In *Basma v. Weeks* (2) it was held by the Privy Council that an agent who contracts in his own name does not cease to be contractually bound because it is proved that the third party knew when the contract was made that he was acting as an agent, and that as such agent can sue on the contract so can the principal.

In *Dramburg v. Pollitzer* (3) where the plaintiff sent to the defendant, a dealer in gelatine paper, over whose door was inscribed "Sole agent for K. & Co. of Vienna", a written order addressed to him personally for gelatine paper to be delivered by monthly instalment. To this the defendant replied by letter:

> "I acknowledge with thanks the receipt of your favour containing order for 150 reams of gelatine, which I have forwarded to Kneppers Actien Gesellschaft, in Vienna, to be executed in monthly parcels of 30 reams each, and remain, etc., L. Pollitzer."

Some parcels of the ordered goods were sent by Kneppers to England invoiced to the defendant and were by him delivered to the plaintiff. Delay occurred in sending the remainder, and the plaintiff, after pressing the defendant to complete the delivery, wrote at last to Kneppers: "We gave your Mr. Pollitzer an order, etc. We must fall back upon you in case of any claims, if the goods are not delivered." An action was thereafter brought against the defendant for breach of contract for non-completion of the delivery. He denied personal liability. It was held that the order and acceptance formed a contract between the plaintiffs and the defendant personally; and that the plaintiffs had not by their subsequent letters to the manufacturers of the paper elected to treat them as principals.

It was further submitted by counsel for the defendant that, on the evidence of Demetre Adamantidis and Robert Marsboom, the meat was unfit for human consumption on arrival at Usumbura, Ruanda Urundi. It was condemned by the Veterinary Authorities there, because it was found to be at an advanced stage of putrefaction and dirty, it having been carried loose in the hold of the aircraft. That being so, it was submitted that there was a breach of implied warranty or condition that the meat should be of merchantable quality and fit for the purpose for which it was bought. By that submission I understood the contention to be that there was a breach of warranty by the plaintiff in that the meat supplied was not fit for the purpose for which it was bought.

That submission would have been a sound one if there was evidence to show that at the time when the meat was sold to the East African Airways and loaded into the aircraft, it was made known to the plaintiff that the meat was intended for consumption at Usumbura, Ruanda Urundi; or, if when the meat was delivered at the Airport Entebbe, Uganda, it was found to be unfit for human consumption. Unfortunately there is no such evidence before the Court. On the other hand there is the evidence, which I accept, that when the meat was delivered at the airport it was inspected and weighed before being loaded on to the aircraft. The loading itself was done in the presence and under the supervision of the pilot of the aircraft. The pilot of the aircraft as a representative of the defendant had ample opportunity of examining the meat during the inspection, weighing and loading of the same into the aircraft. One would have thought that if the meat was then at some stage of decomposition that the same

would have been discovered during the period of inspection, weighing and loading. There is no evidence before this Court as to the precise time when the aircraft took off from Entebbe airport with the meat, nor is there any evidence as to when they landed at Usumbura, Ruanda Urundi. On the evidence of Demetre Adamantidis and Robert Marsboom, putrefaction had begun at least 24 hours before the meat arrived at Usumbura, Ruanda Urundi. Assuming that the meat spoken of by Demetre Adamantidis and Robert Marsboom was the meat which had been sold by the plaintiff to the defendant in Uganda, it must follow that the meat was at an advanced stage of decomposition before it was ever loaded into the aircraft at Entebbe. In other words, at the time when the meat was received on board the aircraft, it was unfit for human consumption, and yet that fact was not discovered by the officials of the East African Airways and the pilot of the aircraft at the time. I think it is highly improbable that that was so.

Having given careful consideration to the whole of the evidence and the circumstances of the instant case, I find myself unable to accept the evidence of Demetre Adamantidis and Robert Marsboom as to their estimation of the time as to which putrefaction had occurred in the meat. The incident to which they testified took place in July 1960. Their evidence was taken in Brussels in October, 1964.

A careful reading of the evidence of Robert Marsboom in particular leaves one with the impression that the evidence was directed towards explaining how it came about that the certificates Nos. 5810 to 5812 were issued. Although the certificates of seizure Nos. 5810 to 5812 state that the meat was from Entebbe, neither the aircraft which had carried the meat nor the flight numbers of the aircraft are given. It is therefore difficult to relate the meat which was condemned to the meat which was loaded by the East African Airways into the defendant's aircraft covered by the bills, Exhibits B.1 to B.3, in which appear the flight numbers of the aircraft which had carried the meat to Usumbura. There is the further question that immediately on the condemnation of the meat at Usumbura the defendant did not communicate that fact to the East African Airways or to the plaintiff.

Finding as I do, that the plaintiff in selling its meat had honestly believed it was dealing with the East African Airways, and that it was never disclosed to it that it was intended for Usumbura, I am of the opinion that it cannot be held responsible for the state of the meat at Usumbura, its responsibilities having ceased immediately the meat was delivered to the East African Airways at the Entebbe airport. I am also of the opinion that the meat was in good condition and of merchantable quality at the time when it was delivered to the East African Airways at the Entebbe airport. The defendant, having accepted the goods and loaded the same into its aircraft, cannot be heard to complain about the quality of the meat since it had ample opportunity of examining the goods at the time when the same was inspected and weighed before being loaded into the aircraft. I conclude that the defendant is liable on the contract.

I do not think it is right to treat the sale which took place on this occasion as a sale by description or by sample. Sections 15 and 16 of the Sale of Goods Ordinance, cap. 214, to which the court was referred by counsel for the defendant, would appear to be irrelevant and inapplicable.

The next question for consideration is as to whether the third party is liable to indemnify the defendant on the contract. It was submitted by counsel for the defendant that if the meat supplied was of merchantable quality at the time of supply but subsequently went bad and was condemned, then the loss resulting therefrom must fall on the third party for whom the defendant had contracted as an agent. The defendant must therefore be indemnified by the third party,

it was submitted. In support of that submission the Court was referred to s. 222 of the Indian Contract Act, which provides that an employer of an agent is bound to indemnify him against the consequence of all lawful acts done by such agent. It is noteworthy that the right of indemnity under the provisions of s. 222 of the Indian Contract Act is a qualified one. An agent can only be indemnified against the consequence of all lawful acts done by him. Counsel's submission that the defendant ought to be indemnified expressed simpliciter in this way would appear to ignore the decision in *Duncan v. Hill* (4) in which it was held that there is no implicit promise by a buying principal to his broker that he would indemnify him from the consequences of his own wrong, such as insolvency or negligence; or having sold at a loss in breach of his agreement with the principal.

The complaint against the defendant by the third party, as I understand it is that the fact that the meat, according to the defendant, was found in an advanced stage of putrefaction and condemned on arrival at Usumbura is *prima facie* evidence of negligence on the part of the defendant unless the contrary can be shown. I think that for an agent to be entitled to an indemnity such an agent must show that it had conducted the business of the principal with as much skill as is generally possessed by persons engaged in similar business, and that it had acted with reasonable care and diligence. See ss. 211 and 212 of the Indian Contract Act.

In the instant case, on the evidence, the defendant has admitted that it was both an agent of and carrier for the third party in respect of the meat which it brought and carried from Entebbe to Usumbura. It is also its case that on arrival at Usumbura the meat was condemned as unfit for human consumption. Thus the defendant was acting in a dual capacity both as agent for the supply of the meat and for the transportation of the said meat to Usumbura on behalf of the third party. There has not been any evidence as to the amount of care exercised by the defendant either at the time of the purchase or on taking delivery of the meat or in the carriage of the meat from Entebbe to Usumbura. The evidence produced by the defendant is to the effect that the meat was carried loose and unwrapped or uncovered with anything in the hold of the aircraft, and that it was dirty; and on arrival at Usumbura it was found to be in an advanced stage of putrefaction. Nothing appears to have been done by the defendant for the preservation of the meat nor was there any step taken to have the meat packed with ice blocks.

Now, if it is true that the meat was loaded on board the aircraft loose and unprotected in the hold of the aircraft and in dirt, in my view, that *prima facie* would be some evidence of negligence. For it would go to show that in taking delivery of the meat and in loading the same in the hold of the aircraft, the defendant did not exercise that degree of care over the goods as an ordinary man of prudence in similar circumstances would take of his own goods of the same quality and value. This point is important, particularly as the goods were of a perishable nature. It was the duty of the defendant, I think to make certain that the meat of which it took delivery was of good quality and in good condition and in a state not likely to putrefy en route to Usumbura; and in loading the same into the aircraft to take necessary precautions to preserve it. The pilot who supervised the loading of the meat on the aircraft has not given evidence. It is impossible in the circumstances for this Court to determine the degree of care, if any, which had been exercised in the acceptance of the goods and in the carriage thereof.

As was said by Lord Loreburn in the unreported decision of the House of Lords in *Morrison, Pollexfen & Blair v. Walton* (5), in a passage quoted with approval in *Joseph Travers & Sons Ltd. v. Cooper* (6) and by Lord Wright in

Brooks Wharf & Bull Wharf Ltd. v. Goodman Bros. (7), ([1937] 1 K.B. at p. 538) to which this Court was referred by counsel for the third party:

> "Here is a bailee, who, in violation of his contract, omits an important precaution, found by the learned Judge upon ample evidence to be necessary for the safety of the thing bailed to him, and which might have prevented the loss. And his breach of contract has the additional effect of making it impossible to ascertain with precision, and difficult to discover at all, what was the true cause of loss. I cannot think it is good law that in such circumstances he should be permitted to saddle upon the parties who have not broken their contract the duty of explaining how things went wrong. It is for him to explain the loss himself, and if he cannot satisfy the Court that it occurred from some cause independent of his own wrongdoing he must make that loss good."

And in *Joseph Travers & Sons, Ltd. v. Cooper* (6) it was held that the onus lay on the defendant who was in possession of the goods as bailee, of showing that the negligence of his servant, in leaving the barge unattended, did not cause the loss; and that he had failed to discharge that onus.

In the instant case, I think it was the duty of the defendant in its claim for indemnity against the third party to show to the satisfaction of the Court that it took reasonable and proper care for the due preservation of the meat while in transit to Usumbura and that the meat was conveyed to Usumbura with all reasonable speed. On the evidence as it stands, it is impossible to discover the cause of the putrefaction of the meat which had resulted in its condemnation and destruction. In the circumstances, the only reasonable conclusion is that the defendant has failed to prove to the satisfaction of the Court that it had exercised that degree of care which it was bound to exercise in the performance of its agency, both in the purchase of the goods and the carriage thereof. I am therefore unable to hold that the defendant is entitled to be indemnified by the third party.

In my judgment, the claim for indemnity against the third party fails. It is dismissed with costs. There will be judgment for the plaintiff against the defendant in the sum of Shs. 31,130/- as claimed with costs. The plaintiff is also awarded interest at 6 per cent from the date of the filing of this suit until payment.

Order accordingly.

Judgment for the plaintiff. Third party action dismissed.

For the plaintiff:
PJ Wilkinson, QC and *Jaffer*
Wilkinson & Hunt, Kampala

For the defendant:
AI James
Hunter & Greig, Kampala

For the third party:
YV Phadke
Parekhji & Co, Kampala

Chanan Singh v The Official Receiver

[1965] 1 EA 426 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	8 April 1965
Case Number:	64/1964
Before:	Sir Clement de Lestang, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Sherrin, S.R.M

[1] Bankruptcy – Discharge – Appeal – Application for discharge refused – Co-debtor discharged subject to suspension – No reasons stated in order refusing discharge – Whether order refusing discharge outright harsh – Bankruptcy Act (*Cap.* 53) *s.* 103 (1) (*K*) *– Bankruptcy Rules* 15 *and* 316 (*K*).

Editor's Summary

The appellant, his father and three brothers were partners in a firm and on July 18, 1961, all were adjudged bankrupt. Applications by the appellant and two of his brothers for discharge were heard on January 3, 1964. The two brothers were granted discharge subject to six months suspension but the application of the appellant was refused. The appellant did not appeal but filed an application to review the order by way of notice of motion under rr. 15 and 316 of the Bankruptcy Rules and invoked the inherent powers of the court. It was supported *inter alia* on the grounds of the appellant's ill health and that one of the responsible partners in the debtor firm had been discharged and that it was inequitable to penalise the appellant alone. The Senior Resident Magistrate, exercising the powers of the Supreme Court, dismissed the application. The appellant appealed on the grounds (*a*) that the Senior Resident Magistrate had erred in dismissing the application without giving any reason and without taking the evidence on the record into account and (*b*) that the wording of the order suggested that he had relied mainly on the public examination of the debtor and other parts of the record in arriving at his decision and that the ruling contained no indication that he had considered the new facts and arguments advanced at the hearing.

Held –

(i) the application for review should have been made under s. 103 (1) of the Bankruptcy Act (Cap. 53);

(ii) though it was true that there was nothing in the Bankruptcy Act or in the Bankruptcy Rules themselves requiring reasons to be given for the refusal of an order of discharge it seemed clear from form No. 104 in the Schedule to the Bankruptcy Rules that the court must give its reasons for refusing a discharge;

(iii) if a debtor was gravely ill and unlikely to live long, that was a good reason for granting a discharge because it was contrary to public policy to refuse a discharge to a dying man or one permanently incapacitated;

(iv) as a matter of principle and so that justice may be seen to be done, an order made on an application by one of several joint debtors for discharge should be reviewed if it was manifestly more severe

than that made in respect of a co-debtor whose responsibility for the bankruptcy was not materially different;

(v) the court was of the opinion that the outright refusal of discharge was too severe.

Appeal allowed in part. Order of Senior Resident Magistrate set aside and an order that the appellant be granted his discharge but suspended for twelve months substituted.

Cases referred to in judgment

(1) *In re Nicholas* (1890), 7 Mor. 54.

(2) *In re Freeman, Ex parte Freeman* (1890), 7 Mor. 38.

(3) *Re Wood, Ex parte Leslie & Co. Ltd.* [1915] H.B.R. 53.

(4) *In re Badcock, Ex parte Badcock* (1886), 3 Mor. 138.

(5) *In re Rankin, Ex parte Rankin* (1887), 5 Mor. 23.

(6) *Re Smith*, [1947] 1 All E.R. 769.

(7) *In re Solomons*, [1904] 1 K.B. 106.

April 8. The following judgments were read:

Judgment

Spry JA: This is an appeal against an order of the Supreme Court of Kenya dismissing an application for review of an earlier order refusing a discharge from bankruptcy. The appellant was a partner in a firm which also included his father and his three brothers. A receiving order was made against all five on December 16, 1960, and on July 18, 1961, all five were adjudged bankrupt. On October 3, 1963, an application for discharge was filed by the appellant and one of his brothers, Ronuk Singh, and another brother, Harnam Singh filed an application on November 8, 1963. The applications were heard together on January 3, 1964, when Ronuk Singh and Harnam Singh were granted discharge subject to six months' suspension but the application of the appellant was refused. For the sake of completeness, it may be observed that the other two debtors were outside the jurisdiction when the receiving order was made and have not returned. The appellant did not appeal against the order refusing his application for discharge but on June 24, 1964, he filed an application for the rescission or variation of the order. This application was heard on July 3, 1964, and on July 17, 1964, the learned Senior Resident Magistrate, exercising by delegation the powers of the Supreme Court, dismissed it. It is from that last-mentioned order that the appellant now appeals.

The application was made by Notice of Motion and was headed with references to rr. 15 and 316 of the Bankruptcy Rules and to the inherent powers of the court. That was clearly wrong. At the hearing it was apparently suggested that r. 197 applied, but that again, I think, was wrong, because this was not an application arising out of inability to comply with the terms of an order of discharge. It appears to me that the application should have been made under s. 103 (1) of the Bankruptcy Act (Cap. 53). The grounds on which the application was based were four: the first two related to the health of the appellant; the third was so vague as to be meaningless, being an allegation that full facts were not before the court when the order of January 3, 1964, was made; and the fourth, that one of the responsible partners in the debtor firm had been discharged and that it was inequitable to penalise the appellant alone.

I would pause at this point to say that the power conferred by s. 103 (1) of the Bankruptcy Act is very wide and it seems to me that there are two kinds of applications which may be made for the exercise of the power of review in relation to the refusal of a discharge: the court may be asked to review its order on the ground that it was made per incuriam or contains some error or it may be asked to review its order on

the ground that circumstances have changed since the order was made. An application of the former kind must, of course, be made without delay. On the other hand, an application of the latter kind should not, I think, in the absence of extraordinary circumstances, be made until a substantial period has elapsed from the date of the order.

The learned Senior Resident Magistrate who heard the application for review dismissed it in the following words:

> "I adjourned this application so that I could peruse this debtor's public examination and other parts of the record and I have done so. I cannot see my way to review the previous order. The application is dismissed."

The first ground of appeal was that the learned Senior Resident Magistrate had erred in dismissing the application "without giving any reasons and without taking the evidence on the record into account". This was also the eighth of ten vague and prolix grounds of appeal. Counsel submitted on behalf of the appellant that the wording of the order suggested that the learned Senior Resident Magistrate had relied mainly on the public examination of the debtor and other parts of the record in arriving at his decision and that the ruling contained no indication that he had considered the new facts and arguments advanced at the hearing. With respect, I do not think there is any merit in this argument. It was obviously proper for the learned Senior Resident Magistrate to examine the record before giving his ruling, and I do not think his reference to this should be taken as an indication that he had relied exclusively on it. I think the reference is no more than a link connecting the order with the previous proceedings, and that the order dismissing the application was one given without reasons.

I think there is merit, however, in the submission that the failure to give reasons constitutes an error. It is true that there is nothing in the Bankruptcy Act (Cap. 53) or in the Bankruptcy Rules themselves requiring reasons to be given for the refusal of an order of discharge but it seems clear from Form No. 104 in the Schedule to the Bankruptcy Rules (which was not followed when the formal order was issued) that the court must give its reasons for refusing a discharge. I do not suggest that a fully reasoned ruling is required in every case but I think that there must be findings of fact on the questions leading to the decision, otherwise an appellate court is likely to find itself in difficulty (*In re Nicholas, ex parte Nicholas* (1) is relevant). Consequently, it is necessary for this court to go into the merits of the application.

The fourth ground of appeal was that the learned Senior Resident Magistrate erred

> "in not finding that upon the medical evidence produced before him, there was no reasonable probability of the appellant being employed in future or have an earning power to pay the statutory dividend or at all. The learned Senior Resident Magistrate also erred in not finding that the appellant with his advanced age of 60 years and deteriorated health was not capable any longer of doing a mischief with the public discharged."

The medical evidence consisted of certificates by two doctors annexed to the appellant's own affidavit. These were to the effect that the appellant had suffered from diabetes for the previous ten years, which made daily treatment necessary. There were also references to weakness and to the effect of worry. Mr. Handa, who appeared for the Official Receiver, is recorded as saying that he did not dispute the medical evidence. The difficulty is, however, that that evidence is so extraordinarily vague. There is an obscure reference to the "malady weakening his life span" and to the "possibility" of his getting worse "which is going to shorten his life in near future". If a debtor is gravely ill and unlikely to live long, that is a good reason for granting a discharge because it is, I think, contrary to public policy to refuse a discharge to a dying man or one permanently incapacitated. There is, however, nothing in the certificates, as I understand them, to indicate that the appellant's condition is of such gravity as to negative the hope that he may live for many years. He gave his age in his affidavit as fifty-nine years, which is not nowadays regarded as old. The question of the appellant's health is also relevant so far as it affects his potential earning power and I will deal with that aspect later.

The other main ground on which the appeal was argued, the ninth ground, was that one of the appellant's co-debtors, Harnam Singh, had been granted a discharge, subject only to six month's suspension. Counsel for the appellant argued that according to the record, Harnam Singh had been responsible to a greater extent than the appellant for the insolvency of their firm. It is certainly the fact that at his public examination the appellant made grave allegations against Harnam Singh. What I find most extraordinary is that the public examination of Harnam Singh followed immediately but he was only asked a few formal questions. He was not asked a single question, either by the representative of the Official Receiver or by the court, on the allegations that had just been made against him. This is a point which might have been taken on appeal against the order of January 3, 1964, but the fact that no appeal was lodged against that order does not, in my opinion, preclude the point being taken now, since it seems to me the duty of a court reviewing an order of discharge to reconsider every relevant factor.

It is the practice in criminal appeals to reduce the sentence on a convicted person where it is manifestly disproportionate to the sentence passed on a co-accused and, of course, the punishment of the debtor is one of the factors which a court considers in refusing or suspending a discharge. I think, therefore, that, as a matter of principle, and so that justice may be seen to be done, the order made on an application by one of several joint debtors for discharge should be reviewed if it is manifestly more severe than that made in respect of a co-debtor whose responsibility for the bankruptcy is not materially different. In the present case, however, on the unsatisfactory record before us, it is difficult to compare the relative responsibilities of the appellant and Harnam Singh, particularly in view of the fact, to which I have already referred, that the latter was virtually not examined at all. It does appear from the public examination of the appellant that he was the senior partner and in over-all charge of the firm. It also appears that the books of the firm were his responsibility, although they were actually kept by a son of Harnam Singh, who was employed by the firm as a clerk. It was also the appellant who arranged the loans on which the firm was latterly dependent and as, on his own account, he was borrowing at an extortionate rate of interest, it would seem clear that he knew the firm was in grave financial difficulty. His criticism of his partner, Harnam Singh, was, first, that he was drawing bills, the honouring of which necessitated borrowing at high rates of interest, and, secondly, that he mismanaged a business in Tanzania, in which the firm had a half share. The drawing of the bills appears, however, to have gone on for several years beginning in 1954 and the appellant took no steps to stop the practice. Similarly, the business managed by Harnam Singh appears, to the appellant's knowledge, to have been in financial difficulty since 1954. I do not, therefore, think that the evidence, unsatisfactory as it is, shows the responsibility of Harnam Singh to have been as great as that of the appellant.

I think, on the material before us, that Harnam Singh was probably treated unduly leniently. As Cave, J., said in *In re Freeman, Ex parte Freeman* (2) ((1890), 7 Mor. at p. 47):

> "A sentence of three months' or six months' disqualification is not a nominal punishment, it is more than that; at the same time it is not sufficiently severe to be of any effect at all in discouraging debtors from committing offences of that kind."

On the other hand, six months' suspension was probably reasonable in the case of Ronuk Singh, who had played no substantial part in the business of the firm. Be that as it may, it does seem to me that the outright refusal of a discharge in the case of the appellant was disproportionately severe treatment compared

with that meted out to Harnam Singh, who was an active partner in the firm and must be presumed to have known its financial status.

I do not propose to examine in any detail the causes of the bankruptcy. There may have been some elements of misfortune and the extent of the insolvency may have been aggravated by a fall in the value of land. But the record as a whole indicates that from 1954 onwards the firm was experiencing difficulties and had plenty of time to discover exactly how it stood. Instead, it carried on trading, not keeping proper books of account and borrowing money at extortionate rates of interest. It appears, one cannot on the evidence say with certainty, that the real position was obscured by the artificial inflation of property values. The outcome was a bankruptcy in which the creditors will receive less than a shilling in the pound.

Counsel for the appellant, relying on *Re Wood, ex p. Leslie & Co. Ltd.* (3), no report of which is available to us but which is cited in Halsbury's Laws of England, 3rd Edn., Vol. 2, at p. 520, argued that the appellant, not having been convicted, could not be treated as having been guilty of any bankruptcy offence. I think that is correct, but that too much should not be read into it. It is clear from *In re Badcock, Ex parte Badcock* (4) that the court, in considering generally the conduct of the debtor, may take into account behaviour which might have formed the subject of a charge or even in fact formed the subject of a charge on which the debtor was acquitted.

On the aspect of punishment, the learned Senior Resident Magistrate clearly took a serious view of the debtor's conduct and on the material before us, I think he was justified in doing so. At the same time, this cannot be regarded as an exceptionally serious case, since there was at no stage any suggestion of fraudulent conduct. As Cave, J., observed in *In re Rankin, Ex parte Rankin* (5):

> "The moment you give so excessive a sentence for one offence like this, you put it out of your power to give a heavier penalty in cases where the conduct has been very much worse."

The interests of the creditors need to be considered, although they themselves appear to have taken no interest in the proceedings. The appellant in the affidavit supporting his application said that owing to his age and ill-health he was unemployed and saw no prospect of getting employment. It may be noted that two years earlier the appellant had applied for leave to take employment with his son in a business of a similar nature: leave was given conditional on his paying the monthly sum of Shs. 500/- for the benefit of his creditors. He appears to have made payments for seven months only. It must be presumed from his affidavit that he is no longer employed by his son. I think it would be unrealistic to think that the withholding of his discharge would result in any substantial benefit to the creditors. The other consideration, and it is perhaps the most important, is the protection of the public. As Lord Greene, M.R., said in *Re Smith* (6):

> ". . . if a bankrupt has become to a greater or less extent a danger to the public, that would be a very good reason for extending the period of suspension."

This is a very difficult factor to assess, but it may be said in the appellant's favour that he has not previously been bankrupt, that there does appear to have been some element of misfortune in his bankruptcy and that there is no allegation of fraud. It is to be hoped that he has learned from his experience.

The court to which an application for discharge has been made has a judicial discretion and where that discretion has been exercised, this court will only

interfere if it is satisfied that the exercise of the discretion has been capricious or based on a wrong view of the facts or on an error of law. But in the circumstances of this appeal, where we do not know the learned Senior Resident Magistrate's reasons, we have to reach our own decisions on the facts and on the order that should be made. It would seem that the usual procedure is for the applicant to satisfy the court that he has a *prima facie* case and for the court then to decide which, if any, creditors should be served with notice. However, it appears that the creditors were served with notice of the application for discharge and none thought fit to appear either in person or by counsel. I agree with the learned Senior Resident Magistrate that in such circumstances, further notice was unnecessary. I do not think it necessary to remit the application to the Supreme Court: I think it is open to us to dispose of it (as was done in *In re Solomons* (7)).

I think the application for review was made prematurely, six months being much too short a period after the order of refusal in the absence of very special circumstances, and that might have been a good reason for refusing a review. As, however, fifteen months have now passed and it is open to the appellant to apply again, I think it would be unrealistic to reject the appeal on that ground. After weighing all the considerations set out above, I am of the opinion that the outright refusal of discharge was too severe. I would allow the appeal to this extent, that I would set aside the order of July 17, 1964, and substitute an order that the appellant be granted his discharge but suspended for twelve months from the date of the order of this court.

Counsel for the respondent asked that if the decision went against him, the question of costs should be reserved for argument and I would accordingly so order.

De Lestang JA: I have had the advantage of reading in draft the judgment of Spry, J.A., and agree with it.

The appellant is one of five members of a family who used to carry on business in partnership and were adjudicated bankrupt on July 18, 1961, two of them in absentia. The appellant and two of his brothers, namely, Ronuk Singh and Harnam Singh, are in this country. The partnership which was under the general management of the appellant at all material times began in 1936 and apparently prospered until 1954 when it began to run down owing initially to the mismanagement of its interest in Tanganyika by debtor Harnam Singh. To carry on it was forced to borrow money at extortionate rates of interest which it could not repay until finally a receiving order was made in 1960 on the petition of a creditor. The appellant attributes the failure to the following causes:

(1) A large deposit required by the Income Tax Authorities subsequently found not to be due.

(2) Thefts of stock in trade.

(3) The abscondment of one Kishan Singh with Shs. 800,000/- from a business in Tanganyika in which the appellant had a 50% interest.

(4) Costly litigation.

(5) The drawing of accommodation bills by Harnam Singh who managed the Ngambo Estates in Tanganyika in which the appellant had a 50% interest and the mismanagement of the estate, with the result that the firm had to borrow money to meet the bills.

(6) The loss of large remunerative contracts with the Railways and the Ministry of Works owing to the failure of Harnam Singh to supply timber in time.

(7) The political situation.

Whether the explanations of the appellant were accepted or not is impossible to say in the absence of any finding by the court below. It is, however, conceded that the bankruptcy was not a fraudulent one and that the political situation, which undoubtedly adversely affected land values, seriously aggravated it. There would seem also to be no good reason to doubt the allegations which the appellant made against Kishan Singh and Harnam Singh. As regards the latter in particular, although the appellant blamed him largely for the failure of the firm, he was not asked a single question about it in his examination and it must be assumed in these circumstances that the allegations were not disputed by the Official Receiver. As regards the other alleged causes of bankruptcy, there is nothing on the record to contradict them.

The appellant and the two other debtors, Ronuk Singh and Harnam Singh, applied for their discharge within two years from the date of adjudication, as they were required so to do. On January 3, 1964, the court granted the other two a discharge suspended for six months, but refused the appellant his discharge. It gave no reasons for its decision. The appellant did not appeal against the refusal. Instead he waited approximately six months and then applied to the court to review its decision. The court refused the application but again gave no reasons for its decision. The judge's notes of the hearing of the application are so scanty that for the purpose of the appeal counsel found it necessary to implement them from their recollections. From them it would appear that the learned judge confessed to having erred in granting Harnam Singh his discharge, but nevertheless thought the mistake did not help the appellant. The refusal of his discharge to a bankrupt is in the nature of punishment and so, on the analogy of criminal cases, although mere disparity in the treatment of two bankrupts in a joint bankruptcy is not a ground on which the court necessarily interferes with the harsher treatment of one bankrupt, in an appropriate case it will take such disparity into account. In the present case in particular, I should have thought that the admission by the court that it was in error and that after all blame attached to Harnam Singh would have the effect of relieving the appellant of part at least of the responsibility for the bankruptcy and so necessitate reconsideration of his treatment. Although the amount of the bankruptcy is fairly large, the bankruptcy itself cannot be described as a bad one. It was due neither to fraud nor to speculation, but to a combination of circumstances, some of which were outside the control of the appellant. The concern being a family one, the failure of the appellant to take strong measures against his brother is, in the circumstances, understandable. The sudden change in the political climate in 1960, resulting in a considerable drop in the value of real estates and the slowing down of businesses generally, was pure misfortune. Considering all this, together with the facts that the appellant is not young, that he is admittedly a sick man suffering from diabetes and unable to carry out his trade, that the worry of his situation is shortening his life, that he is unlikely to make any substantial payment for the benefit of his creditors in the future and that he was singled out for punishment, I think that the outright refusal of his discharge without giving any reasons was too severe and that a good case was made out for a review of the court's order. I agree with the order proposed by Spry, J.A., and as Law, J.A., also agrees, it will be the order of the court.

Law JA: I have read the judgments of de Lestang and Spry, JJ.A., with which I agree.

Appeal allowed in part. Order of the Senior Resident Magistrate set aside and an order that the appellant be granted his discharge but suspended for twelve months.

For the appellant:
Clive Salter, QC and *GS Pall*
GS Pall, Nairobi

For the respondent:
Satish Gautama
The Official Receiver of Kenya

Usha v Bachubhai and others
[1965] 1 EA 433 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	29 April 1965
Case Number:	2/1965
Before:	Sir Samuel Quashie-Idun P, Duffus and Law JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Chanan Singh, J

[1] Negligence – Collision at cross-roads – Major and minor road – Whether driver on major road negligent in failing to observe cross-roads – Driver unaware of cross-roads – No traffic signs on either road.

Editor's Summary

This was an action for damages brought by the appellant in respect of the death of her husband in a collision between two motor vehicles at a cross-roads in a rural area. The deceased was travelling in a car driven by the first respondent along a minor road and the second respondent was driving the other car along a major road. The two roads intersected, but on neither road was there any traffic sign warning drivers of the intersection ahead. The trial judge found that the first respondent was solely to blame and awarded £3,000 damages against him, but dismissed the action against the second respondent. The appellant appealed against that part of the judgment which absolved the second respondent from all blame. It was argued by counsel for the appellant that the second respondent was also negligent, although admittedly to a lesser degree, for not keeping a proper look-out on approaching the intersection along the major road, and further, that, having regard to certain passages in the judgment which indicated that the trial judge considered the second respondent to have been negligent, it was not open to him to hold that the first respondent was solely responsible for the accident.

Held –

(i) the trial judge was justified in holding that the second respondent was under no duty to stop or slow down or to keep a particular look-out to the sides, because on the evidence he did not know of the existence of the junction and had no reason to know of it;

(ii) since the trial judge had not been shown to have ignored relevant evidence, or to have misapprehended any evidence, or to have drawn inferences unsupported by evidence, the court would not interfere with his decision;

(iii) it had not been established that the second respondent was under any duty to anticipate the reckless driving of the first respondent in the particular circumstances of this case, in driving from a minor road on to a major road at an intersection which the second respondent could not have been expected to be aware of until such time as he was so close to it as to make it impossible for him to take avoiding action.

Appeal dismissed.

Cases referred to in judgment

(1) *Lang v. London Transport Executive*, [1959] 3 All E.R. 609.

(2) *Williams v. Fullerton* (1961), 3 C.L. 498, The Times, March 14.

(3) *Morris v. Luton Corporation*, [1946] 1 All E.R. 1.

(4) *Tidy v. Battman*, [1934] 1 K.B. 319.

(5) *Lofthouse v. Leicester Corporation*, 64 T.L.R. 604.

(6) *Zarina A. Shariff v. Noshir P. Sethna*, [1963] E.A. 239 (C.A.).

April 29. The following judgments were read:

Judgment

Law JA: This is an appeal by the plaintiff against the judgment and decree of the Supreme Court of Kenya in a civil suit in which the plaintiff claimed damages in respect of the death of her husband in a collision between two motor vehicles, one driven by the first defendant (now first respondent) and the other driven by the second defendant (now second respondent). The learned trial judge awarded the plaintiff £3,000 damages against the first respondent, and dismissed the claim against the second respondent and his employer, the third respondent, holding the first respondent to be solely responsible for the accident. The plaintiff now appeals against that part of the judgment which absolves the second respondent from all blame. The memorandum of appeal sets out 14 grounds of complaint, but I think it will be sufficient if the first three only are reproduced here, as the others relate to matters of detail relevant to the three general grounds, which read:

> "1. The learned judge erred in not finding that the second Defendant was, at the very least, guilty of contributory negligence and that the collision was not solely due to the negligence of the first Defendant.
>
> 2. The learned judge's finding that the first Defendant was solely responsible for the accident is against the weight of the evidence.
>
> 3. The learned judge after having come to the conclusions that he did on questions of fact erred in law in not holding that the second Defendant was also to blame for the collision."

At the hearing of this appeal, Mr. Gautama and Mr. Vohra appeared for the appellant, and Mr. Hoshang Shroff for the second and third respondents. The first respondent did not appear and was not represented.

The facts of the accident are reasonably clear. The appellant's husband was a passenger in a saloon Peugeot 403 motor car driven by the first respondent, along a road leading from the Nandi escarpment towards Miwani village. At a short distance north of Miwani post office, this road intersects the main road from Kibigori to Kisumu which runs in a straight line parallel to the Nandi escarpment, and along which the second respondent was driving a Peugeot station wagon. At about 4 p.m. on Sunday, September 14, 1961, the car and the station wagon came into violent collision at the point of intersection of the two roads, and the plaintiff's husband received injuries from which he died a few days later. The main road is 24 ft. wide overall, and consists of a "usable" crown 14 ft. wide with sloping shoulders on each side leading to drainage ditches on the sides. The surface is murram and loose gravel. The road along which the first respondent was driving is 9 ft. wide, and was described by the expert witness called by the second respondent (D.W. 4, Mr. David Barber) as being "a track compared to the main road". On neither road was there any official traffic sign to warn drivers of an intersection ahead. On both sides of both roads were sugar cane plantations, tall grass and thick bush. The nature of the terrain is illustrated by various photographs put in on behalf of the appellant and the second respondent. No buildings or habitations of any sort are in the immediate vicinity of the scene of the accident. The first respondent admitted in his evidence in chief that he drove out of the minor road, or track, onto the intersection with the major road at about 20 to 25 m.p.h. He wanted to cross the major road and was looking ahead. He never saw the other car, which was on the major road, at all before the impact. In his evidence in chief he said "the other car was coming from my right, from Kisumu side", and it is only in cross-examination that he admitted "I now agree that the other car came from the Kibigori side". There was evidence that he knew of the existence of the intersection, having driven along the minor road across the major road

only half an hour earlier. It is clear that in driving across the major road at 20 to 25 m.p.h., knowing of the existence of the intersection, without taking any precautions at all to see if the major road was clear, the first respondent was guilty of the grossest negligence, and it is not surprising to learn that he subsequently pleaded guilty to a charge of dangerous driving arising out of the accident.

Counsel for the appellant quite rightly does not dispute that the first respondent was grossly negligent but he strongly submits that the second respondent was also negligent, although admittedly to a lesser degree, for not keeping a proper look-out on approaching the intersection. As to this, the second respondent's evidence is that, immediately before the collision, he was driving along the major road towards Kisumu, on his proper side, at about 40 m.p.h. He was looking straight ahead, and not at anything specially on the sides. He did not notice the intersection until he was about 20 ft. from it, and the collision occurred in a flash. In re-examination he admitted that he could have seen the first respondent's car coming from the farm road on his right hand side if he had particularly looked for it, from 30 to 40 ft., if the car had been near the junction.

Counsel has submitted that the second respondent was guilty of negligence in failing to notice the intersection as he approached it, especially as it was marked by two signposts. The learned judge held that neither driver was to blame for not noticing these signs, because of vegetation growing on both sides of the road. The sign to the post office was well off the edge of the main road, not less that 3 ft., and the other sign was parallel to the main road and intended for traffic emerging from the side road coming from the post office, as can be clearly seen from the photograph Ex. 3B. It was not designed to be seen by traffic using the major road. The post office sign was not a traffic sign, and even if seen by a motorist on the main road would not necessarily indicate the presence of a cross-road. Mr. Barber's evidence is that the intersection would not be visible to a motorist approaching along the main road until he was 30 ft. from it. At 40 m.p.h., on a murram surface, a car would require about 110 ft. to stop. Whether the second respondent noticed the intersection from a distance of 30 ft., or 20 ft. as he says, clearly he could have done nothing in that space to avoid the collision, allowing for "thinking" time. On the evidence as a whole, it would seem that the learned judge's finding that the second respondent was not to blame for not noticing the sign posts and thus anticipating the presence of an intersection is supported by the evidence and should not be disturbed.

Counsel has also submitted that having regard to certain passages in the judgment which indicate that the learned judge considered the second respondent to have been negligent, it was not open to him to hold that the first respondent was solely responsible for the accident. The following passage from the judgment is relevant in this connexion:

> "Although both the drivers were at fault in not keeping a good look-out, I am of the opinion that the driver of the saloon car was more at fault in not stopping before entering the main road."

At first sight, this passage appears to fix some degree of blame on the second respondent. But it must be read in its context, and not in isolation. The learned judge goes on to say:

> "While the driver of the saloon car was certainly negligent, can it be said that the driver of the station wagon was also negligent?"

and he goes on to examine the second respondent's duty to keep a good look-out to the sides, in the light of the particular circumstances of this case, which

concerned a collision, in a rural district, at a cross-roads which in the judge's opinion the second respondent was not aware of, and had no reason to be aware of, until it was too late to take any avoiding action. In the event, the learned judge found that the second respondent was under no such duty. Again, counsel for the appellant complains that, in the light of the following passage, it was not open to the learned judge to absolve the second respondent from all blame:

> "Defendant No. 1 was travelling on a minor road. He had passed the junction just previously and knew of its existence. Defendant No. 2 was travelling on a major road. He had seen the junction once on the previous day but did not remember it. It was the duty of defendant No. 1 to stop before entering the major road. It was the duty of defendant No. 2 to stop or to slow down only if he knew of the existence of the junction or if he saw it or saw the car emerging from the minor road. Neither driver kept a lookout on the sides.
>
> In these circumstances I hold that defendant No. 1 was solely responsible for this accident."

Counsel complains that this last sentence is a non sequitur, in view of the immediately preceding finding that neither driver kept a look-out to the sides, but I do not agree. The clear implication of the passage, read as a whole, is that the second defendant was under no duty to stop or slow down or to keep a particular look-out to the sides, because he did not know of the existence of the junction and had no reason to know of it. In my view this conclusion was justified on the evidence.

Counsel referred to a number of English cases, such as *Lang v. London Transport Executive* (1) and *Williams v. Fullerton* (2), the effect of which is that a driver on a major road is not entitled to take his precedence for granted, and is under a duty to anticipate cars coming out of side roads; but like the learned judge I have found little assistance from these cases, which all concern collisions in crowded cities, where a reasonably prudent driver must expect unreasonable behaviour from traffic and pedestrians alike. This appeal concerns a collision which occurred in a remote country area, and principles drawn from cases arising out of collisions in populous cities are not necessarily applicable to this case. Lord Greene, M.R., in *Morris v. Luton Corporation* (3) quoted with approval the observation of Lord Wright in *Tidy v. Battman* (4).

> ". . . that no one case is exactly like another, and no principle of law can in my opinion be extracted from those cases. It is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has no doubt properly been applied in deciding other cases on other sets of facts."

This appeal concerns findings of facts arrived at by the learned trial judge in the court below, and in particular his findings that the second respondent had no reason to anticipate the presence of an intersection or to keep a particular look-out to his sides. As Lord Goddard said in *Lofthouse v. Leicester Corporation* (5):

> ". . . the Court ought not to interfere where the question is a pure question of fact, and where the only matter for decision is whether the judge has come to a right conclusion on the facts, unless it can be shown clearly that he did not take all the circumstances and evidence into account, or that he has misapprehended certain of the evidence, or that he has drawn an inference which there is no evidence to support."

In my view the learned judge in the case now under appeal has not been shown to have ignored relevant evidence, or to have misapprehended any evidence, or to have drawn inferences unsupported by evidence, and I see no reason why this court should interfere with his decision. The latest cases relating to collisions at cross-roads were exhaustively examined by this Court in *Zarina A. Shariff v. Noshir P. Sethna* (6) in which it was held *inter alia* that the finding of a trial judge as to degrees of blame to be attributed to two or more tortfeasors involves an individual choice or discretion and will not be interfered with on appeal save in exceptional circumstances. The same applies, in my opinion, to a trial judge's finding that one of two or more defendants is or is not guilty of negligence, on the facts of any particular case. I would also draw attention to the following extract from the judgment of Newbold, J.A., in *Zarina's* case (6), with which I respectfully agree:

> "It is the duty of every driver to guard against the possibility of any danger which is reasonably apparent, but it is not his duty to proceed in such a way that he could avoid an accident no matter how reckless the other party may be."

In my view it has not been established that the second respondent was under any duty to anticipate the reckless driving of the first respondent in the particular circumstances of this case, in driving from a very minor road on to a major road at an intersection which the second respondent could not be expected to be aware of until he was so close to it as to make it impossible for him to take avoiding action. It follows from what I have said that in my opinion this appeal fails and should be dismissed with costs to the second and third respondents.

Duffus JA: I have had the advantage of reading the draft judgment of Law, J.A. This is an action for negligence by a widow whose husband died as a result of a collision between two motorcars at a cross-roads. There are three defendants. The learned trial judge found the first defendant solely responsible for the accident and gave judgment against him accordingly. The first defendant was driving on a minor road which went across a major road. It is agreed that the first defendant completely disregarded the major road and drove straight across and there can be no doubt that he was grossly negligent. This appeal concerns the liability of the second and third defendants/respondents, the driver and owner of the car proceeding along the main road. It is admitted that the second respondent drove straight ahead and he also completely disregarded the fact that there was a minor road crossing the road on which he was driving and the question here is whether he was negligent, and as such partly to blame for the accident.

Each case must depend upon its own particular circumstances. This court fully considered the degree of care required in cases of this nature in the case of *Zarina A. Shariff v. Noshir P. Sethna* (6) ([1963] E.A. at p. 249) and I would quote here from the judgment of Sinclair, P. where he states:

> "The speed at which a prudent driver approaches an intersection must bear some relation to the nature of the intersection. Such matters as the width of the roads, the number of traffic lanes and the general visibility must always be relevant and each case be considered on its own facts. Ormerod, L.J.'s observation in *Williams v. Fullerton* (2) that if a driver exercises proper care, he approaches a crossing with his foot off the accelerator and ready on the brake to deal with any traffic from the minor road by slowing down or stopping, is no doubt to be related to the facts of that case and the nature of the crossing in question. It cannot apply with full force to all crossings. In the present case, however, the crossing was a dangerous one; the roads were comparatively narrow, there was some obstruction of the second respondent's

> vision to the right and a substantial obstruction on his left. At such an intersection a driver could not justifiably place complete reliance upon an expectation that traffic on the minor road would conform to the requirements of the 'Yield' sign. He could not, of course, be expected to cope with every form of reckless or outrageous conduct on the part of other road users, but ordinary prudence would require him to approach at a speed which, combined with a proper look-out, would leave him able to take reasonable avoiding action if the need became apparent. What is reasonable is a question of degree depending on the particular circumstances. If he did not do so, or deprived himself of his opportunity to take avoiding action by not keeping a proper lookout, that could be negligence contributing to an accident."

The learned trial judge found as a fact that the second respondent did not know that he was approaching the cross-roads and the only substantial ground of appeal is the appellant's complaint that the second respondent should have known of the existence of this cross-roads if he had been keeping a proper look-out. This would be a question of fact and I have had some difficulty in arriving at what were the findings of the learned trial judge on this point.

In his summary of the facts the trial judge said, *inter alia*:

> "Defendant No. 1 was travelling on a minor road. He had passed the junction just previously and knew of its existence. Defendant No. 2 was travelling on a major road. He had seen the junction once on the previous day but did not remember it. It was the duty of Defendant No. 1 to stop before entering the major road. It was the duty of Defendant No. 2 to stop or to slow down only if he knew of the existence of the junction or if he saw it or saw the car emerging from the minor road. Neither driver kept a lookout on the sides."

It is to be noted here that the judge does not deal with the question as to whether the second respondent would have known of the existence of this cross-roads if he had been keeping a proper look-out. In the course of this judgment the trial judge also said:

> "Although both the drivers were at fault in not keeping a good look-out, I am of the opinion that the driver of the saloon car was more at fault in not stopping before entering the main road."

Counsel for the appellant relied largely on this passage in support of his argument that the judge had found as a fact that the second respondent had not kept a proper look-out and that if he had done so he would have been aware of the approaching cross-roads and would have taken precautions which may have avoided the accident. On this point it is clearly the duty of any driver of a motor vehicle to be always on the alert and to be keeping a look-out for all factors which may be relevant to his passage on the road, thus a careful driver will take note of all roads joining a major road and should always take into consideration not only traffic approaching him or overtaking him on the main road, but other traffic or pedestrians that may be likely to come on to the road.

In this case the learned judge has found as a fact that the second respondent was at fault in not keeping a proper look-out. It would thus appear that he does attach some blame for the accident on the second respondent. Later on in his judgment though the learned judge does find as a fact that neither of the two drivers had observed the two signs placed on or very near to the cross-roads and he attaches no blame on either driver for not doing so and then, further, again he finds that there was no indication to the station wagon, the vehicle driven by the second respondent, that they were approaching a crossing. On his point the judge said further:

> "Admittedly, there are no indications on either road of a 'crossing'. Neither one driver nor the other would, therefore, know that he was approaching a crossing until he was on it."

If this is so then it is difficult to see how the second defendant could be blamed for not keeping a proper look-out.

The judgment on this aspect of the case is contradictory and this, together with the fact that the learned judge had, in the passage that I have quoted, apparently misdirected himself in saying that, "It was the duty of Defendant No. 2 to stop or to slow down only if he knew of the existence of the junction or if he saw it or saw the car emerging from the minor road" and in not considering whether the second respondent would, in fact, have seen the junction if he had been keeping a proper look-out is so unsatisfactory that I consider that the appeal should be allowed and the judgment set aside. There was evidence to support the judge's final conclusion that the first defendant was solely to blame for the accident but there is also evidence to support his earlier conclusion that both drivers were at fault in failing to keep a proper look-out, and in all the circumstances of this case I would have ordered a new trial.

Sir Samuel Quashie-Idun P: I have had the advantage of reading the draft judgments of my brothers Law and Duffus, and without any hesitation I agree with my brother Law that the appeal should be dismissed for the reasons stated in this judgment. The appeal is accordingly dismissed with costs.

Appeal dismissed.

For the appellant:
Satish Gautama and *GS Vohra*
GS Vohra, Nairobi

For the second and third respondents:
Hoshang Shroff
Hoshang Shroff, Nairobi

S S Gupta v Inder Sing Bhamra
[1965] 1 EA 439 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	15 July 1965
Case Number:	184/1965
Before:	Keatinge J
Sourced by:	LawAfrica

[1] Pleading – Plaint – Action on dishonoured cheque – No averment in plaint of giving of notice of dishonour or reason for no such notice – Whether any cause of action disclosed by plaint in absence of

such averment – Cause of action in case of bill or cheque not requiring notice of dishonour – Civil Procedure Rules, O. 6, *r.* 19 *and r.* 21; *O.* 7, *r.* 11 (*a*); *O.* 33 (*U*).

Editor's Summary

The plaintiff sued on a dishonoured cheque without alleging due notice of dishonour or why notice of dishonour was dispensed with. After a defence had been filed the plaintiff put in an amended plaint showing that notice of dishonour was not necessary. The defendant contended that as the original plaint did not disclose the cause of action, in that it had not pleaded notice of dishonour, it must be rejected and could not be amended under the provisions of O. 7, r. 11. The defendant relied on the case of *Husseinali Dharamsi Hasmani v. The National Bank of India Ltd*. (1) which had been followed in the High Court of Uganda in at least three unreported cases.

Held –

(i) the court was not bound by the *Hasmani* case because: (*a*) the *Hasmani* decision rested on the interpretation of the Indian Civil Procedure Code and Rules, which Rules have the same effect as if they were enacted in

the body of the Code; whereas in Uganda the Civil Procedure Rules are made by a committee under powers given by the Civil Procedure Ordinance, which specifically provides that such Rules must not be inconsistent with the Ordinance. Thus, the Uganda O. 7, r. 11 (*a*) could not be applied inconsistently with s. 103, of the Ordinance; (*b*) comments made in the *Hasmani* case, which concerned a bill of exchange requiring a notice of dishonour are obiter with reference to bills which do not require such notice; (*c*) the Indian case relied on by the court in the *Hasmani* case is no longer good law;

(ii) if any averments stating why notice of dishonour was dispensed with were necessary, the amendment should be allowed under s. 103 of the Civil Procedure Ordinance;

(iii) where a bill of exchange or cheque does not require notice of dishonour the cause of action is complete as soon as the bill or cheque is dishonoured, and therefore no averment that notice of dishonour was unnecessary is required.

Application dismissed.

Cases referred to in judgment

(1) *Husseinali Dharamshi Hasmani v. The National Bank of India Ltd*. (1937), 4 E.A.C.A. 55.

(2) *Sullivan v. Ali Mohamed Osman*, [1959] E.A. 239 (C.A.).

(3) *Colonial Stores v. Modhybhai and Another*, Uganda High Court Civil Case No. 86 of 1957 (unreported).

(4) *Hussein Pirbhai Nathani v. S. M. Rajan*, Uganda High Court Civil Case No. 12 of 1961 (unreported).

(5) *Gulam Rasool v. D. K. Hindocha*, Uganda High Court Civil Case No. 3 of 1960 (Jinja Registry) (unreported).

(6) *Midnapore Zemindary Co. Ltd. v. Secretary of State for India*, 44 Cal. 352.

(7) *Ahmed Hussein v. Mt. Chembelli and Others*, [1951] A.I.R. Cal. 262.

(8) *Gagaumal Ramchand v. The Hong Kong & Shanghai Banking Corporation*, [1950] A.I.R. Bom. 345.

(9) *The Central Maize Millers Association v. Maciel & Co. Ltd*., 6 U.L.R. 130.

(10) *African Overseas Trading Co. v. Bhagwanji Harjiwan*, [1960] E.A. 417.

(11) *Burgh v. Legge*, 151 E.R. 177.

Judgment

Keatinge J: The facts in this matter are that the respondent (hereinafter referred to as "plaintiff") filed a Specially Endorsed Writ (Order 33) against the applicant (hereinafter referred to as "defendant") as drawer of a dishonoured cheque. Defendant then obtained unconditional leave to appear and defend. Defendant duly filed his written statement of defence and the only defence is contained in paragraph 2 which reads:

"(2) Defendant states that the plaint does not disclose cause of action as there is no averment of any due notice of dishonour having been given to the defendant and there is no averment stating why notice of

dishonour is dispensed with".

Within fourteen days from the filing of the written statement of defence the plaintiff under the provisions of O. 6, r. 19, filed an amended plaint without leave in which facts were pleaded showing that notice of dishonour was not necessary. The defendant now applies to this court under O. 6, r. 21, to disallow the amended plaint.

Counsel for the defendant submits that since the original plaint did not contain an averment that notice of dishonour had been given or an averment stating why notice of dishonour is dispensed with, the plaint did not disclose the cause of action. In these circumstances he argues the plaint must be rejected and cannot be amended. The material part of O. 7, r. 11, reads: "The plaint shall be rejected in the following cases – (*a*) where it does not disclose a cause of action". In support of this argument counsel relies on *Husseinali Dharamsi Hasmani v. The National Bank of India Ltd*. (1) (hereinafter referred to as "*Hasmani's* case") in which it was held that as the terms of O. 7, r. 11 (*a*) of the Indian Procedure Code (which is the same as our O. 7, r. 11 (*a*)) are mandatory a plaint which does not disclose a cause of action should be rejected and cannot be amended. In *Sullivan v. Ali Mohamed Osman* (2) (C.A.) it was also held that

> "under O. 7, r. 11, of the Indian Civil Procedure Rules it is mandatory upon the court to reject a plaint which does not disclose a cause of action" (per Windham, J.A., ([1959] E.A. at p. 243).

However, it would seem that in that case the question of whether such a plaint could be amended was not considered. The decision in *Hasmani's* case (1) has been followed by this court in at least three unreported cases viz. *Colonial Stores v. Modhybhai* (3), *Hussein Pirbhai Nathani v. S. M. Rajan* (4) and *Gulam Rasool v. D. K. Hindocha* (5).

Counsel for the plaintiff has made two submissions. Firstly that the amendment to the plaint is perfectly proper and secondly that where notice of dishonour is not necessary then it is unnecessary so to aver in the plaint. As regards the first submission it is pointed out that this court is not bound by *Hasmani's* case (1). The decision in that case rests on the interpretation of the Indian Civil Procedure Code and Rules. In India under s. 121 of the Civil Procedure Code the Rules have the same effect as if they were enacted in the body of the Code. But the position is quite different here. Our Civil Procedure Rules are made by a Rules Committee under s. 85 (1) of the Civil Procedure Ordinance. Under s. 85 (1) the Rules Committee has power

> "to make rules not inconsistent with the provisions of this ordinance and subject thereto to provide for any matters relating to the procedure of Civil courts".

Thus although our O. 7, r. 11 (*a*), is the same as the Indian O. 7, r. 11 (*a*), it has not the force of law and it must not be inconsistent with provisions of the ordinance. Section 103 of the ordinance provides:

> "The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding".

There are two other aspects of *Hasmani's* case (1) on which I think comment should be made. The first is that in *Hasmani's* case the court was considering a bill of exchange which required notice of dishonour. Thus any comments which may have been made regarding bills of exchange which do not require notice of dishonour (as in this case) are really *obiter*. The other point is that the court in *Hasmani's* case, when holding that a plaint which does not disclose the cause of action must be rejected, relied on *Midnapore Zemindary Co. Ltd. v. Secretary of State for India* (6). I think it is clear that the *Midnapore* case is no longer good law: *Ahmed Hossein v. Mt. Chembelli* (7) and *Gagaumal Ramchand v. The Hong Kong & Shanghai Banking Corporation* (8). In India though a court is bound to reject under O. 7, r. 11 (*a*), a plaint which does not disclose a cause

of action still it has power to allow amendments so that it should disclose a cause of action.

From the judgments in the three Uganda cases cited earlier it would appear that it was never argued that *Hasmani's* case (1) was not binding on this court and *Hasmani's* case was followed. Nor was the attention of the court drawn to *The Central Maize Millers Association v. Maciel & Co. Ltd.* (9) where this court, having considered *Hasmani's* case (1) held that O. 7, r. 11 must be construed so that it does not conflict with the provisions of the Civil Procedure Ordinance (s. 103) and that, therefore, the words "does not disclose a cause of action" must mean that the plaint must be such that no legitimate amendment can be made which would make it disclose a cause of action.

I would observe that the latter part of s. 103 of the Civil Procedure Ordinance is couched in mandatory terms–

> "and all necessary amendments *shall* be made for the purpose of determining the real question or issue raised by or depending on such proceeding".

In the present case there is really no defence on the merits. The only defence pleaded is that there is no averment in the plaint stating why notice of dishonour is dispensed with. In my opinion, assuming such averment is necessary, if this court were to disallow the amendment it would be failing in its duty to carry out the provisions of s. 103 of the Civil Procedure Ordinance.

The second submission of counsel for the plaintiff is that where notice of dishonour is not necessary it is unnecessary so to aver in the plaint. In view of the opinion expressed above and as, in fact, the plaint in this case has been amended, it seems to me that any comments I make on this aspect of the matter are obiter. In the circumstances I do not propose to mention all the many authorities cited. Under the provisions of O. 7, r. 1 (*e*), the plaint shall contain "the facts constituting the cause of action and where it arose". When a bill of exchange requires notice of dishonour liability does not arise till notice has been given. Thus the notice is part of the cause of action and should be pleaded. But where a bill of exchange or cheque does not require notice of dishonour in my view the cause of action is complete as soon as the bill or cheque is dishonoured. Therefore, I consider O. 7, r. 1 (*e*), does not require an averment in the plaint that notice of dishonour was unnecessary. Under O. 6, r. 13, "wherever it is material to allege notice to any person of any fact, matter or thing it shall be sufficient to allege such notice as a fact etc." Our O. 6, r. 13, is the same as Tanganyika O. 6, r. 11. In the Tanganyika case of *African Overseas Trading Co. v. Bhagwanji Harjiwan* (10) it was held that it was not necessary for the plaint to contain a negative averment that notice of dishonour was unnecessary. Although there are English authorities which appear to be to the contrary such as *Burgh v. Legge* (11) if it were necessary to make a ruling on this submission I would be disposed to follow the *African Overseas Trading Co*. case (10).

For these reasons this application is dismissed with costs.

Application dismissed.

For the applicant/defendant:
KG Korde
Wilkinson & Hunt, Kampala

For the respondent/plaintiff:
PJ Wilkinson, QC and *E Hunt*
Korde & Esmail, Kampala

Edward J K Kitamirike v E Mutagubya

[1965] 1 EA 443 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	16 July 1965
Case Number:	743/1964
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Negligence – Collision at night between lighted stationary vehicle parked at the side of the road with vehicle travelling in opposite direction – Whether "limits of vision" a sound test of negligence.

[2] Nuisance – Whether stationary lighted car parked on verge was an obstruction – Whether dangerous.

Editor's Summary

The plaintiff parked his car during the hours of darkness one foot from the tarmac surface of an unlit road. He waited inside his car with his parking lights on. The defendant driving in the opposite direction collided with the plaintiff's car. The plaintiff and the defendant both claimed special and general damages alleging negligence the one against the other. Both denied the alleged negligence. Contributory negligence formed no part of the case of either party. The defendant contended that the plaintiff's car was at the time of the collision standing in the middle of the road without lights. The plaintiff's case was that a person driving a motor car at night must drive within the limits of his own vision and that if he collides with something either he was driving too fast or was not keeping a proper look-out.

Held –

(i) the presence on a road at night of a wholly unlit vehicle in a dark place where there is no street lighting is evidence of negligence but, on the facts, the plaintiff's car was sufficiently lighted to warn other road users of its presence;

(ii) that the plaintiff's car was parked well clear of the tarmac on the adjacent murram portion and on its correct side of the road and was not, therefore, a nuisance;

(iii) it is doubtful whether the proposition that a person driving a car at night must drive within the limits of his vision is sound without some qualifications: but on the facts the defendant was negligent in having failed to keep a proper look-out and in driving too fast on the wrong side of the road.

Judgment for the plaintiff. Defendant's counter-claim dismissed.

Cases referred to in judgment

(1) *Henley v. Cameron* (1949), 118 L.J. R. 989.

(2) *Parish v. Judd*, [1960] 3 All E.R. 33.

(3) *Baker v. E. Longhurst & Sons Ltd*. (1933), 149 LT. 264.

(4) *Morris v. Borough of Luton*, [1946] 1 All E.R. 1.

(5) *Tidy v. Battman*, [1934] 1 K.B. 319.

(6) *Tart v. G. W. Chitty & Co. Ltd*., [1933] 2 K.B. 453.

Judgment

Sir Udo Udoma CJ: The claim of the plaintiff against the defendant in this case is for special and general damages suffered by the plaintiff in consequence of the alleged negligence of the defendant in driving his car on the Entebbe/Kampala road, whereby the same collided with the plaintiff's car. The special damages claimed have been admitted by the defendant and comprise

the sum of Shs. 9,500/-, being the pre-accident value of and the cost of salvaging the plaintiff's car, which was completely damaged, and the sum of Shs, 1,100/-, being medical expenses incurred in connection with the treatment of the injuries suffered by the plaintiff as a result of the collision.

The negligence alleged and the particulars thereof were in paragraph 3 of the plaint pleaded as follows:

> "3. On or about the 10th day of May 1964 the plaintiff had lawfully parked his said motor car No. USI 690 at a place about 6 miles on the Kampala/Entebbe road when the defendant so negligently drove, managed and controlled his said motor car No. USE 998 that it collided with the plaintiff's said motor car No. USI 690.
>
> *Particulars of Negligence*
>
> The defendant (*a*) drove too fast.
>
> (*b*) drove on the wrong side of the road.
>
> (*c*) failed to notice the plaintiff's car.
>
> (*d*) failed to slow, stop, swerve or so otherwise to manoeuvre his said motor car as to avoid the said collision.
>
> (*e*) failed to keep a proper look-out.
>
> (*f*) failed to give adequate warning of his approach.
>
> (*g*) collided with the plaintiff's car."

The defendant has denied negligence. He has alleged that the collision was caused solely by the negligence of the plaintiff and has therefore counterclaimed special and general damages against the plaintiff in consequence of the collision. The special damage counterclaimed is the sum of Shs. 8,350/-, being the value of his car which was also damaged as a result of the collision.

The averments as to negligence by the plaintiff and the particulars thereof were pleaded by the defendant in paragraphs 2 and 3 of his statement of defence in the following terms:

> "2. That as regards paragraph 3 of the plaint, the defendant specifically denies that he drove negligently as alleged and further states that he was driving on his correct side of the road at a reasonable speed when he collided with the plaintiff's vehicle which was parked almost in the centre of the road without lights.
>
> 3. That the said collision was caused solely by the negligence of the plaintiff.
>
> *Particulars of Negligence*
>
> The plaintiff was negligent in that he:
>
> (1) parked his vehicle at approximately Mile 6 on the Kampala/Entebbe road at about 2.30 a.m. without lights, thus giving no indication to the oncoming traffic of the presence of the vehicle on the road – and
>
> (2) failed to take any precaution to give due warning to the defendant of the presence of the plaintiff's vehicle on the road."

Thus contributory negligence was not pleaded in the statement of defence and would appear on the pleading not to form part of the defendant's defence.

The plaintiff is at present a legal assistant in the office of the Attorney General of the Kabaka's Government, Mengo, Buganda, but at the time of the accident, the subject-matter of this suit, was a state

attorney of the Government of Uganda. He is 34 years of age. The defendant is a civil servant of the government of Uganda. He is the airport manager at the Entebbe Airport.

In the night of May 9, 1964 the plaintiff had attended a farewell party at Entebbe. In the early morning hours of May 10, 1964 he left the party in his car – a Saab Saloon No. USI 690 – which was then being driven by him, returning from Entebbe to Kampala. He was alone in the car. On the Entebbe/Kampala road at a place 6 miles to Kampala, where there is a small hill or what the defendant has described as a "medium sized hill", he drove his car up the hill. He was ascending the small hill when the car suddenly stopped. It could no longer ascend the hill. On inspection the plaintiff discovered to his surprise that he had run short of petrol. He therefore got the car to roll backwards towards Entebbe down the slope to the foot of the hill, where it finally stopped. He successfully manoeuvred and cleared the car well off the tarmac on to the murram portion of the road and there parked it well to the left side of the road, the car still then facing Kampala direction. That was at about 2.15 a.m.

The car as parked was on the murram portion of the road about one foot away from the edge of the tarmac portion of the road. The car having thus been parked, the plaintiff switched off its head lights but switched on its parking lights and remained inside the car all the time, sitting on the driver's seat. Shortly thereafter Reginald Serunjogi (P.W. 2), who was also at the farewell party at Entebbe, arrived at the place in his car, and, on seeing the plaintiff's car, which he at once recognised, there parked to the left hand side of the road and on approaching it, slowed down his own car as if about to stop. But when the plaintiff noticed Reginald Serunjogi (P.W. 2) slowing down his car, he waved to him to pass on, which the latter did. Then about ten minutes thereafter Francis Nalima (P.W. 4), in whose car were also his wife and his two relatives – Kato Serebe and Eddie Serebe (P.W. 6) – arrived from Entebbe. As soon as Francis Nalima (P.W. 4) saw the plaintiff's car parked on the lefthand side of the road, he pulled up his own car alongside of it, and conversation ensued between the plaintiff and Francis Nalima (P.W. 4), who, on being informed that the plaintiff had run short of petrol, offered and undertook to drive on to Kampala and therefrom to send petrol to the plaintiff. Eddie Serebe (P.W. 6) joined the plaintiff in his car for the purpose of keeping him company as the area was known to be dangerous. Eddie Serebe (P.W. 6) sat on the front seat of the car with the plaintiff.

At about 2.30 a.m. the plaintiff saw the defendant's car approaching him in the opposite direction, that is to say, coming from Kampala and going towards Entebbe. The car – a Peugeot 404 station wagon No. USE 998 – was descending the small hill at a high speed. It zigzagged along the road as if it had a puncture and suddenly collided with the plaintiff's car parked on the lefthand side of the road. As a result the plaintiff's car was pushed backwards for about 20 ft. and off the murram portion of the road into the bush for about 10 ft.

On hitting the plaintiff's car, the defendant says he lost control of his car, which then drove past the plaintiff's car, veered into the bush and finally came to stop on the same side of the bush as the plaintiff's car but behind it about 150 ft. from the place of impact. The car having stopped, the defendant alighted therefrom and walked back to the spot where the collision had taken place. He found the plaintiff's car lying there with the plaintiff therein trapped, the front door of the car being completely jammed up. The plaintiff, who was then crying, had subsequently to be extricated from the car by local residents who, attracted to the scene, had to cut open the door of the car with the aid of an axe. The plaintiff's car was completely damaged. The plaintiff himself suffered three categories of injuries, the first of which was a compound fracture of the left tibia; the second injury was a posterior dislocation of the right hip joint complicated by the upper margin of the socket into which the right leg bone fits. The third category of injuries consisted of minor cuts and bruises. The plaintiff also suffered a concussion of his left jaw and was under severe pain.

At the time of the collision and as a result of the impact between the defendant's and the plaintiff's car, Eddie Serebe (P.W. 6), who, on joining the plaintiff had sat on the front seat of the car of the plaintiff, was completely thrown out of the car into the bush. He became unconscious. He was, however, later that morning picked up walking on the Entebbe/Kampala road towards Kampala. He was taken to the Mulago Hospital, Kampala, for admission, in the same car with both the plaintiff and defendant, who were also therein admitted for treatment. On the way to the hospital, the plaintiff became unconscious but regained consciousness later that day after admittance. He remained in hospital for 11½ weeks undergoing treatment and thereafter was treated in the hospital as an outpatient until December, 1964. The defendant was detained in the hospital for one night. He had fractured four of his ribs on the right side of the chest. He had a deep cut on the right knee and a cut on his thumb. On his discharge the defendant continued treatment of his injuries at the Entebbe Hospital as an outpatient for seven days and thereafter was only able to resume his normal duties one month after the accident.

Now from the evidence and the circumstances disclosed by the evidence, the most crucial question for decision by the Court must be, who between the plaintiff and the defendant was negligent thereby causing the collision between the two cars? The issue of negligence is a very controversial one. Both the plaintiff and the defendant have blamed each other and both have denied negligence. The case of the defendant on the pleading and on the submission of his counsel is that it was the plaintiff who was alone negligent because he had parked his car almost in the centre of the road without lights on a dark night at about 2.30 a.m., thereby giving no indication to oncoming traffic of the presence of the vehicle on the road; and also had failed to give due warning to the defendant of the presence of the said vehicle. On the authority of *Henley v. Cameron* (1) counsel for the defendant submitted that for the plaintiff to have left the car in that manner on the highway constituted a nuisance as the vehicle, placed as it was, was an obstruction. The plaintiff was therefore solely negligent as it was impossible for the defendant to have avoided the accident. *Henley v. Cameron* was an action in which the plaintiff therein – a widow of one George Henley, a motorcyclist – had claimed against the defendant therein damages for the death of her husband caused by the defendant's negligence or nuisance. The action was dismissed by Henn Collins, J., who found that the defendant was not guilty either of negligence or nuisance and that the motorcyclist, George Henley, was the sole author of his misfortune. On appeal to the Court of Appeal, the judgment was reversed by a majority of the Court, which then held that the defendant was liable in negligence and that as there was contributory negligence on the part of the motorcyclist, George Henley, the plaintiff should only be entitled to two-thirds of the damages.

There, a motorist, Cameron, whose car had run out of petrol, left it on the highway at 1.30 a.m. with its rear wheels close to the nearside of the kerb and the front wheels one foot away from it. The car was unlighted owing to the exhaustion of the battery. It could have been pushed onto the grass verge or into a lane nearby. Five hours later, while it was still dark, the driver of a motorcycle combination, George Henley, was found dying near his wrecked machine, which had apparently collided with the projecting front wing of the car. There was no reason to doubt that the combination's lights, which were of normal strength, were burning at the time of the collision. In allowing the appeal and setting aside the judgment of the court of first instance, Tucker, L.J. said:

> "As to the finding of no negligence or nuisance on the part of the defendant, I feel no doubt that the judge was in error. The reason why a motor car is required by law to carry a rear lamp during the hours of darkness is that

> such a vehicle not so lighted is a potential danger to other road users, and in particular to the occupants of other vehicles travelling quite lawfully at speeds not contemplated in former times. To leave this motor car at an angle with its front wheels projecting slightly towards the centre of a road 19 ft. wide, unlighted and unattended for a period of five hours of darkness, when it could have been quite possible, with the assistance of two Police officers, to have pushed the car off the main road either up the lane some 30 yards along the road in the direction of Newcastle, or up a larger lane some 100 yards back towards Market Drayton, or else over the 3 inch kerb on to the grass verge, was clearly negligent, and equally clearly, in my view, constituted a nuisance on the highway."

The important point to note in *Henley v. Cameron* (1) is, I think, that the uncontradicted evidence accepted by the Court was that the car involved was parked unlit on the highway with its rear wheels close to the nearside kerb and front wheels one foot away from it.

I think the law is clearly that the presence on a road at night of a wholly unlit vehicle in a dark place where there is no street lighting is *prima facie* evidence of negligence by the person responsible for the vehicle. But the mere fact that an unlighted vehicle is found at night on a road is not sufficient to constitute a nuisance. See *Parish v. Judd* (2).

If it is true therefore that the plaintiff's car was left wholly unlit in a dark place in such an important road as the Entebbe/Kampala road as alleged by the defendant, the evidence being that at the place there are no street lights, that in my view would be *prima facie* evidence of negligence on the part of the plaintiff. And if the car was parked in the centre of the road as alleged by the fault of the plaintiff, thereby constituting a danger to other users of the road, that again, in my view, would amount to an actionable nuisance.

There is, however, an uncontradicted preponderance of evidence in favour of the plaintiff that the Saab saloon car No. USI 690 was in fact lighted at the material time, as its parking lights were switched on by the plaintiff and later seen to be on prior to the collision by Reginald Serunjogi (P.W. 2), Victoria Serunjogi (P.W. 3), Francis Nalima (P.W. 4) and Eddie Serebe (P.W. 6). I prefer the evidence of the plaintiff and his witnesses, which I accept on this point, to the evidence of the defendant and find as a fact that not only was the car sufficiently lighted at the material time to warn other users of the road of its presence on the road, but that it was parked well clear off the tarmac on to the murram portion on the lefthand side of the road as one faces Kampala from Entebbe. The car was on its correct side of the road. There is no evidence, which I can accept, that at the time of the collision those parking lights were not on, nor is there any reason to suppose that they were extinguished. Indeed the evidence of the defendant on the points both as to the lights and as to the position of the plaintiff's car on the road, was of no assistance to the Court. It was unsatisfactory and unconvincing.

On the issue as to the position of the plaintiff's car on the road, the evidence of the defendant was as follows:

> "I am familiar with the road. When the accident took place I was then driving my car. I was descending a medium sized hill going towards Entebbe from Kampala. I was then driving at a speed of about 50 m.p.h. when I abruptly or suddenly hit another car on the road. It was the plaintiff's car. The car was about 100 ft. away from the crest of the little hill down the valley. I did not see the plaintiff's car before the accident. The car was almost in the centre of the road. I was then driving in the centre of the road. I had to drive in the centre of the road as a precaution against hitting any parked

> vehicle on the side of the road. I had to do that from past experience. Before I suddenly hit the plaintiff's car I did not see any lights from the vehicle at all nor did I see parking lights issuing from the vehicle I hit."

Cross-examined the defendant swore:

> "My lights were fully on. I could see for about 200 yards with the aid of the beams of my lights. . . .
>
> I could not have seen the plaintiff's car with my lights fully on because I was just coming over the crest of the hill. The whole thing happened suddenly as I descended from the crest of the hill and there were no parking lights showing from the plaintiff's car as a warning. Before the accident I had seen along some parts of the road unlighted vehicles parked to the side of the road. . . .
>
> When I descended the hill before the accident my lights were facing downwards. . . .
>
> At the time of the impact I did not see the plaintiff's car. In fact I did not notice any car there until after I had hit it. Before the accident I had no time to apply my brakes. When I hit the plaintiff's car I did not know it was a car until I came out of my car and went back to the spot and inspected it. It was then I realised I had hit another car."

The evidence of the defendant on the issue of the position of the plaintiff's car above summarised, amounts to this: That even though his lights were fully on and with the aid of which he should see the road for a distance of 200 yards on descending the hill, his lights then pointed downwards, he was not able to see the plaintiff's car, which according to him, was parked in the centre of the road only about 100 feet from his car when he collided with it. If that is true, in the absence of any other explanation, the probability must be that the defendant was driving unduly fast and had failed to keep a proper lookout; and not having seen the car, he had failed either to slow down, stop, swerve or so otherwise to manoeuvre his Peugeot 404 station wagon as to avoid the collision.

For the plaintiff, it was submitted by counsel that the defendant's admission of failure to have noticed the plaintiff's car, where it was parked before it was hit by his car, was a clear evidence of negligence on the part of the defendant; for, in law, a person driving a motor car at night must drive within the limits of his own vision; and if he collides with something, either he was driving unduly fast or he was not keeping a proper look-out.

It is doubtful whether this proposition is at the present stage of our law a sound one without some qualifications. I am aware that that was the principle enunciated by Scrutton, L.J., in *Baker v. E. Longhurst & Sons Ltd*. (3). In more recent times, however, the principle has been the subject of severe criticism, and the tendency has been to treat the decision in *Baker v. E. Longhurst & Sons Ltd*. (3) as not having laid down any principle of law applicable to any other case. In *Morris v. Borough of Luton* (4), in rejecting the principle enunciated by Scrutton, L.J., in *Baker v. Longhurst & Sons Ltd*. (3), Lord Greene, M.R., had said ([1946] 1 All E.R. at p. 3):

> "I cannot help thinking that that observation, namely, "that a person riding in the dark must be able to pull up within the limits of his vision' turned out in the result to be a very unfortunate one because the question as has been so often pointed out, is a question of fact. . . . I cannot regard that observation of Scrutton, L.J., as in any sense affecting other cases where circumstances are different.

> In the hope that this suggested principle may rest peacefully in the grave in future and not be resurrected with the idea that there is still some spark of life in it, I should like to say that I am in agreement with the observations of Lord Wright in *Tidy v. Battman* (5), where he says ([1934] 1 K.B. at p. 322) referring to *Tart v. Chitty & Co. Ltd*. (6) and *Baker v. Longhurst* that they show:
>
> > 'that no one case is exactly like another and no principle of law can in my opinion be extracted from these cases. It is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has no doubt properly been applied in deciding other cases on other sets of facts.'"

In my opinion and bearing in mind the observations of Lord Greene in the above passage, the instant case must be decided on its own facts and circumstances. Having regard to the whole of the evidence and the circumstances in this case, I am satisfied on the evidence of the plaintiff and his witnesses, which I accept, and find as a fact that the defendant, in descending the small hill, had failed to keep a proper look-out and therefore had failed to notice the plaintiff's car parked on the murram portion of the lefthand side of the road. With the beam of his lights showing 200 yards, if he had kept a proper look-out, he could have seen whether there was some object on the road with regard to which he had to exercise the care due from a reasonable driver in order to avoid doing damage either to the object or to himself. It is obvious that if the defendant had seen the car on the road he could have taken reasonable care in driving his own car or in slowing down or stopping or driving to avoid it by swerving to his lefthand side of the road, which, on the evidence, was quite clear of any obstruction, and so could have avoided the accident. The fact that the defendant did not see the car and therefore had failed either to slow down, stop or swerve to his left side (i.e. the right side of the road facing Kampala) to avoid the accident, is clear evidence that he was driving so fast that he could not exercise his judgment in time to swerve or to apply his brakes and I so hold.

I find also as a fact that the defendant lost control of his car, not after colliding with the plaintiff's car, as he says, but on descending the little hill; which must account for his car zigzagging down the hill and colliding with the plaintiff's car. It is evident that the defendant could not have been travelling in the centre of the road as he has sworn. I hold that he was travelling on the wrong side of the road, that is to say, on the right-hand side of the road as one faces Entebbe. It seems quite obvious in my judgment and I hold that the accident could not have happened if the defendant had acted with reasonable care.

For these reasons and on a careful consideration of the whole of the evidence, I am satisfied and hold that without doubt the defendant alone was negligent. I also hold that it was his negligence alone which had caused the collision which occurred at 2.30 a.m. on May 10, 1964 on the Entebbe/Kampala road at a place 6 miles to Kampala.

The defendant is, therefore, I find liable in damages to the plaintiff.

I turn now to consider the most difficult aspect of this case, namely, damages. There are two categories of damages claimed by the plaintiff. The special damages claimed as already stated, comprise the sum of Shs. 9,500/-, being the value of the car and the cost of the salvage thereof; and the sum of Shs. 1,100/-, being the medical expenses incurred by the plaintiff. Both these sums have been admitted by the defendant.

It is the plaintiff's claim for general damages which presents some difficulty. The plaintiff is a professional man. At present he is a legal assistant in the office

of the Attorney General to the Kabaka's Government of Buganda. The injuries suffered by the plaintiff in consequence of the collision are considerable. He had a compound fracture of his left tibia and a posterior dislocation of the right hip joint complicated by the upper margin of the socket into which the right leg bone fits. He had minor cuts and bruises. He had suffered severe pain. In hospital he was put under anaesthesia before the dislocated hip joint could be put into position; and thereafter was put under sedative and morphia to relieve him of his pain. The left leg was put into traction, where it remained for a period of three months, after which the plaintiff was able to use crutches. In hospital the plaintiff had remained in bed until about one week before his discharge. He was an inpatient in the hospital for 11½ weeks. The injuries have now completely healed, but the plaintiff still suffers occasional pain both in his left knee joint and in his right hip joint, which may continue for about five years; and the possibility of osteoarthritis later on and a subsequent operation cannot be ruled out. The plaintiff's left leg is shortened by about one inch permanently; and he now wears specially improvised and expensive shoes in order to bring up his left leg to the level of his right leg. The left leg of his trousers must always be shortened to match the right leg. The plaintiff can no longer take part in any dances because of the defect in his left leg and the pain. There is no doubt that this was a very serious accident.

Assessment of damages in a case of this kind is by no means an easy operation, taking into account the injuries suffered by the plaintiff, his permanent disability, his limitation of movement and the consequent loss of amenities. For it is impossible adequately to compensate the plaintiff in terms of money for such injuries. However that may be, I have reached the conclusion that the general damages to which the plaintiff is entitled should be, and they are hereby assessed at the modest sum of Shs. 50,000/-. I accordingly award the plaintiff the sum of Shs. 50,000/- as general damages. In the result the plaintiff's action succeeds, while the defendant's counterclaim fails. Judgment is entered for the plaintiff against the defendant in the sum of Shs. 50,000/- as general damages, and in the agreed sum of Shs. 10,600/- as special damages, making the total damages of the sum of Shs. 60,600/-, with costs. The defendant's counterclaim is accordingly dismissed also with costs. Order accordingly.

Judgment for the plaintiff. Defendant's counterclaim dismissed.

For the plaintiff:
Anil Clerk
Anil Clerk & Co, Kampala

For the defendant:
C Mboijana
Binaisa Mboijana & Co, Kampala

Republic v Anyelwisye Undule
[1965] 1 EA 451 (HCT)

Division: High Court of Tanzania at Dar-Es-Salaam

Date of judgment: 2 November 1964

Case Number: 195/1964

Before: Platt Ag J

Sourced by: LawAfrica

[1] Criminal law – Insanity – Fitness of the accused to plead – Unfitness apparent at the close of prosecution case – Criminal Procedure Code (*Cap*. 20) *s.* 164 *and s.* 168 (*T*).

Editor's Summary

The magistrate, after hearing medical evidence, concluded that the accused was fit to stand trial. At the end of the prosecution case the magistrate decided the accused was unfit to make his defence because of unsoundness of mind. He found that the accused committed the offence as charged but that he was not guilty by reason of insanity. He ordered the case to be reported to the President and remanded the accused in custody as a criminal lunatic. In revision,

Held –

(i) the magistrate confused s. 164 with s. 168 of the Criminal Procedure Code;

(ii) the magistrate, having found that the accused was unfit to make his defence, after pleading, due to mental disturbance rather than illness of the body, should have made an order under s. 164 of the Criminal Procedure Code postponing further proceedings in the case;

(iii) the proceedings disclosed no evidence that the accused was of unsound mind at the time the offence was committed although he at first pleaded that he was then of unsound mind. Until this issue was resolved s. 168 did not arise.

Order made under s. 168 quashed except for the finding that accused was unable to make his defence by reason of unsoundness of mind. Proceedings ordered to be postponed in accordance with s. 164.

No cases referred to in judgment

Judgment

Platt Ag J: During the trial of the accused Anyelwisye Undule, the magistrate was aware that there was a possibility that the accused was of unsound mind. Accordingly, before he commenced the trial he considered medical evidence and came to the conclusion that the accused was fit to stand his trial. Several witnesses were called for the prosecution and at the end of the prosecution case the accused complained that he was unwell and began to cry. The magistrate thought that the accused was clearly mentally disturbed, and made the following finding:

"*Special finding under s.* 168 *Criminal Procedure Code*

> The accused had not been addressed in accordance with s. 206 of the C.P.C. but just after the last prosecution witness the accused stood up and began to cry he said he had nothing to say.
>
> I am satisfied that the accused cannot make his defence by reason of unsoundness of his mind.
>
> I find that the accused committed the act as charged but by reason of insanity as aforesaid is not guilty of the offence.
>
> *Order*: Case to be reported to the President. Accused remanded in custody as a criminal lunatic until direction

from the President issues”.

With respect, the learned magistrate has confused s. 164 with s. 168 of the Criminal Procedure Code. The magistrate found that the accused was unable to make his defence, which he considered was due to mental disturbance rather than illness of the body. Accordingly he should have made an order under s. 164 postponing further proceedings in the case (s. 164 (2)). Having placed the accused in remand he should have transmitted the court record or a certified copy thereof to the Attorney-General for consideration of the Minister for Justice (s. 164 (4)). The proceedings disclosed no evidence that the accused was of unsound mind at the time the offence was omitted, although the accused at first pleaded that he was of unsound mind at that time. Until this issue was resolved s. 168 was not the appropriate section under which the magistrate could act. Indeed, as the magistrate concluded that the accused was unable to make his defence this issue could not be resolved in the proceedings before him.

Accordingly, I quash the order made under s. 168 except for that part of it in which the magistrate has found that the accused was unable to make his defence by reason of unsoundness of his mind, and in accordance with s. 164 I order that the proceedings be postponed. The court record must now be submitted to the Attorney-General for consideration of the Minister for Justice. In the meantime the accused is remanded in custody. No doubt arrangements will be made for the accused to be properly examined at Isanga Institution.

Order made under s. 168 *quashed except for the finding that accused was unable to make his defence by reason of unsoundness of mind. Proceedings ordered to be postponed in accordance with s.* 164.

Nathalal Raghavji Lakhani v H J Vaitha and another
[1965] 1 EA 452 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	30 July 1965
Case Number:	673/1964
Before:	Bennett J
Sourced by:	LawAfrica

[1] Contract – Gaming – Illegal consideration – Securities given to cover a gaming debt irrecoverable – Gaming Act, 1835, *s.* 2 *– Gaming Act,* 1845, *s.* 18.

Editor's Summary

The plaintiff endorsed over two promissory notes and a cheque to the first defendant in settlement of gambling debts due by the plaintiff to both defendants incurred at dice. The plaintiff claimed a declaration that the endorsements were obtained illegally and fraudulently and sought an injunction and an order for delivery up of the notes and the cheque. The defendants contended that the plaintiff's claim disclosed no cause of action. At the request of all three parties the court agreed to decide as a preliminary issue whether or not the suit was maintainable having regard to the Gaming Acts. It was common ground

that the Gaming Act, 1835, and the Gaming Act, 1845, were statutes of general application which were in force in Uganda and that the Gaming Act, 1922 which repealed s. 2 of the Gaming Act, 1835, was not in force in Uganda.

Held –

(i) the plaintiff was unable to rely on s. 2 of the Gaming Act, 1835, as that section only afforded relief to a loser at play who had actually paid the amount secured by a bill, note or mortgage while here the plaintiff had not paid the amount of the notes and cheque;

(ii) the Gaming Act, 1710, rendered void securities given for money lost at dice, such securities fell within the provisions of s. 1 of the Gaming Act, 1835, and by that section were deemed to have been given for an illegal consideration. Consequently the contention of the first defendant that the plaintiff was seeking relief to set aside an illegal transaction to which he himself was a party was correct;

(iii) following the case of *Jones v. Merionethshire Permanent Benefit Building Society* (1), the plaintiff could not rely on the illegality of his own conduct as a ground for setting aside an illegal transaction to which he himself was a party, unless he proved pressure or undue influence.

Suit dismissed.

Cases referred to in judgment

(1) *Jones v. Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173.

Judgment

Bennett J: It is alleged in the plaint that the plaintiff endorsed two promissory notes which were payable to him and a cheque drawn on National and Grindlays Bank Ltd., Mbarara, to the first defendant in settlement of gambling debts due by the plaintiff to both defendants. The plaint also alleges that when the plaintiff endorsed the promissory notes and cheque to the first defendant, his mind was so affected by alcohol that he lacked the mental capacity to make a contract and that this fact was known to the defendants. The plaintiff seeks a declaration that the two defendants or either of them obtained the endorsement on the said promissory notes and cheque illegally and fraudulently. He also seeks an injunction restraining the defendants from negotiating the promissory notes and cheque and an order that the defendants do deliver up the promissory notes and cheque. In their defences both defendants contended that the plaintiff's claim disclosed no cause of action.

Counsel for all three parties have asked me to decide, as a preliminary issue, whether or not the suit is maintainable, having regard to the effect of the Gaming Acts. Counsel for the plaintiff concedes that in considering this preliminary issue the Court should ignore the plaintiff's alleged intoxication.

It is common ground that the Gaming Act, 1835, and the Gaming Act, 1845, are statutes of general application which are in force in Uganda by virtue of s. 2 of the Judicature Ordinance, 1962. It is also common ground that the Gaming Act, 1922, which repeals s. 2 of the Gaming Act, 1835, is not in force in Uganda. Counsel for the plaintiff contended that he is entitled to the relief claimed in the plaint by virtue of s. 2 of the Gaming Acts, 1835. Section 2 of the Gaming Act, 1835 is only intelligible if read with s. 1. The effect of the two sections is stated thus in Byles on Bills, 21st Edn. at pp. 142 and 143:

> "The Acts of Charles II and Anne were modified by the Gaming Act, 1835 (5 & 6 Will. 4, c. 41), which, after reciting the earlier Acts, provides, in s. 1, that securities, including bills and notes, which would under the former Acts have been absolutely void, shall be deemed and taken to have been drawn or made for an illegal consideration. The effect of this amendment is to make such instruments enforceable at law in the hands of a third person who acquires them innocently, but he must prove that the instrument was acquired for value and in good faith. The second section of this Act (now repealed, see post) provided that if a loser at play gave 'any note, bill or mortgage' void

> under the Acts against gaming, and paid 'any indorsee, holder or assignee,' he might recover back the money so paid from the person to whom he originally gave the bill or note as money paid on his behalf."

It will be observed that s. 2 only affords relief to a loser at play who has actually paid the amount secured by a bill, note or mortgage. In the instant case the plaintiff has not paid the amount of the notes and cheque which he endorsed to the first defendant so that he cannot take advantage of the section.

Counsel for the first defendant contended that the transaction fell within s. 18 of the Gaming Act, 1845, and that the present suit was not maintainable by reason of that section. He also contended that the consideration for endorsing the notes and the cheque to the first defendant was illegal and that the plaintiff was not entitled to relief in equity on the ground of the illegality of his conduct. Section 18 of the Gaming Act, 1845, renders contracts by way of gaming void, but it does not make them illegal. In the instant case, it is alleged in the plaint that the game at which the plaintiff lost his money was dice. The Gaming Act, 1710, renders void bills and notes given for money won at dice. Such bills and notes fall within the provisions of s. 1 of the Gaming Act, 1835, and by that section, are deemed to have been given for an illegal consideration. This being so, I agree with counsel's contention that the plaintiff is seeking relief to set aside an illegal transaction to which he himself was a party.

A somewhat similar situation was considered in *Jones v. Merionethshire Permanent Building Society* (1). In that case the secretary of a building society made default in accounting for money belonging to the society, and was threatened by the society with prosecution. The plaintiffs, who were his relatives, gave a written undertaking to the society to make good the loss on the understanding that there should be no prosecution. In pursuance of their undertaking the plaintiffs gave two promissory notes to the society who were the defendants in the suit. The defendants brought an action on the notes in the Queen's Bench Division and the plaintiffs brought an action in the Chancery Division to set aside the promissory notes on the ground that they were made for an illegal consideration. Both actions were transferred to the Chancery Division and tried together by a consent order. One of the terms of the consent order was that the defendants should deliver up to the plaintiffs the two promissory notes. When the case reached the Court of Appeal, Lindley, L.J., expressed doubt as to whether had it not been for the consent order the plaintiffs would have been entitled to any relief in equity, and similar doubts were expressed by Fry, L.J. In his judgment, Lindley, L.J., said:

> "A plaintiff is not entitled to relief in a court of equity on the ground of the illegality of his own conduct. In order to obtain relief he must prove, not only that the transaction was illegal, but something more: he must prove either pressure or undue influence. If all that he proves is an illegal agreement he is not entitled to relief. . . .
>
> Now, in this case of *Jones v. Merionethshire Permanent Benefit Building Society* (1) there is no proof, scarcely a trace of evidence, of pressure or undue influence. The learned Judge has not found any, and we cannot find it. Therefore, if it had not been for the order of February (i.e. the consent order) to which I have referred, I should have thought that the plaintiffs in equity had failed."

Fry, L.J., said in his judgment:

> "Was there that pressure which enabled the Joneses to come forward in their character of oppressed parties to sue the building society as oppressors in the court of equity? The learned judge has not found that there was such pressure and for my own part I cannot find any reason to quarrel with his

> conclusion. The result of that would be, of course, the dismissal of the proceedings in equity; as already observed by Lindley, L.J., there has been an agreement embodied in the order to which he has referred, by which the counsel for the building society appear to feel themselves bound to this extent, that they would not raise any question about the custody of the notes. Attention being drawn to it, they declined to argue it. That being so, it appears to me we cannot act upon the strict rights in this case, and that the order indicated by Lindley, L.J., is the right one to make."

Those passages seem to me clear authority for the proposition that a plaintiff cannot rely on the illegality of his own conduct as a ground for setting aside an illegal transaction to which he himself was a party, unless he proves pressure or undue influence. In the instant case pressure or undue influence has not been pleaded. As I understand it, I am not being asked to consider the question of fraud or intoxication since counsel for the plaintiff has conceded that if the court holds that the documents are irrecoverable by reason of the Gaming Acts, that is the end of this case.

In my judgment, the suit is not maintainable because the consideration for the endorsement of the cheque and notes is rendered illegal by s. 1 of the Gaming Act, 1835, and because of the rule of equity that a plaintiff cannot seek relief on the ground of the illegality of his own conduct.

Suit dismissed.

For the plaintiff:
SH Dalal
Dalal & Singh, Kampala

For the first defendant:
EP Nowrojee and *PV Parekhji*
PV Parekhji, Kampala

For the second defendant:
MC Ghelani
MC Ghelani, Kampala

Prince George Mawanda v The Kabaka's Government
[1965] 1 EA 455 (HCB)

Division:	High Court of Buganda at Kampala
Date of judgment:	8 January 1965
Case Number:	390/1963
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Res judicata – Estoppel per rem judicatam by interlocutory proceeding in the same suit – Issue not finally determined in interlocutory proceedings.

[2] Jurisdiction – Buganda Courts – Suit filed in High Court of Buganda – Customary rights of Kiwewa – Suit for declarations – Buganda Courts Ordinance (*Cap* 77) *s.* 6 (4), *s.* 7, *s.* 10 (*b*) *and s.* 27 (*U*) *– Judicature Ordinance,* 1962, *s.* 2 (*U*) *– The Uganda (Independence) Order in Council,* 1962, *s.* 90 (1) *and s.* 90 (3) *of Constitution.*

[3] Native law and custom – Claim to the style, incidents and dignity of Kiwewa.

Editor's Summary

The plaintiff filed an action in the High Court of Buganda against the Kabaka's Government claiming declarations that he was entitled to the style and dignity of Kiwewa, and entitled to such financial allowance as the defendant might decide, and that it was the defendant's duty to decide upon such allowance from time to time. The plaintiff alleged that, as the eldest son of the late Kabaka, he was entitled by the customary law of Buganda to the position and emoluments of the Kiwewa. The defendant Government alleged that, while the plaintiff qualified (amongst others) for appointment as the Kiwewa, he had not been appointed as such by the Kabaka as required by customary law, and, as to the allowance, the Kiwewa was not as such entitled to any allowance except

as a Prince, and that the Finance Committee of the Lukiiko had rejected an application by the plaintiff for an allowance in 1955. The amended defence also alleged that the case should be transferred to the Principal Court of Buganda, the Buganda High Court having no jurisdiction by reason of s. 7 of the Buganda Courts Ordinance; at an interlocutory stage of the suit Jones, J., made an order refusing an application by the defendant to transfer the suit to the Principal Court on the ground that no leave of the "Resident" could now be obtained under s. 6 (4) of Buganda Courts Ordinance to file a suit there.

Held –

(i) the issue of jurisdiction of the High Court of Buganda vis à vis the Principal Court was not res judicata by virtue of Jones, J.'s order under s. 7 of the Civil Procedure Ordinance because the previous interlocutory proceedings had not dealt with nor finally determined the point nor was it directly or substantially the same as the issue there canvassed namely whether the necessary consent to sue the defendant was either available or a condition precedent to filing a suit in the Principal Court;

(ii) s. 90 (1) and s. 90 (3) of the Constitution as set out in the Uganda (Independence) Order in Council, 1962, and s. 2 of the Courts Ordinance, 1962, conferred no overriding jurisdiction on the High Court of Buganda over the Principal Court set up under the Buganda Courts Ordinance (Cap. 77); therefore, while the Buganda High Court had power to entertain this suit, it had no power to hear and determine it in the face of s. 7 of the Buganda Courts Ordinance;

(iii) if the necessary consent was unavailable the Principal Court would still have jurisdiction because such consent was merely a procedural requirement capable of being waived by the defendant;

(iv) on the footing that the High Court of Buganda could determine this suit, the plaintiff had failed to make out his claim on the evidence.

Suit dismissed.

Cases referred to in judgment

(1) *Reuben Musanjer v. Tomasi Yamulemya*, [1961] E.A. 716.

(2) *Matiya K. Wamala v. Samusoni Sebutemba and Others*, [1963] E.A. 631 (U).

(3) *R. v. Metropolitan Police Commissioner, Ex parte Hammond*, [1964] 1 All E.R. 821.

(4) *R. v. Armitage* (1860), 2 L.T. 459.

(5) *Moore v. Gamgee* (1890), 25 Q.B.D. 244.

(6) *R. v. Leicestershire JJ.*, 117 E.R. 391.

(7) *Eshugbayi Eleko v. Government of Nigeria*, [1931] A.C. 662.

Judgment

Sheridan J: By a plaint dated July 19, 1963, and filed in the High Court of Buganda, the plaintiff claims declarations (1) that he is entitled to the style and dignity of Kiwewa, and (2) that he is entitled to such financial allowance as the defendant – the Kabaka's Government – may decide, and (3) that it is the duty of the defendant to decide upon such allowance from time to time. The plaint avers:

(1) that the plaintiff is the eldest son of the late Kabaka of Buganda, His Highness Sir Daudi Chwa, who died in 1939. (This is admitted).

(2) that by the customary law of the Kingdom of Buganda, plaintiff is, as the eldest son of the late Kabaka, entitled to the dignity and style of Kiwewa;

(3) that by the customary law of the Kingdom of Buganda the Kiwewa is entitled to a reasonable allowance to maintain himself in a style suitable

to the dignity of that position and it is to be determined by the defendant Government from time to time what sum is a reasonable sum for such purpose and to pay the same to the Kiwewa;

(4) that the plaintiff has from time to time requested the defendant Government to recognise plaintiff's right to the said style and dignity of Kiwewa and to determine what sum of maintenance is to be paid to him but defendant has refused or neglected to recognise plaintiff's title as Kiwewa and has refused or neglected to decide upon the allowance to be given to the plaintiff.

The amended defence denies the second averment and states:

(*a*) that the eldest son of a Kabaka qualifies, among others, for appointment as the Kiwewa;

(*b*) that no person is entitled to the dignity and style of Kiwewa unless and until he is appointed as Kiwewa by the Kabaka; and

(*c*) that the plaintiff has not been so appointed as the Kiwewa.

It pleads in answer to the third averment:

(*a*) that the Kiwewa is not entitled as such to receive any allowance;

(*b*) that any allowance that may be received by the Kiwewa is one that is made to him as a Prince;

(*c*) that the allowance to Princes and Princesses of Buganda are, and have been, paid upon the authority of the Lukiiko given each year when the Annual Estimates are passed, and no variation of the list of persons for whose benefit the money is so provided can properly be made without the authority of the Finance Committee of the Lukiiko; and

(*d*) that an application made by the plaintiff for an allowance was after debate rejected by the Finance Committee of the Lukiiko on June 15, 1955.

It admits that the plaintiff requested the defendant to recognise him as Kiwewa and to make him payment as allowances allegedly due to the Kiwewa, but states that these requests are not warranted by law or custom. Finally, it avers:

> ". . . that these proceedings should be transferred under s. 7 of the Buganda Courts Ordinance to the Principal Court of Buganda which has jurisdiction to hear the case and that in view of the mandatory provisions of s. 7, the High Court has no jurisdiction to hear the case."

At the outset it becomes necessary to consider not only whether this Court has jurisdiction to try the suit, but also whether I can go behind a ruling – it should be an order – by Jones, J., dated June 9, 1964, refusing an application by the defendant under s. 18 (1) of the Civil Procedure Ordinance (Cap. 6) read with s. 7 of the Buganda Courts Ordinance (Cap. 77) to transfer the suit to the Principal Court, as being res judicata. The learned judge held that, in view of the proviso to s. 6 (4) of the Buganda Courts Ordinance which provides that in the case of proceedings against the Buganda Native Government, the leave of the Resident shall first be obtained, and as the Resident is an office which no longer exists there was no one who could give the necessary consent. He further held that this was a condition precedent to a suit being filed in the Principal Court against the Buganda Government, and that the difficulty could only be overcome by an Act of Parliament which could only come into operation when the Legislative Assembly of the Kingdom of Buganda had, by resolution, signified its consent that the Act should have effect [s. 74 (5) (*a*) and (*b*) of the Constitution of Uganda.] He noted that the matter could not have been dealt with by the Provincial Commissioners (Devolution of Powers and Duties) Ordinance, 1962 (No. 10 of 1962), as the term Provincial Commissioner did not include Resident but here his attention was not drawn to the Interpretation

and General Clauses (Amendment) Ordinance, 1955 (No. 10 of 1955), s. 2 which re-defined "provincial commissioner" to include the Resident. For reasons which I need not go into the Buganda Courts Ordinance has never been amended since it came into operation in 1940, and as this Court has pointed out more than once, it now contains many anomalies. The defendant sought to appeal against this Order but the East African Court of Appeal held that the Order was procedural, relating to jurisdiction and did not come within the definition of "decree" in s. 2 of the Civil Procedure Ordinance and so no appeal lay (Civil Application No. KAM 6 of 1964). Thereafter, the defendant applied to amend the defence by introducing the final averment. By my order dated October 28, 1964, I granted this application. At the hearing of the application counsel for the defendant conceded that the proposed amendment would be res judicata as far as the trial court was concerned, but stated that he wanted to preserve his right to raise this issue in an appeal to the East African Court of Appeal against the final decree. At that time I was inclined to agree with that view, but it has since occurred to me that if the order of Jones, J., stands and in view of the mandatory provisions of s. 7 of the Buganda Courts Ordinance, the result might be that no Court has power to hear and determine the suit which would probably be contrary to the provisions of the Constitution of Uganda as set out in the Uganda (Independence) Order in Council, 1962. It is conceded that an assent by one or both parties cannot confer jurisdiction on a Court where it does not exist. Jurisdiction is fundamental. It is always in issue.

Dealing first with the question of res judicata, s. 7 of the Civil Procedure Ordinance provides:

> "7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

This section is reproduced from s. 11 of the Indian Code of Civil Procedure. It has been held in the Courts in India that s. 11 is not exhaustive of the general doctrine of res judicata and that a previous interlocutory order in a proceeding finally adjudicating a matter cannot be canvassed by the parties thereto in subsequent stages of the same proceeding (Chitaley and Rao's Civil Procedure Code, 6th Edn., Vol. I, pp. 279, 313.) Counsel for the plaintiff argues that Jones, J., has finally decided that the Principal Court has no jurisdiction. My view is that the issue of jurisdiction has not been heard and finally determined, and that it is not directly and substantially the same as Jones, J., confined himself to dismissing the motion for transfer of the suit to the Principal Court whereas the issue now is whether or not the High Court has jurisdiction. While I admit that the distinction is a fine one, I consider that I am entitled to consider the matter afresh.

Hence it becomes necessary to trace the history of the jurisdiction of the Courts of Justice in Uganda. The High Court was established and its jurisdiction was conferred by s. 15 (1) and (2) of the Uganda Order in Council, 1902, which provide:

> "15. (1) There shall be a Court of Record styled 'His Majesty's High Court of Uganda' (in this Order referred to as 'the High Court'), with full jurisdiction, civil and criminal, over all persons and over all matters in Uganda.

(2) Subject to the other provisions of this Order, such civil and criminal jurisdiction shall, so far as circumstances admit, be exercised in conformity with the Civil Procedure, Criminal Procedure and Penal Codes of India in force at the date of the commencement of this Order and subject thereto and so far as the same shall not extend or apply shall be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 11th day of August, 1902, and with the powers vested in and according to the procedure and practice observed by and before Courts of Justice and Justices of the Peace in England according to their respective jurisdiction and authorities at that date, save in so far as the said Civil Procedure, Criminal Procedure and Penal Codes of India and the said common law, doctrines of equity, and statutes of general application, and the said powers, procedure and practice may at any time before the commencement of this Order have been, or hereafter may be, modified, amended or replaced by other provision in lieu thereof by or under the authority of any Order of His Majesty in Council or by any Ordinance or Ordinances passed in and for the Protectorate:

Provided always that the said common law, doctrines of equity and statutes of general application shall be in force in the Protectorate so far only as the circumstances of the Protectorate and its inhabitants, and the limits of His Majesty's jurisdiction permit, and subject to such qualifications as local circumstances render necessary."

It is unnecessary to set out the intermediate steps but the equivalent existing provisions after the repeal of the 1902 Order in Council are to be found in s. 90 (1) of the Constitution and s. 2 of the Judicature Ordinance, 1962. They provide:

"90. (1) There shall be a High Court for Uganda, which shall have jurisdiction as may be conferred on it by this Constitution or any other law."

"2 Subject to the provisions of this Ordinance, the jurisdiction of the High Court shall be exercised

(*a*) in conformity with the written laws which are in force in Uganda on the date on which this Ordinance comes into operation (including the laws applied by this Ordinance) or which may hereafter be applied or enacted; and

(*b*) subject to such written laws and so far as the same do not extend or apply:

(i) in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the August 11, 1902; and

(ii) in conformity with the powers vested in and according to the procedure and practice observed by and before Courts of Justice and Justices of the Peace in England according to their respective jurisdiction and authorities at that date:

Provided that the said common law, doctrines of equity and statutes of general application shall be in force in Uganda only so far as the circumstances of Uganda and its inhabitants permit, and subject to such qualifications as local circumstances may render necessary."

Whereas s. 20 of the Order in Council, 1902, enjoined the Court to be guided by native law in all cases to which natives were parties no similar provision is contained in the Judicature Ordinance, 1962, the reason being, I believe, that pursuant to s. 18 of the Order in Council, 1902, the Buganda Courts Ordinance

had constituted the Principal Court in the meantime to administer such law in Buganda. It is a court of special jurisdiction: *Reuben Musanjer v. Tomasi Yamulemya* (1), ([1961] E.A. at p. 726). By virtue of the revocation of s. 20 the High Court is no longer required to be guided by "native law" in every case in which Africans are parties: *Matiya K. Wamala v. Samusoni Sebutemba* (2). Section 90 (1) of the Constitution establishes the High Court with such jurisdiction as is conferred on it by the Constitution "or any other law". The Judicature Ordinance, 1962, is such a law, and s. 2 (*a*) of that Ordinance provides that the jurisdiction shall be exercised in conformity with the written laws which are in force. The Buganda Courts Ordinance is one of those laws. I am unable to agree with the submission of counsel for the plaintiff that s. 90 (3) gives the High Court an overriding jurisdiction. It provides:

> "90. (3) The High Court of Uganda shall be a superior court of record and, save as otherwise provided by Parliament, shall have all the powers of such a court."

It must be read subject to s. 90 (1), otherwise there would be no need for that provision. Superior courts of record are to be contrasted with courts not of record and are expressed by declared statute to be so or if not so declared, the answer to the question whether a court is a court of record seems to depend in general upon whether it has power to fine or imprison, by statute or otherwise, for contempt of itself or other substantive offences (see Halsbury's Laws of England, 3rd Edn. Vol. 9, pp. 346, 347.). Section 90 (3) refers to powers and not to jurisdiction: jurisdiction is one of the powers of the court.

I must not be taken as agreeing to the proposition that in no case can the High Court entertain a question of customary law. It would probably come within the ambit of the words "or any other law" in s. 90 (1) in the absence of a specific written law in the Buganda Courts Ordinance. The High Court has power to entertain the suit but not to hear and determine it. By way of contrast I note that s. 15 (1) (*a*) of the Magistrates' Courts Act, 1964, provides that a magistrate's court shall administer the customary law prevailing in the area of its jurisdiction so far as it is applicable and is not repugnant to natural justice, equity and good conscience and not in conflict with any written law for the time being in force within the area.

Coming to the question of a non-existent Resident being unable to give his consent to proceedings against the Buganda Government in the Principal Court, it seems to me that if such an objection were taken in that Court and it was upheld, then on an appeal to the High Court s. 27 of the Buganda Courts Ordinance might be invoked. It provides:

> "27. It is hereby declared that no proceedings in a court and no summons, warrant, process, order or decree issued or made thereby shall be varied or declared void upon appeal or revision solely by reason of any defect in procedure or want of form but every authority exercising powers of appeal or revision under this Ordinance shall decide all matters according to substantial justice without undue regard to technicalities."

A similar provision was contained as regards courts of first instance in s. 20 of the Order in Council, 1902. While the Buganda Courts Ordinance, an existing law, perhaps could have been adapted to cope with the disappearance of the Resident by an order under s. 4 (2) of the Uganda (Independence) Order in Council, 1962, can it be said that any failure to do so would render these proceedings nugatory in the Principal Court? With some hesitation I think not. I say this in spite of the decision in *R. v. Metropolitan Police Commissioner, Ex parte Hammond* (3), where it was held that a warrant of arrest in the Republic of Ireland which was endorsed by the Deputy Commissioner of the Garda

Siochana was ineffective because that officer had not been substituted for the deputy inspector general by the Irish Free State (Consequential Adaptation of Enactments) Order, 1923. That was a case involving the liberty of the subject and not, as here, a procedural defect. Jones, J., based his order on *R. v. Armitage* (4) which is cited in Maxwell on Interpretation of Statutes, 11th Edn., p. 375, where it was held that on a bastardy summons the Act providing that the justices "shall hear the evidence" of the matter were incompetent where the woman died before the hearing. With respect to the learned judge, I would say that the leave of the Resident was a procedural requisite and not a condition precedent to the exercise of jurisdiction by the Principal Court and it could be waived by the defendant, the party for whose benefit it was provided: *Moore v. Gamgee* (5). In my view it is not the same as the Director of Public Prosecutions' fiat which is essential to the commencement of criminal proceedings under certain sections of the Penal Code. I would say that the maxim "Lex non cogit ad impossibilia" does apply: *R. v. Leicestershire JJ.* (6). The proviso is spent. It follows that in my view the absence of the leave of a non-existent official did not deprive the Principal Court of jurisdiction to hear and determine this suit which in terms of the mandatory provision of s. 10 (*b*) of the Buganda Courts Ordinance calls for the enforcement of "the native customary law prevailing in Buganda on or after the commencement of this Ordinance", which was in 1940.

In case I am wrong on the question of jurisdiction I will try shortly to assess the evidence on its merits, bearing in mind (1) that the onus of proving the custom of Kiwewaship rests on the plaintiff, and (2) that I am concerned with the custom as it existed in 1940 whether or not it has developed since. This second consideration is important because the burden of the evidence was that any allowances to which the Kiwewa might have been entitled in olden times were derived mainly from the outcome of looting expeditions which, of course, would not be acceptable after 1940. Indeed, after 1902 it would be a native law which would be repugnant to justice and morality (s. 20 of the Order in Council). Otherwise I am satisfied that the custom of Kiwewaship in Buganda has existed from time immemorial and that it is reasonably certain. Although the Constitution of Buganda, article 2 (3) in Schedule I to the Constitution of Uganda, does not specify the Kiwewa as it does the Namasole and Nalinya as members of the Royal Family, I am again satisfied that the custom whereby the eldest son of a Kabaka becomes Kiwewa, as he cannot himself become Kabaka, with the duty of looking after his other brothers, had been preserved. At the same time it appears to me that his duties are minimal and the title honorific. On the documentary evidence (Exs. B, C and E) the plaintiff's claim that he or any of his predecessors, particularly Prince Suna, who was an employee of the Kabaka's Government, have ever been entitled to an allowance as Kiwewa fails. On the evidence generally I am guided by the advice of the Judicial Committee of the Privy Council in *Eshugbayi Eleko v. Government of Nigeria (Officer Administrating*) (7) ([1931] A.C. at p. 673):

> "The questions whether an office or a dignity exists, whether a person has been appointed to it or removed from it, are all issues which the Courts will have to decide after hearing the relevant evidence tendered by either side."

There was some understandable confusion by elderly witnesses speaking about an age long custom. The plaintiff called Masitula Nkinzi (P.W. 1), the only surviving daughter of Kabaka Mutesa I, himself (P.W. 2), Lalilo Gabango (P.W. 3), a member of the Royal Family, Ernest Kaima (P.W. 4) and ex Sabalingira, Mary Luwedde (P.W. 5), the only surviving daughter of Kabaka Muwanga and a sister of Kabaka Daudi Chwa, and Erika Kabi (P.W. 6) who described himself as the Sabaganzi, the brother of Namasole (mother) of Kabaka Daudi

Chwa. Princess Masitula and Mary Luwedde would certainly be able to speak with authority on the custom of Kiwewaship. Masitula stated that the Kiwewa is the first born son of the Kabaka but only becomes so on the death of the Kabaka when any existing Kiwewaship ceases. She knows of Bunamwaya Hill where the defence allege that the Kiwewa has to be installed but denies that it has anything to do with the Kiwewaship. This denial is not borne out by the rest of the evidence. She went on to say that a Kiwewa is by birth and is not appointed by the Kabaka but this cannot be reconciled with her earlier statement that he only becomes so after the Kabaka's death. It seems to me somewhat unreal that the first born son automatically becomes Kiwewa at birth with the responsibility of looking after brothers who have not yet been born. The plaintiff stated that he became Kiwewa in 1939 after the death of his father. In 1939 he was on active service with the Army and only became aware of the position in 1954. He knows that Bunamwaya Hill is on the official mailo of the Kiwewa but he denies that it is the official place for installing him. Gabango turned out to be only remotely connected with the Royal Family. He contradicted himself badly. He said that Prince Suna continued to be Kiwewa until his death in 1945, and at the same time that the plaintiff became Kiwewa on the death of his father in 1939. Kaima, who was dismissed as Sabalingira in 1955, stated that Suna was *elected* as Kiwewa and that when he died the plaintiff took over. This is to be contrasted with Masitula's statement that Suna would cease to be Kiwewa on the death of his father. He admitted that Bunamwaya Hill is on the Kiwewa's land and that he had heard of a ceremony there but he had never witnessed it. Princess Mary agrees with Masitula's original evidence. She said that the plaintiff took over as Kiwewa in 1945, when Suna died, but we know from the plaintiff that he only started to advance his claim in 1954. Kabi stated that if the Kabaka has a son the first born is known as Kiwewa while the Kabaka is still alive, but he has no responsibilities until his father dies. This approaches the defence case and highlights the difference between the plaintiff's other witnesses who say that the first born son only becomes Kiwewa on the death of his father. This witness states that Suna ceased to function in 1939 on the death of Chwa and that the plaintiff then started to function which is not the plaintiff's case. If that were so there would be no need for him to ask for the first declaration. He would merely have to ask for the allowances pertaining to his office and, as I have just said, the plaintiff did not start to agitate his claim until 1954, some 15 years after his father's death. Further, he was one of the signatories of the Buganda Agreement, 1961, which was silent on the question of Kiwewaship although it did provide for the Nalinya and Namasole (article 2(3) of the Constitution of Buganda in the Third Schedule to the Buganda Agreement, 1961).

On the defence side there were seven witnesses, Ephraim Kamanyi (D.W. 1), the Minister of Natural Resources in the Buganda Government who was Acting Omuwanika (Treasurer) in 1954, Michael Ernest Kawalya Kagwa (D.W. 2) who was Katikiro (Prime Minister) from 1945 to 1950, Musa Katende (D.W. 3), the Kasuju or keeper of the royal children, Princess Ann Nasolo (D.W. 4), a grandchild of Kabaka Mutesa I who must be nearly 80, Princess Salima Ndagaire (D.W. 5), a grandchild of Kabaka Suna, Mesusera Kisumugungu (D.W. 6), the custodian of Bunamwaya Hill, and Makabiri Nalinya (D.W. 7) another elderly princess. Here I should explain that there are four traditional officials connected with the Royal Family. They are the Kasuju, Kisumugungu, Sabalingira and Mugema. Although the last two were available to give evidence, both sides were reluctant to call them. This has some relevance to the burden of proof resting on the plaintiff. A summary of the defence evidence is that while the eldest son of the reigning Kabaka is eligible to be Kiwewa he must first be appointed by a ceremony which is performed at Bunamwaya Hill, and that the plaintiff was

never appointed during the reign of his father, Daudi Chwa. At the same time I realise that this has resulted in a lacuna in that there is no appointed Kiwewa to look after the reigning Kabaka's brothers. On balance I believe that the custom was for the reigning Kabaka to acknowledge his eldest son and appoint him as Kiwewa with the duty of looking after his brothers, other than the brother who was elected as Kabaka, after his death. It is somewhat analogous to the recognition of the Prince of Wales in the United Kingdom. This was not an inflexible rule as is shown by the succession to the throne of H. H. Daudi Chwa, the eldest surviving son of the deposed Kabaka Muwanga with his younger brother Prince Suna, as his Kiwewa. It appears that Prince Suna continued to be Kiwewa until his death in 1945, and that for some reason the plaintiff was never acknowledged and appointed as Kiwewa. Counsel for the defendant concedes that there was no objection to the plaintiff styling himself as Kiwewa after his father's death and at least until the reigning Kabaka appointed his son Prince Kimera as was confirmed by the installation ceremony at Bunamwaya Hill on November 19, 1964. Although this ceremony was performed after the institution of this suit, the evidence on both sides does point to that locality having something to do with the Kiwewaship and, I believe, with his recognition there. It seems reasonable and probable that a reigning Kabaka would make some public gesture to indicate who was to be his Kiwewa. At the same time I must confess that I am a bit puzzled as to what the position would be if the plaintiff's father had recognised him as Kiwewa in the light of the recent appointment of Prince Kimera. On this I was impressed by the evidence of Mr. Kawalya-Kagwa. He stated that there was no custom which the Kabaka could not override and that statement remains uncontroverted.

In conclusion, and with apologies for not analysing the evidence, including the text books to which I was referred, in greater detail, I find that on the balance of probabilities the plaintiff has failed to make out his claim. Even if he had, I doubt – I was not addressed on the point – whether this would be a suitable case for the Court to exercise its discretion in granting the declarations prayed for. The defendant could grant the plaintiff a nominal allowance and that would be an end of the matter. The court cannot bind the Lukiiko to do or not to do what it is empowered to do only by article 32 of the Constitution of Buganda. The suit is dismissed with costs.

Suit dismissed.

For the plaintiff:
RE Hunt
Wilkinson & Hunt, Kampala

For the defendant:
Paul Jayarajan
Paul Jayarajan, Kampala

Ottoman Bank v K S Mawani and others

[1965] 1 EA 464 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 24 March 1965

Case Number: 717/1964

Before: Rudd J

Sourced by: LawAfrica

[1] Contract – Undue influence – Son signing guarantee under influence of father.

Editor's Summary

S, the third defendant, signed a guarantee in favour of the plaintiff bank as further security for advances made by the bank to a firm of merchants of which F (S's father) and M (S's mother) were the proprietors. S lived and worked with F and M, was entirely dependent on them, and although of age, was found by the judge to be subject to F's authority and immature. S had no property of his own and had no independent advice before singing. S denied liability when sued by the bank on his guarantee claiming that he signed it under the undue influence of F.

Held – On the evidence of S, he signed the guarantee under the influence of his father and the defence of undue influence succeeded.

Judgment for the third defendant with no order for costs.

Cases referred to in judgment

(1) *Lancashire Loans Ltd. v. Black*, [1934] K.B. 380.

Judgment

Rudd J: The first and second defendants are a husband and wife and were the proprietors of a firm called Kenyan Grocers which did business as general provision and liquor merchants. The third defendant is their son. All three defendants lived together and worked in the business, the son being entirely dependent upon his father and mother. Just prior to March 23, 1964 the firm was indebted to the plaintiff bank on an overdraft which exceeded the limits previously agreed by the bank and the bank through its assistant branch manager was demanding immediate reduction of the overdraft and threatening that if this was not done it would close the account and take steps to recover the amount that was due to the bank. This would have entailed the winding up of the business and would have left the three defendants destitute. Alternatively the bank was prepared to provide continuing overdraft facilities to the extent of Shs. 280,000/- provided that it was secured by a personal guarantee signed by all the defendants. On March 22, 1964 the overdraft stood at Shs. 273,667/86 and on March 23, 1964, it stood at Shs. 269,424/56 when a form of guarantee was signed by the three defendants. In addition to this guarantee the overdraft was secured by three fixed deposits by the first defendant to the amount of Shs. 89,890/- in all. The first two having been deposited before March 23, 1964, and the third for Shs. 25,750/- on May 1, 1964: see Exhibit 5. In addition the overdraft was secured by three policies of insurance for £10,500 in all. The overdraft carried interest at 8 ½% capitalisable monthly up to demand and thereafter at 9 ½% capitalisable monthly. However, in the case of the guarantee, the third defendant's liability was limited to the principal sum of Shs. 280,000/- with interest thereon at the rate of 8 ½% from the date of demand from any of the three defendants and commission, ledger fees and other charges due

by Kenyan Grocers. Demand was made on August 20 and simple interest at 8 1/2% per annum was against the third defendant as from 24 hours after that notice, the principal amount being then Shs. 186,872/32. In my opinion once

demand was made the principal amount crystallized as far as the third defendant is concerned and he is liable on the terms of the guarantee only for that amount plus simple interest at 8 ½% per annum not 9 ½% per annum and not capitalisable monthly. The provisions for capitalisation and increase of interest after demand were contained in another document to which the third defendant was not a party and which is not referred to in the guarantee which the third defendant signed. Subject to the question of undue influence this defendant would be liable for the principal sum due at the date of the demand including capitalised income to that date provided the principal did not exceed Shs. 280,000/- and he would also be liable to interest at 8 ½% per annum from that date.

The suit was instituted against all three defendants on August 26, 1964. The first and second defendants allowed judgment to go against them by default but the third defendant disputes liability on the ground of undue influence. Other defences were raised namely that the guarantee was bad because the first and second defendants were parties as guarantors while they were principal debtors of the money guaranteed. That there was no consideration and a counterclaim conditional on judgment being given against the third defendant was raised during assignment of insurance policies held as collateral security. I consider that the guarantee would be binding against a real guarantor not withstanding that the principal debtors purported to sign as guarantors. There was consideration in as much as time was given and the overdraft was allowed to be increased after the signing of the guarantee on March 23. It went up to over Shs. 290,000/- after that date but was subsequently reduced particularly when the fixed deposits were cancelled and credited against the overdraft.

The defence of undue influence requires more consideration. Although the third defendant is now, and at the time he signed the guarantee was, considerably over the age of majority, he was still very much subject to his father's authority, and he did not impress me as a very mature person. He had no property or income of his own. He lived with his father, had no salary, worked in his father's business and was entirely dependent on his father and mother. In fact I think he was very much subject to his father's influence. I accept his evidence that he signed the guarantee because his father told him to do so and because he knew that by doing so he would relieve the pressure and strain on his father which he had noticed and he was worried about the effect of this on his father's health. He did not concern himself about the terms of the document but I think he must have known that it was a guarantee and that he was binding himself in some way as a guarantor. It is not a case of pure non est factum. He did not think that he was signing a different sort of document. He did not have independent advice. He did not say in evidence that if he had realised the terms of the document he would have refused to sign it. He knew that if he did not sign, the business on which he, as well as his father and mother, were dependent would have to be closed. He signed in order to save the business and because his father told him he should do so. He had no property to assign and he did not assign any property but he made himself liable as a guarantor for the overdraft to which his parents' business was subject. He was told by the plaintiffs' assistant manager that he should sign but I do not find any undue influence on the part of the plaintiff bank. The question is whether his father exercised undue influence on the third defendant to sign and if so, whether the court should absolve the third defendant from liability on that account.

I think that the third defendant had very little say in matters of policy in the running of the business. I am inclined to think that even if he had fully informed himself of the whole position before he signed he might still have signed the guarantee but on the whole I think he actually signed because his father told him to do so without heeding the possible consequences to himself and because he was influenced to do so by his father.

The plaintiffs' assistant manager dealt with the shop and while he would not know exactly all the full details of the third defendant's subservience to his parents he could make some appreciation of the probable position from his observation as a customer and his dealings with the firm as banker as well as customer. On the whole I consider that there is just enough here to sustain the defence of undue influence and not enough to rebut the presumption that arises from the third defendant's known filial relationship to his father and his subservience to him in the affairs of the business which ought to have been sufficiently noticeable to put the plaintiffs on their guard. No steps at all appear to have been taken to see that the third defendant acted as a free agent with knowledge of the full probable effects on him of his guarantee.

For these reasons I have decided that the defence of undue influence should succeed as far as the third defendant is concerned and I think the principle of the decision in *Lancashire Loans Limited v. Black* (1) applies. The counterclaim would necessarily have failed in any event since the third defendant could only be entitled to assignment of the securities if and when he paid towards the discharge of the debt, and he has paid nothing. The claim and counterclaim are both dismissed. I make no order for costs.

Judgment for the third defendant with no order for costs.

For the plaintiff:
JDM Silvester
Hamilton, Harrison & Mathews, Nairobi

For the third defendant:
Anil Ishani
Grhani & Grhani, Nairobi

Meshak Olimba Caleb v Republic
[1965] 1 EA 466 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	18 February 1965
Case Number:	1122/1964
Before:	Sir John Ainley CJ and Miller J
Sourced by:	LawAfrica

[1] Criminal law – Prosecution of police officer – Whether notice necessary under Police Act s. 31 (*Cap.* 84).

[2] Police – Section 31 *of Police Act* (*Cap.* 84) *– Whether notice necessary before prosecution of police officer.*

[3] Interpretation – Police Act s. 31 (*Cap.* 84) *– When notice necessary.*

Editor's Summary

The appellant, a police officer, was convicted of assault causing actual bodily harm. The prosecution arose out of an incident during which the appellant, commanding a "999" car, was engaged in dealing with a traffic problem and, having been disobeyed by the driver of a lorry, struck the complainant who was a passenger on that lorry. No notice under s. 31 of the Police Act was given to the appellant before the prosecution was instituted, and he appealed against conviction on the ground (*inter alia*) that he should have had such notice. This report is restricted to that point.

Held – The striking by the appellant was an act isolated from his duties under the Act and he was not entitled to notice under s. 31 of the Police Act.

Appeal dismissed.

No cases referred to in judgment

Judgment

Sir John Ainley CJ: read the following judgment of the Court:

The appellant, who at all relevant times was an inspector of police, was convicted of assaulting one Kiprotich arap Soboke and causing him actual bodily harm, contrary to s. 251 of the Penal Code. He was sentenced to pay a fine of £15, but no complaint is made as to sentence. The appeal from the conviction is based partly upon a point of law which in its turn is bound up with questions of fact. Further the allegation is made that the learned Magistrate in a number of instances reached unreasonable conclusions, failed to give due weight to matters which assisted the appellant, and on more than one occasion mistook the purport of the evidence before him.

[The Court then dealt with the facts and continued:]

It is said that the appellant was entitled to notice of the proceedings under s. 31 of the Police Act. Section 31 of the Police Act is clearly a difficult section to construe and is even more difficult to administer. It reads as follows:

> "31. No action shall be commenced or prosecution instituted against any police officer in respect of anything done or purporting to have been done by him under the provisions of this Ordinance, unless at least one month before the commencement of the action or the institution of the prosecution notice in writing of the action or prosecution, and particulars thereof, have been given to the police officer and to the officer in charge of the Force in the place where the act complained of was committed."

We will leave the commencement of civil actions aside and concentrate upon the institution of criminal proceedings. There is no difficulty in ascertaining when criminal proceedings may be said to have been instituted. Section 89 (1) of the Criminal Procedure Code states that proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without a warrant. It would appear then that the making of a complaint to a magistrate is forbidden in the circumstances envisaged by the section unless a month prior to the making of the complaint the complainant has issued two notices in writing. In such circumstances also the arrest of a police officer and his conveyance before a magistrate, though otherwise lawful, would appear to be forbidden. We must construe against absurdity, and we think we must suppose that the legislature has not intended to give a wide meaning to the words "in respect of anything done or purporting to have been done by him under the provisions of this Act". To give too wide a meaning to these words would be to place intolerable restrictions upon attempts by the police to enforce law and order and to bring offenders to justice.

It was indeed suggested in argument before the court below that the restriction upon the institution of criminal proceedings was intended to apply only to private prosecutors, and there is some force in this argument. "The officer in charge of the Force in the place where the act complained of was committed" is very likely to be the person who directs the institution of the proceedings, or of course he may be the offender. However we take the view that the section cannot be emasculated to this extent.

It is reasonably clear that in its context the section requires this at least, that police officers going about those duties which are specified in the Act should

have ample notice before the machinery of the law is set in motion against them, if complaint is made as to the manner in which they have performed their duties. It is perfectly clear that a man may have the power and duty to perform a particular act but may yet perform that act in an unlawful manner. For example, a necessary arrest may be accompanied by incidents of unnecessary violence. We are striving to make good sense of this section. It would be to make nonsense of the section to suppose that "anything done under this Act" meant "anything lawfully done" or so we think. The phrase can only refer to a complaint arising from allegedly unlawful acts incident to the performance of a duty mentioned by the Act, or the exercise of a power conferred by the Act. What value is to be given to the words "purporting to have been done by him" it is harder to say. We suspect that the draftsman has misunderstood the meaning of the word "purporting," but the only rational meaning in this context which we can apply to the word is comprised in the word "intended". To give a primary dictionary meaning to the word, for example the meaning "profess" would lead to extraordinary difficulty. It cannot have been intended to leave the fate of a civil action to the professions of the defendant, or the fate of a prosecution to the professions of the accused. We think that this section calls for robust interpretation. If a police officer intends to do his duty, if he intends to exercise the powers conferred on him, but makes an honest error, he is yet entitled to the notice mentioned in the section. In its context we do not think that further protection to police officers is afforded by this section.

In the present case the appellant was at the time that he struck the complainant engaged in sorting out a traffic problem. So at any rate the learned Magistrate found, and we consider that his finding was reasonable. He struck the complainant with what he carried in his hand, whether what he carried was a "kiboko" or a swagger cane, and caused him some harm. That act was committed perhaps in a moment of exasperation, we do not know. But the appellant cannot be said to have intended or to have purported to strike the complainant in furtherance of his undoubted duties in connection with the control of traffic on a public road. The striking was an act isolated from those duties, and we do not consider that the appellant was entitled to the notice under s. 31. For the above reasons we dismiss this appeal.

Appeal dismissed.

For the appellant:
Shaikh M Amin
Shaikh M Amin, Nairobi

For the Republic:
IE Omolo (Deputy Public Prosecutor (S))
The Attorney General, Kenya

Uganda General Trading Co Ltd v Jinja Cash Stores Ltd and another

[1965] 1 EA 469 (HCU)

Division: High Court of Uganda at Kampala

Date of judgment: 27 April 1965

Case Number: 431/1964

Before: Sheridan J

Sourced by: LawAfrica

[1] Practice – Parties – Misjoinder of defendants – Misjoinder of causes of action – Right to relief arising out of same act or transaction or series of acts or transactions – Claim against first defendant for price of goods sold and delivered – Claim against second defendant for declaration under Bulk Sales Ordinance (*Cap.* 215) *– Declaration for setting aside sale of three lorries to second defendant by first defendant – Whether misjoinder of parties and causes of action – Civil Procedure Rules, O.* 1, *r.* 3 (*U*).

Editor's Summary

The plaintiff filed a suit claiming Shs. 56,649/36 against the first defendant being the amount due for goods sold and delivered and cash advanced. Against the second defendant the plaintiff's claim was for a declaration setting aside the transfer of three lorries to the second defendant by the first defendant, in contravention of the Bulk Sales Ordinance. For the first defendant a preliminary objection was taken that the suit was not maintainable as the plaintiff had improperly joined separate defendants and separate causes of action against different defendants in one suit. It was submitted that no common question of fact or law would arise if separate suits were brought and that the right to relief against each defendant was based on different facts.

Held –

(i) under the Bulk Sales Ordinance the plaintiff in his capacity as a creditor of the first defendant was entitled to have any redress against the second defendant as transferee of the lorries and a common question of law or fact would have arisen if separate suits were brought;

(ii) there was no misjoinder of the defendants or causes of action and the suit was maintainable.

Preliminary objection overruled.

Cases referred to in judgment

(1) *The Bank of India Ltd. v. Shah*, [1965] E.A. 18 (U).

(2) *Sultanally Ramzanali v. Nurdin Madhanji & Brothers and Another* (1953), 7 U.L.R. 37.

Judgment

Sheridan J: Counsel for the first defendants has taken the preliminary point of law that the suit is not maintainable as the plaintiff has improperly joined separate defendants and separate causes of action against different defendants in one suit.

The plaintiff's claim against the first defendants is for Shs. 56,649/36 being the amount due for goods sold and delivered and cash advanced by virtue of a mutual account during the years 1961, 1962 and 1963. Their claim against the second defendant is to set aside the transfer of three lorries to her by the first defendants on January 10, 1964, in contravention of the Bulk Sales Ordinance (Cap. 215). Counsel

relies on the Civil Procedure Rules O. 1, r. 3 which provides:

> "All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of

> acts or transactions is alleged to exist, whether jointly, severally, or, in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise".

He submits that before defendants can be joined two conditions must be fulfilled: (1) the right to relief must arise out of the same act or transaction or series of acts or transactions or series of acts or transactions and (2) if separate suits were brought a common question of law or fact would arise. He submits that no common question of law or fact arises in a suit against the first defendants for the value of goods sold and delivered and against the second defendant for contravention of the provisions of the Ordinance. The right to relief against each defendant is based on different facts and the time when the causes of action arise would be different in the two suits.

Counsel for the plaintiff replies that it is only in his capacity as creditor of the first defendant that he can have any redress against the second defendant under the Ordinance and it is that which provides the link between the debt and the bulk sale, a common question of law or fact. On common sense grounds, I would say that this should be so and that it is all part of a series of transactions.

In my ruling in *The Bank of India Ltd. v. Shah* (1), I considered O. 1, r. 3 and sought to distinguish the cases which have been cited again in the present application. There is nothing in the Order which provides that the causes of action may not arise at different times. Nor is it a bar to joinder that different reliefs are sought.

> "It is not necessary that all the defendants should be interested in all the reliefs and transactions comprised in the suit or that the liability of all defendants should be the same". Chitaley's the Code of Civil Procedure (7th Edn.), Vol. 2, p. 1865.

In *Sultanally Ramzanali v. Nurdin Madhanji and Brothers* (2) the plaintiff sued the first defendant under a promissory note and against the second defendant he claimed that subsequent to the making of the note the second defendant bought the entire business and stock of the first defendants in contravention of the Bulk Sales Ordinance and he asked for the sale to be set aside as against him. It was held that the onus of proving that a person seeking to set aside a sale under the Ordinance was a creditor prior to the sale lay upon that person and that the plaintiff there had failed to discharge the onus but no question of misjoinder was raised. Why should the plaintiff seek to prove that he is a creditor when he can conveniently do so by suing both defendants in the same suit? In my view the preliminary objection fails. The plaintiff will have any costs occasioned by it.

Preliminary objection overruled.

For the plaintiff:
ML Patel
Manubhai Patel & Son, Kampala

For the defendants:
RS Dave
Patel and Dave, Kampala

Maganga Msigara v Republic

[1965] 1 EA 471 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	30 March 1965
Case Number:	180/1964
Before:	Crabbe, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – Biron, J

[1] Criminal law – Evidence – Child – Sworn evidence of child – Corroboration – Summing up – Misdirection – No warning given to assessors of accepting child's evidence without corroboration.

[2] Criminal law – Practice – Witness later admitting that he gave false evidence – Incident mentioned in court in presence of assessors – Court informed that prosecution would not rely on witness's evidence – Correct procedure to be followed in similar circumstances.

Editor's Summary

The appellant was convicted of murdering his wife. The defence was that he had found her committing adultery. The prosecution case depended on the evidence of three witnesses, including the sworn evidence of a child. Prosecuting counsel questioned the two adult witnesses afterwards outside the court and they then admitted that they had given false evidence in telling the court that they had seen the appellant stabbing the deceased. The incident was reported to the judge in the presence of the assessors. In fact only one witness had lied and the prosecuting counsel informed the judge that the prosecution did not intend to rely on his evidence. The judge then offered to recall the witness who had lied if the assessors so desired but each assessor stated that this would be of no use. In his summing up the judge did not warn either the assessors or himself of the desirability of the child's evidence being corroborated, although he did in his directions to the assessors and in his judgment deal with the fact that the child was of tender years. In his judgment the judge disregarded the evidence of the witness who had lied in its entirety and he accepted and convicted the appellant of murder on the evidence of the remaining adult and the child. On appeal,

Held –

(i) the correct procedure would have been for the prosecuting counsel to have informed the judge in open court, in the presence of the accused and his counsel, but not in the presence of the assessors, what had occurred and then to seek the directions of the court as to the procedure to be followed; the judge then should either have directed that the witness who lied be recalled and questioned as to what had occurred, or should have allowed prosecuting counsel to withdraw and have the trial adjourned for the State to appoint another attorney to enable the prosecuting counsel to be a witness for the prosecution or the defence or the court;

(ii) where there has been no proper direction as to corroboration the court will allow the appeal even if there was corroboration unless it considers that no substantial miscarriage of justice has occurred and could apply the proviso to s. 41 (1) of the East African Court of Appeal Rules, 1954;

(iii) it would be unsafe to allow the verdict of murder to stand and accordingly a conviction of

manslaughter should be substituted.

Appeal allowed. Conviction of murder set aside and conviction of manslaughter substituted.

Cases referred to in judgment

(1) *Mohamed Saeed Akrabi v. R.* (1956), 23 E.A.C.A. 512.

(2) *Mohamed Sugal v. R.*, [1946] A.C. 57.

(3) *Kibangeny Arap Kolil v. R.*, [1959] E.A. 92 (C.A.).

(4) *Muroki Kiori and Another v. R.* Criminal Appeal No. 150 of 1964 (unreported). (E.A.C.A.)

(5) *Davies v. Director of Public Prosecutions*, [1954] A.C. 378.

(6) *Okeyo Kigeni v. Republic* (1965), E.A. 188 (C.A.).

Judgment

Duffus JA: read the following judgment of the Court:

The appellant was convicted of murder in the High Court of Tanzania. The learned trial judge accepted the prosecution's case and found that the appellant intentionally inflicted two severe stab wounds on the body of the deceased, his wife, thus causing her death and that he did so with intent to kill her and accordingly found him guilty of murder.

The appellant, in his extra-judicial statement and again in his sworn testimony at the trial, admitted that he inflicted the two stab wounds on his wife but he stated that he discovered his wife committing adultery with one Msogoro and that he ran after to catch both of them and that Msogoro then ran away in the grass and his wife tried to hold him to prevent him from catching her lover and he then stabbed his wife twice. The real issue was whether the assault was committed as the prosecution allege without provocation, or whether the appellant acted in the circumstances that he alleged which would then have afforded sufficient provocation to reduce the crime from that of murder to manslaughter.

The incident happened in July, 1963, but the trial did not take place until December, 1964, due, apparently, to the appellant having absconded after the incident. The prosecution's case as presented to the court depended largely on three witnesses. These were Mateo Doto, brother-in-law to the deceased. He was shaving one Hussein Musa, the second of these witnesses. Mateo describes how the deceased first arrived, to be followed by her husband, the appellant, who was angry and abused the deceased. They both went away but after a while the deceased returned running past his house, to be followed by the appellant also running. The witness did not see the appellant catch up with the deceased. He then heard the deceased crying, "Mother I am dying – my brother-in-law I am dying". He ran in the direction of the voice and on his way he saw the appellant running away and the deceased on the ground. He went and called the Jumbe and came back with him and then found the deceased suffering from knife wounds on her back and chest. The second witness, Hussein, relates a similar tale to Mateo except that he states that when the deceased and the appellant ran by the house the second time he was then sitting by a wall and he avers that he saw the appellant overtake the deceased by a mango tree and strike her on her chest and back and that he then saw the appellant running away holding his right hand as if carrying something. The third witness was a child, Margareta Mateo. This witness was adjudged to be twelve years old and after examination by the judge was duly sworn and gave evidence on oath. She saw the deceased and the appellant approaching by her father's house and she had them in view all the time until they came nearer when, to use her own words:

“they passed me they were about 25 paces away (indicates distance). Then the trouble started. The deceased was beaten by Maganga Sigara. She was

> beaten on the chest and back and on the side – the right side and the left side. Maganga used a knife. I saw the knife when he when he was doing it like this (demonstrates a stabbing downward movement). She cried out. She fell down when she was struck. Then Maganga ran away".

The prosecution had thus established an apparently strong case on the evidence of these three witnesses but then occurred a rather unusual incident. The State Attorney, Mr. Rutakyamirwa, after the child, Margareta, had given evidence, told the court that he wanted to withdraw the evidence of Hussein Musa. On being asked by the court how he proposed to do this he then stated that the Republic did not intend to rely on the evidence of the two witnesses Hussein Musa and Mateo Doto as he had discovered that they had told untruths. Further in answer to the court, the State Attorney stated that after the child Margareta had given evidence that morning he then questioned both Mateo and Hussein outside the court and that they then both admitted to him that they did not see the appellant stab the deceased. It would appear that both the State Attorney and Mr. Matemba, counsel for the appellant, were under the impression that both the witnesses, Hussein and Mateo, had stated in their evidence that they had seen the appellant stab the deceased. Counsel for the appellant actually stated that he had recorded Mateo as saying this. The State Attorney was not sure what evidence Mateo had given but he said that if he had given evidence to this effect then the Republic did not intend to rely on his evidence. The learned judge was then faced with this unusual situation and we would quote here from part of the ruling that he made:

> "I doubt the wisdom – even the propriety of questioning witnesses after they have given evidence. But once learned State Attorney discovered that a witness has admitted to telling an untruth, I agree with learned State Attorney that it was his duty to inform the court as he has very properly done. The question now is, what course should the court take? The case of Mateo presents no difficulty, as according to my record he not only never at any time stated that he saw the stabbing, but he specifically stated that he did not even see the accused catch up with the deceased . . ."

The learned judge then offered to recall Hussein if the assessors so desired but each assessor stated that this would be of no use. Mateo was then recalled on the application of the appellant's counsel and was further questioned. Hussein was never recalled. At the end of the trial in his summing-up to the assessors the judge reminded the assessors of what had occurred and the fact that the State Attorney had said that Hussein admitted to him that he had lied and that he had "disowned" him and the judge said, "You may think it safer to disregard his evidence completely". In his judgment the judge disregarded the evidence of Hussein in its entirety and he accepted and convicted the appellant on the evidence of Mateo and the child Margareta.

The judge was undoubtedly placed in an unusual position and one without precedent to guide him but with respect we do not consider that he followed the correct procedure in this matter. The position shortly would be that the State Attorney had now become a vital witness for the defence as being able to show that one, if not two, of the principal witnesses for the prosecution had admitted to him that their testimony at the trial was false in a most vital part of their evidence. This clearly applies to the witness Hussein while the position as regards Mateo is at least doubtful. Hussein was not recalled and there was therefore no evidence before the court to support the fact that he had admitted lying and all that the court had before it was the State Attorney's statement from the bar so that, in effect, evidence which was vital to the defence was not called although it was known to exist.

It would appear to us that the correct procedure would have been for the State Attorney to have informed the judge in open court, in the presence of the accused and his counsel, but not in the presence of the assessors, what had occurred and then to seek the directions of the court as to the procedure to be followed. At this stage, in our view, the learned judge should either have directed that the witness be recalled, and questioned as to what had occurred or, in the alternative, allow the State Attorney to withdraw from the prosecution and adjourn the trial for the State to appoint another attorney to prosecute, and for the State Attorney to be called as a witness either by the prosecution or the defence or by the court. If the witness was recalled and admitted having lied, then we do not think it would have been necessary for the State Attorney to have withdrawn, as the evidence of the witness's admitted perjury would then be before the court. If, however, he denied that he had lied to the court then it would be necessary for the State Attorney to be called as a witness and in this case he should no longer act as counsel for the prosecution. As we have said, Mateo's position is open to doubt but yet the State Attorney did make a definite statement that he had admitted lying to him and both the counsel were apparently under the definite impression, and the defence counsel had noted this, that Mateo had given evidence that he had actually seen the appellant striking the deceased. This error might have been due to bad interpretation in court but clearly some confusion did exist as to what Mateo had really said. In our view the trial, having regard to all that occurred regarding these two witnesses, was unsatisfactory. We desire to say that although we do not agree with the procedure followed we feel, as did the learned trial judge, that the State Attorney acted with propriety in bringing these admissions of perjury to the immediate notice of the court.

Four of the sixteen grounds of appeal filed complained of the evidence of the child, Margareta, and the reliance that the trial judge placed on her evidence in convicting the appellant of murder. The judge, having rejected the evidence of Hussein in its entirety, was left with the evidence of Margareta alone as to the actual assault and with her evidence and that of her father, Mateo's, evidence as to the actual events just before and after the incident. Margareta was only a child of twelve years and the learned judge quite properly satisfied himself of her knowledge of an oath before she was sworn. Her evidence was given on oath and does not require corroboration as a matter of law although as a matter of practice a judge should always warn the jury, or, where he sits with assessors, warn himself and the assessors as to the danger of convicting on the uncorroborated evidence of a child. The Indian Evidence Act still applies in Tanganyika and this court in delivering judgment in the case of *Mohamed Saeed Akrabi v. R.* (1), (23 E.A.C.A. at p. 514) quoted the following extract from the judgment of the Privy Council in the case of *Mohamed Sugal v. R.* (2), ([1946] A.C. at p. 62), an appeal from Somaliland where the Indian Evidence Act was in force, which would also be applicable here:

> "In England, where provision has been made for the reception of unsworn evidence from a child, it has always been provided that the evidence must always be corroborated in some material particular implicating the accused. But in the Indian Act there is no such provision, and the evidence is made admissible whether corroborated or not. Once there is admissible evidence a Court can act upon it; corroboration, unless required by statute, only goes to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law."

It is to be noted though that in Tanganyika s. 152 (3) of the Criminal Procedure Code specifically requires corroboration of the unsworn evidence of a child of tender years in criminal cases.

I would also refer to the judgment of this court in the cases of *Kibangeny Arap Kolil v. R.* (3), ([1959] E.A. at p. 96) and to the recent case of *Muroki Kiori v. R.* (4). In the judgment (delivered by Spry, J.A.) in the latter case this court, in dealing with the law to be applied where non-direction occurred, said:

> "Where corroboration is necessary and the trial court has neither directed itself to the need nor has in fact looked for corroboration, this court will not itself consider whether corroboration existed (following *Davies v. D.P.P.* (5)) unless the circumstances are such that it is quite clear that there has been no failure of justice."

This court in its judgment in the case of *Okeyo Kigeni v. Republic* (6), also fully considered this matter but this was a case where the evidence of the child was not on oath. Shortly, this court will, in cases where there has been no proper direction as to corroboration, allow the appeal even if there was corroboration except in those exceptional cases to which this court after full consideration of all the evidence and the circumstances of the case may, if it considers that no substantial miscarriage of justice has occurred, apply the proviso to s. 41 (1) of the East African Court of Appeal Rules, 1954, and dismiss the appeal.

In this case the evidence of Margareta was corroborated if the court accepted the evidence of either Hussein or Mateo. The learned judge does not appear to have warned either the assessors or himself of the desirability of her evidence being corroborated although he did in his directions to the assessors and in his judgment deal with the fact that she was a child of tender years.

It is necessary to consider the evidence of Margareta in some detail. Counsel for the appellant has pointed out some material and important differences between her evidence given at the trial and that given by Senior Inspector of Police Lathigra as to what Margareta pointed out to him and told him the day after the incident occurred. First, there was the question as to the distance that the incident occurred from where Margareta stood. Senior Inspector Lathigra said that Margareta showed him some rocks about two hundred yards away from the body of the deceased whilst in her evidence Margareta said that the appellant was only twenty-five yards away from her when he stabbed the deceased who fell down where she was struck. She had at the preliminary inquiry given the distance as two hundred and fifty yards. The other major discrepancy was that in her evidence Margareta stated that she saw the appellant and the deceased all the time from when they passed her father's house until they came near her and the assault took place, whilst according to the Senior Inspector she told him that she was tending her cattle and that it was only when she heard some shouts that she turned in that direction and then saw the stabbing from the top of the hill. These are material discrepancies as, although the appellant admits the stabbing, the vital question from the point of view of the defence is whether or not his wife and Msogoro were together when he came up. It must also be remembered that the child Margareta was giving her evidence some seventeen months after the incident occurred. This delay might also have given rise to another discrepancy in the evidence of the prosecution witnesses and that is the fact that the medical officer, when he performed the post-mortem examination, only found two stab wounds in the chest of the deceased whilst all the other prosecution witnesses who saw the body also saw wounds on her back. Senior Inspector Lathigra found five stab wounds on her back. It is to be noted though that the medical evidence supports the appellant's version that he only stabbed the deceased twice.

Having regard to the various irregularities and discrepancies in the evidence that occurred during this trial, we regard the evidence of the three prosecution witnesses Mateo, the child Margareta and Hussein as unreliable, especially on

the question of the appellant's defence that he found his wife and Msogoro in adultery "flagrante delicto".

The judge in his summing-up and in his judgment states that the appellant's defence was that the injuries were accidentally caused. It does not appear from the record that this defence was ever seriously put forward by the appellant, and his learned counsel did not advance this defence at the appeal. The appellant was not very clear as to what occurred in his evidence at the trial but he did at various times make the following statements in his evidence:

> "I fell on top of her. I tried to get up but she caught hold of both my hands and I think, then I stabbed her the second time, but I did not know. I looked and I saw the man just vanishing in the long grass and when I looked at the woman I saw that I had injured her and I ran away. I know when I stabbed her the first time, the second was, I think, when she caught hold of both my hands and I tried to get up and she then pulled me down."

and

> "I am very sorry that my wife is dead, because I did not intend to stab her. My intention in unfolding my knife was to threaten them that they should not run away . . ."

further

> "I unfolded my knife to prevent them running away. As I was unfolding the knife she came and got stabbed as I was running . . . I was worried because my wife injured herself."

The appellant made an extra-judicial statement to a magistrate and this statement was not disputed but was admitted by the appellant in his evidence at the trial. I would quote from the appellant's evidence where he said in answer to the court after making the various statements already quoted. He said:

> "I remember making an extra-judicial statement to the magistrate and heard it read out in court here. I said that I was angry. I said I stabbed Kalunde twice with my dagger in the side and in the stomach and the next words – She fell down. She was standing up when she got these injuries. The first time she ran to me and got stabbed and then she fell down – then as she was on the ground – she held my hands and got stabbed a second time."

It is clear that the real defence put forward by the appellant was that he stabbed his wife but he did so after he had suffered such extreme provocation as to justify the reduction of his offence from murder to manslaughter.

We are therefore of the opinion that it would, for the reasons we have given, be unsafe to allow the verdict of murder to stand. On the appellant's own admissions he killed his wife but under such circumstances that there would be sufficient provocation under s. 201 of the Penal Code to reduce this offence to manslaughter. We allow this appeal and substitute a conviction of manslaughter for that of murder. We would take into account the extreme provocation under which the appellant acted and we order that the appellant serve a term of five years imprisonment.

Appeal allowed. Conviction of murder set aside and conviction of manslaughter substituted.

For the appellant:
Zaher Ahmed
Zaher Ahmed & Co, Nairobi

For the respondent:
MG Muli (Senior Assistant Legal Secretary, East Africa Common Services Organisation)
The Director of Public Prosecutions, Tanzania

Machunguru Kyoga and another v The United Republic
[1965] 1 EA 477 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	18 January 1965
Case Number:	446/1964
Before:	Reide J
Sourced by:	LawAfrica

[1] Criminal law – Practice – Consent for prosecution required – Charge framed under s. 5 (1) *of Witchcraft Ordinance* (*Cap.* 18) *whereas offence comes under s.* 5 (2) *– Consent obtained for prosecution under s.* 5 (1) *– Whether citing of wrong sub-section a curable error – Whether valid consent has been obtained.*

[2] Criminal law – Practice – Charge – Particulars of charge alleging theft of cattle, chicken and sum of Shs. 100/- *– Charge framed under section relating to simple theft – Cattle stealing a scheduled offence under Minimum Sentences Act attracting heavier punishment – Accused found guilty of stealing cattle – Whether accused to be regarded as convicted of cattle stealing as an aggravated offence or of simple theft.*

Editor's Summary

The first appellant was charged on the first count with representing himself to have the power of witchcraft contra s. 3 (1) and s. 5 (1) of the Witchcraft Ordinance and in the second count with having in his possession instruments of witchcraft contra s. 3 (2) and s. 5 (1) ibid. The second appellant was charged separately on count 3 with employing the first appellant to resort to the use of witchcraft for the purpose of causing death or misfortune to the family of the complainant contra s. 7 and s. 5 (1) ibid. and in addition to these counts the two appellants were charged jointly with demanding property with menaces and stealing, contra s. 292 and s. 265 of the Penal Code respectively. The appellants were found guilty by the resident magistrate's court on all counts, convicted and sentenced. Under s. 5 (1) intent must be alleged whereas under s. 5 (2) no such intent is necessary for the offence and furthermore, a charge under the latter sub-section only requires consent of the Director of Public Prosecutions before a trial may be begun. The particulars in counts 1 and 2 were so worded as not to contain an allegation of intent and therefore these two counts fell under s. 5 (2) and not s. 5 (1). Consent of the Director of Public Prosecutions was obtained in respect of counts 1, 2 and 3. The substantial question on appeal was whether on the footing that the intention of the prosecution was to charge the first appellant with offences under s. 5 (2), the citing of s. 5 (1) was no more than a lapsus plumae and a curable error. In count 5 the two appellants were jointly charged with the theft of six head of cattle, one goat, one chicken and the sum

of Shs. 100/-, all in one count, under s. 265 of the Penal Code which relates to simple theft as opposed to cattle stealing contra s. 268, which is a scheduled offence within the meaning of s. 2 of the Minimum Sentences Act. Section 268 does not itself create an offence but deals with punishment of theft of a particular class of things. The question for consideration therefore was whether, since some of the items with which the appellants were charged and convicted of stealing were cattle, they were convicted ipso facto of the scheduled offence of "stealing cattle" contra s. 265 and s. 268 although no mention of the latter section appeared in the charge, or whether the omission to refer to the latter section precluded their being convicted of more than simple theft.

Held –

(i) the consent of the Director of Public Prosecutions was required for a prosecution under s. 5 (2) and that had not been obtained; no doubt the mention of s. 5 (1) in the Director's form of consent was an oversight similar

to that made in preparing the charge, but the court was obliged to make a distinction between a mere slip in the latter case, where the particulars of the offence were set out so that the accused might know precisely with what he was charged, and a substantial error in the wording of a formal consent required by law without which proceedings could not be begun;

(ii) it was not possible to say whether it was intended to charge the first appellant on counts 1 and 2 under s. 5 (1) or under s. 5 (2); if the former, then the allegations of intent were wanting and the appellant could neither plead to the counts nor be convicted thereon; if the latter, then the proceedings were void ab initio for want of the necessary consent;

(iii) as regards count 3 consent was not required as the particulars did allege intent and the purported "consent" was otiose and could be treated as mere surplusage;

(iv) (*a*) the mere omission to refer to s. 268 in a count, the particulars of which clearly charge with cattle stealing, was not a material defect or such a defect as would preclude an accused person being convicted of cattle stealing or being sentenced under the provisions of s. 268;

(*b*) the conviction in the circumstances of the instant case was and must be treated as being a conviction for cattle stealing whether the accused was convicted in terms of "cattle stealing" or of an offence contrary to s. 268 or not; since the fact of stealing cattle was proved, the provisions of s. 268, ipso facto, came into operation;

(v) in certain cases of a conviction on a "mixed" count the only proper course for a court to take would be to quash the convictions and possibly to order a re-trial on two or more counts, but in the present case justice and expediency would best be served if the court disregarded the mention in count 5 of the chicken and the sum of Shs. 100/-, and convicted both appellants of the scheduled offence of cattle stealing under the provisions of the Minimum Sentences Act.

Appeal allowed in part. Convictions on counts 1, 2 and 5 quashed and sentences set aside and on count 5 convictions for the scheduled offence of cattle stealing substituted under the provisions of the Minimum Sentences Act and each appellant sentenced to 3 years imprisonment and 24 strokes of corporal punishment. Magistrate's order for compensation set aside. Direction that magistrate to make an order for compensation against appellants in conformity with provisions of s. 6 of the Minimum Sentences Act.

Cases referred to in judgment

(1) *Banda v. R.* 5 N.R.L.R. 183.

(2) *Day v. R.*, [1958] R. & N. 731.

(3) *R. v. Bryant* (*No.* 2), [1956] 1 W.L.R. 133.

Judgment

Reide J: The first appellant, Machunguru Kyoga, was charged on four counts as follows:

Count 1: Representing himself to have the power of witchcraft, contrary to ss. 3 (1) and 5 (1) of the Witchcraft Ordinance, Cap. 18.

Count 2: Having in his possession instruments of witchcraft, contrary to ss. 3 (2) and 5 (1) of the Witchcraft Ordinance, Cap. 18.

Count 4: Demanding property with menaces, contrary to s. 292 of the Penal Code.

Count 5: Stealing, contrary to s. 265 of the Penal Code.

The second appellant, Kisekalawa Mwakalele, was charged together with the first appellant on Counts 4 and 5, and separately on Count 3 with employing the first appellant to resort to the use of witchcraft "for the purpose of causing death or misfortune to the family of [the complainant]", contrary to ss. 7 and 5 (1) of the Witchcraft Ordinance, Cap. 18. Both appellants were convicted on all counts charged against them and were sentenced on each count to concurrent terms of three years imprisonment. The court also made a compensation order against them.

The learned trial magistrate found the following facts proved. The son and grand-daughter of the complainant Mgaifilo Mahanga died during 1963, on the same day. (The court did not hear evidence as to the causes of death, or anything to indicate that those causes were other than natural.) At the funeral, the first appellant approached the complainant and told him that he had been employed by the second appellant, who "claimed cattle" from the complainant, to cast a spell designed to extinguish the whole of the complainant's family; that he (the first appellant) had done this; and that the deaths of the two children were the result. The complainant later met both appellants. The second appellant confirmed having employed the first appellant to cast a spell, as a result of which the children had died, and went on to demand six head of cattle and Shs. 100/-, together with a goat and a chicken to be used for preparing "medicine", as the price of "withdrawing the spell". The complainant "out of fright" and "for fear of dying" agreed to give the second appellant these things and this sum of money, and did so. Later on the first appellant's house was searched and a number of articles, including hollow horns containing powders of different colours, a bottle containing a brown liquid, bundles of roots tied with animal skins, and the like, were found therein. The learned magistrate found that these and other objects "clearly appear to be implements of witchcraft", though without hearing evidence about this. He concluded his judgment in these terms:

> "I am left in no doubt that the second accused did employ the first accused in the use of witchcraft and that the first accused did hold himself out as having such powers and also possess instruments of his craft. Each of the items displayed in the court . . . has a sinister rather than innocent look and falls within the categories of instruments normally found in possession of persons in cases of witchcraft. I am also satisfied that the object and motive of both the accused persons was to demand property with threats of death and menaces and [that they] did in fact steal the 6 heads of cattle, Shs. 100/-, one goat and one chicken."

I will deal first with Counts 1, 2 and 3. Section 5 (1) of Cap. 18 provides that:

> "Any person who commits an offence against this Ordinance with intent to cause death, disease, injury or misfortune to any . . . person . . . or to cause injury to any property shall be liable to imprisonment . . . for a period not exceeding seven years or to a fine not exceeding Shs. 4,000/- or to both such fine and imprisonment",

and s. 5 (2):

> "Any person who commits an offence against this Ordinance without any intent such as is described in subsection (1) of this section shall be liable to a fine not exceeding Shs. 1,000/- or to imprisonment of either description for any period not exceeding one year:
>
> Provided that the trial of a person for an offence punishable as in this

> subsection provided shall not be begun unless the consent of the Director of Public Prosecutions thereto shall first have been obtained."

The particulars of Count 1 are that the first appellant "between January and December 1962, in Iringa Region by his statements and actions represented himself to have the power of witchcraft", and those of Count 2 that the first appellant "on or about the 24th day of April, 1964, in Iringa Region, had in his possession instruments of witchcraft, to wit [a list of articles]". Since no allegation of intent as described in subs. (1) appears in the particulars of either of these counts, these alleged offences should have been charged under s. 5 (2), which requires the consent of the Director of Public Prosecutions before a trial may be begun, and not under s. 5 (1), which does not. In fact that consent was sought in respect of Counts 1, 2 and 5, and was purported to be given in the following form:

> "I [the Director of Public Prosecutions] hereby consent to the prosecution of [the first appellant] on charges of:
>
> (1) representing himself to have the power of witchcraft, contrary to ss. 3 (1) and 5 (1) of the Witchcraft Ordinance, Cap. 18;
>
> (2) possessing instruments of witchcraft, contrary to ss. 3 (2) and 5 (1) of the Witchcraft Ordinance, Cap. 18.
>
> And [the second appellant] on a charge of employing a person to resort to the use of witchcraft, contrary to ss. 7 and 5 (1) of the Witchcraft Ordinance."

That is, s. 5 (1) has again been cited instead of s. 5 (2).

The court was competent to pass sentences of three years' imprisonment on Counts 1 and 2 for offences contrary to s. 5 (1) (of which offences, however, the appellant could not have been convicted), but not for an offence contrary to s. 5 (2), so that the sentences on these two counts could in any case not be upheld. Can it, however, be said that, on the footing that the intention of the prosecution was to charge the first appellant with offences contrary to s. 5 (2), the citing of s. 5 (1) was no more than a *lapsus plumae* and a curable error? If the rest of the proceedings had been in order, then that might be a possible and legitimate construction, but then the consent of the Director would be required for a prosecution under s. 5 (2), and that has not been obtained. No doubt the mention of "5 (1)" in the Director's form of consent is an oversight similar to that made in preparing the charge, but I must make a distinction between a mere slip in the latter case, where the particulars of the offence are set out so that the accused may know precisely with what he is charged, and a substantial error in the wording of a formal consent required by law without which proceedings cannot be begun. In the upshot, it does not appear possible to say whether it was intended to charge the first appellant on Counts 1 and 2 under s. 5 (1) or s. 5 (2). If the former, then the allegations of intent were wanting and the appellant could neither plead to the counts nor be convicted thereon: if the latter, then the proceedings were void *ab initio* for want of the necessary consent. In these circumstances learned State Attorney does not seek to uphold the convictions on these counts. I quash them and set aside the sentences.

I ought to add that, apart from these matters, I should have been obliged to quash the conviction on Count 2 on the grounds that there was no evidence before the court that the articles specified in the charge were instruments of witchcraft. That was not a matter of which the learned magistrate was entitled to take judicial notice.

As regards Count 3, the particulars of which *do* allege an intent, it seems clear that, the Director's consent not being required for prosecutions under

s.5(1), the purported "consent" is otiose and may be treated as mere surplusage. The evidence before the learned magistrate justified him in convicting the second appellant on this count and in convicting both appellants on Count 4. There are no merits in the petition of appeal. Having regard to the circumstances in which the appellants took advantage of the death of the complainant's son and grand-daughter to conspire together to terrify him by threats of witchcraft into handing over his property (including a number of cattle), and the need for exemplary punishment for witchcraft offences and offences arising therefrom, I cannot say that the sentences passed upon the appellants in respect of Counts 3 and 4 were manifestly excessive, and I shall not disturb them. The appeals on these counts are accordingly dismissed in their entirety.

I turn to consider the appeals on Count 5. I am satisfied that the evidence which the learned magistrate accepted was sufficient to support a finding of guilty of the theft of the things charged, that is, of six head of cattle, one goat, one chicken and Shs. 100/-. I would remark that the definition of "theft" in s. 258 of the Penal Code differs from that of "larceny" in s. 1 of the English Larceny Act, 1916, in that, *inter alia*, whereas one of the ingredients of larceny in the obtaining of a thing "without the consent of the owner", that ingredient is missing from the definition of "theft", so that it is sufficient in this country to determine the question of theft to consider only whether the accused has taken the thing fraudulently and without claim of right. Nevertheless, I will say obiter that, had a finding on the question of consent been called for, then, the magistrate having accepted evidence that the complainant had "paid" the appellants "out of fright" and "from fear of dying", I should have found without hesitation that the complainant's handing over of the various articles lacked that element of voluntary action which alone could constitute a real consent.

The first question with which I am now concerned is whether, since some of the things with which the appellants were charged and convicted of stealing were cattle, they were not convicted ipso facto of the scheduled offence of "stealing cattle" contrary to ss. 265 and 268 of the Penal Code although no mention of the latter section appears in the charge, or whether, on the other hand, the omission to refer to the latter section (an omission which may well have been an oversight – I do not know) precluded their being convicted of more than simple theft. It must constantly be borne in mind that s. 268 does not itself create an offence, but is concerned only with the court's power of punishment for theft of a particular class of things. That statement of the law does not, I think, require authority to support it, though I am grateful for the diligence of learned State Attorney, who has referred me to two Central African cases (of which unfortunately no reports are available here) which afford persuasive authority. In Northern Rhodesia it was held in *Banda v. R.* (1), that:

> "Charges should be laid under the general section dealing with theft; other sections merely enhance the sentence. They do not create substantive offences"

and in Nyasaland in *Day v. R.* (2):

> "The offences created by the different sections relating to theft are all the same offence merely laying down different punishments."

I am of course aware that this Court has for many years advised subordinate courts that the better practice is to refer to s. 268 in a charge of cattle stealing; and that, with respect, is perfectly right, since the accused is thereby informed from the beginning that he is charged with what is often (perhaps somewhat loosely) called an "aggravated theft", that is, theft of a kind for which he is liable to suffer a graver punishment than for simple theft. Indeed, the practice of referring to a punishment section in a charge was considered and approved

by Lord Goddard, C.J., in a practice note in *R. v. Bryant* (*No.* 2) (3), where he said, referring to s. 2 of the Larceny Act:

> "Section 2 is concerned with punishment and does not create the offence of larceny It is unobjectionable and indeed convenient to refer to s. 2 where a simple charge of larceny is preferred, as it serves to direct the attention of the court to the fact that the charge is not one of compound or aggravated larceny, and to the punishment which the offence charged carries. The reference to the section does not make the indictment bad"

so that by parity of reasoning, and a fortiori, it is at least equally unobjectionable and convenient to refer to a section relating to an enhanced penalty. But it cannot be said, and I have never heard the submission tendered, that the mere omission to refer to s. 268 in a count the particulars of which clearly charge cattle stealing, was a material defect, or such as would preclude an accused's being convicted of cattle stealing or his being sentenced under the provisions of s. 268. Moreover, the conviction in these circumstances is, and must be treated as being, a conviction for cattle stealing whether the accused be convicted in terms of "cattle stealing" or of an offence contrary to s. 268, or not; since, the fact of stealing cattle being proved, the provisions of s. 268 come into operation ipso facto. It follows from this that a person so convicted is a person convicted of the scheduled offence of "cattle stealing contrary to ss. 265 and 268 of the Penal Code" within the meaning of s. 2 of the Minimum Sentences Act, and must be sentenced in accordance with the provisions of that Act. It may not be necessary for me to emphasise that my finding in this matter does not involve the conviction for a major offence of a person who has been charged with a minor offence (using the term "minor" in the sense in which it is employed in s. 181 of the Criminal Procedure Code). The appellants in this case (as I have shown) stood charged throughout with the major offence of stealing cattle (i.e. major vis-a-vis simple theft): aliter if the particulars of offence did not allege a theft of cattle. Had that allegation been omitted, no amount of evidence of such a theft could have ensured to secure a conviction for an offence contrary to ss. 265 and 268.

The next question in connection with Count 5 – and it is a question of some difficulty – is that arising out of the appellants' having unfortunately been charged in one count with the theft not only of cattle but of other things. Where a person is to be charged with simple theft and also with aggravated theft (of whatever kind), then separate counts should be preferred in respect of each kind of theft. It is manifestly inconvenient, to say the least, and may be prejudicial to an accused (though I am satisfied that it is not so here), for a court to be called upon to deal in one count with the theft of things attracting different minimum or maximum punishments. Moreover, since it is not ordinarily possible to record more than one conviction or pass more than one sentence in respect of one count, it may be impossible to determine on appeal how the trial court arrived at its sentence in relation to the different things stolen. The difficulty of maintaining the conviction on appeal becomes intractable, and perhaps logically insurmountable, when the conviction is for a scheduled offence. Suppose, to take a hypothetical case analogous to the present one, that an accused is charged on a single count with the theft of e.g. a bull and a bicycle, and found guilty, then, since the accused has been rightly charged with and found guilty of stealing cattle, he must be convicted of that scheduled offence in respect of the bull. It is, however, impossible to convict him of cattle stealing in respect of both articles, since a bicycle is not cattle, or to convict him of two separate offences. Yet he certainly should not escape the consequences of cattle stealing merely because the theft of something other than cattle had been charged in the same count. It may well be that, in certain cases, the only proper course for this

court to take would be to quash a conviction on a "mixed" count of this sort and possibly to order a re-trial on two or more counts. I am satisfied, however, that in the present case (bearing in mind that the value of the cattle stolen forms by far the greater part of the total value of the things stolen) justice and expediency will best be served, and the appellants will not be prejudiced, if I disregard the mention in the charge of the chicken and the Shs. 100/- and leave the complainant to his civil remedies in respect of these things. Accordingly, the convictions against both appellants on Count 5 are quashed and the sentences set aside. I now convict both appellants of the schedule offence of cattle stealing under the provisions of the Minimum Sentences Act, in that they stole six head of cattle and one goat, and I sentence them each to three years' imprisonment, a sentence which carries with it (subject to their being under 45 years of age) the statutory punishment of twenty-four strokes of corporal punishment. These sentences of imprisonment and those passed on counts 3 and 4 will all be served concurrently. There is no indication of the ages of the appellants in the record, and before the strokes of corporal punishment are inflicted the magistrate is to have both appellants brought before him to make a finding on their ages and to communicate that finding to the prison authorities to ensure that if either of them is over 45 years of age that part of his punishment will not be inflicted.

The appellants having now been convicted of the scheduled offence of stealing cattle, a compensation order must be made under the mandatory provision of s. 6 of the Minimum Sentences Act. Accordingly I set aside the compensation order which the magistrate made, presumably under the provisions of s. 176 of the Criminal Procedure Code. I will remark en passant that that order could not have stood in any case, since there is no indication how the magistrate arrived at his figure, and it is, moreover, not possible to know whether he was purporting to make the appellants liable for compensation severally, or jointly and severally. If the latter, then the order would have been for that reason alone incompetent, since there is no authority to make such an order under the provisions of the section.

The learned magistrate is now to determine when the appellants are brought before him the value of such of the cattle as have not yet been recovered, and to make a compensation order against the appellants in conformity with the provisions of s. 6. He should also explain to the appellants and to the complainant that the latter may pursue his civil remedies against the former in respect of the theft of the chicken and the Shs. 100/- if he wishes to do so.

Appeal allowed in part. Convictions on counts 1, 2 *and* 5 *quashed and sentences set aside and on count* 5 *convictions for the scheduled offence of cattle stealing substituted under the provisions of the Minimum Sentences Act and each appellant sentenced to* 3 *years imprisonment and* 24 *strokes of corporal punishment. Magistrate's order for compensation set aside. Direction that magistrate to make an order for compensation against appellant in conformity with provisions of s.* 6 *of the Minimum Sentences Act.*

The appellant did not appear and was not represented.

For the respondent:
OT Hamlyn (State Attorney, United Republic of Tanzania)
The Director of Public Prosecutions, Tanganyika

Kanji Naran Patel v Noor Essa and another
[1965] 1 EA 484 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	1 April 1965
Case Number:	7/1964
Before:	Crabbe, Duffus and Law JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Dalton, J

[1] Distress – Illegal distress – Non-payment of rent – Court broker's liability – Both landlord and court broker liable in damages.

[2] Damages – Distress – Illegal distress – Measure of damages.

Editor's Summary

The appellant was the tenant of a shop, the property of the first respondent. The second respondent, a court broker and certificated bailiff, on the instructions of the first respondent levied distress on certain goods in the appellant's shop by impounding the goods and looking them in the shop overnight. The appellant protested at the closing of the shop and informed the second respondent that there were no arrears of rent due. The shop remained closed until mid-day next day when the padlock was removed from the shop and the distress raised. The first respondent was present throughout when the second respondent levied the distress. The trial judge found as a fact that there were no arrears of rent due and held that the distress was illegal. He further held that only the first respondent was liable to pay damages and he awarded general damages in the sum of Shs. 800/-. The suit against the second respondent was dismissed on the ground that as the appellant was aware that the second respondent was authorised to act by the first respondent, the action should have been brought only against the first respondent. On appeal the main grounds of appeal were that the judge was wrong in law in dismissing the suit against the second respondent and in awarding only Shs. 800/- as general damages.

Held –

(i) when a distress is illegal it is the bailiff who is primarily liable and the landlord is only liable if he can be shown to have sanctioned or ratified the bailiff's wrongful act;

(ii) an illegal distress is a trespass and where the landlord has knowledge (as in this case) of the bailiff's wrongful acts, he is jointly liable with the bailiff as a joint tortfeasor on general principles;

(iii) the learned judge misdirected himself in holding that the bailiff who was acting in accordance with instructions from the landlord was relieved from liability in an action for damages for wrongful distress; accordingly both the bailiff and the landlord were liable and judgment should be entered against both of them;

(iv) there was no justification for increasing the general damages awarded and the judge correctly directed himself on the question of general damages and further acted on a right principle in fixing them at Shs. 800/- in the circumstances of the case.

Appeal allowed in part.

Cases referred to in judgment

(1) *Lewis v. Read* (1845) 13 M. & W. 834.

(2) *Carter v. St. Mary Abbots, Kensington, Vestry* (1900) 64 J.P. 548.

(3) *Souza Figueiredo & Co. Ltd. v. George Panagopaulos & Others* [1959] E.A. 756 (C.A.).

(4) *Interoven Stove Co. v. F. W. H. Hibbard & Others* [1936] 1 All E.R. 263.

(5) *The Mediana* [1900] A.C. 113.

(6) *Beaumont v. Greathead* (1846) 2 C.B. 494.

(7) *Scott v. Musial* [1959] 2 Q.B. 429; [1959] 3 All E.R. 193.

(8) *Davies v. Powell Duffryn Associated Collieries Ltd*. (*No*. 2), [1942] A.C. 601.

(9) *Rookes v. Barnard* [1964] 1 All E.R. 367.

(10) *McCarey v. Associated Newspapers Ltd*. (*No*. 2) [1965] 2 W.L.R. 45.

(11) *Brewer v. Dew* (1843) 11 M. & W. 625.

(12) *Bayliss v. Fisher* (1830), 7 Bing. 153.

(13) *Owen and Smith v. Reo Motors* (*Britain*) *Ltd*. (1934), 151 L.T. 274.

April 1. The following judgments were read:

Judgment

Law JA: This is an appeal by the plaintiff from the judgment and decree of the Supreme Court of Kenya in an action instituted by the plaintiff against his landlord and a bailiff for damages for unlawful distress.

The facts of the case were plain. The appellant, whom I shall refer to as the plaintiff, was the tenant of a shop, the property of the first respondent, hereinafter referred to as the landlord, at a monthly rent of Shs. 300/-. On January 11, 1963, the second respondent, who is a court broker and certificated bailiff, and whom I shall refer to hereinafter as the bailiff, under colour of a distress for rent on the instructions of the landlord, levied distress on certain goods in the plaintiff's shop by impounding the said goods and looking them in the said shop, after close of business on the afternoon of January 11, which was a Friday. At the same time the bailiff served notice on the plaintiff that unless he paid Shs. 1,170/-, being the alleged arrears of rent for October, November and December, 1962, and Shs. 60/- being the bailiff's charges, the goods distrained upon would be sold. The landlord was present throughout. The plaintiff protested that he had paid the rent for the months of October and November, and claimed that the rent for December was not yet due, being payable in arrears and no demand having been made. The bailiff and the landlord refused to give the plaintiff an opportunity to produce his receipts, and the distress was continued until midday on Saturday, January 12, 1963, when the bailiff, on instructions from the landlord's advocate, removed his padlock from the shop and raised the distress. The learned trial judge found as a fact that the rent for October and November had been paid, and that the rent for December was not due on January 11, and he held accordingly that the distress was illegal. These findings are amply supported by the evidence and have not been challenged on this appeal. The learned judge awarded the plaintiff Shs. 200/- special damages and Shs. 800/- general damages against the landlord, with costs on the subordinate court scale; but dismissed the claim against the bailiff, with costs on the Supreme Court scale, for the following reasons – which I quote from the judgment:

> "It is clear from the plaintiff's evidence that he knew that the second defendant was authorised to act by the first defendant. It therefore seems to me that the plaintiff should have brought this action only against the landlord."

The plaintiff appeals on the following grounds:

"1. That the Learned Judge was wrong in law in stating that in case of a distress for arrears of rent the bailiff is not liable if the Landlord unlawfully or illegally authorised the bailiff to levy distress.

2. That the Learned Judge was wrong in law in dismissing the case against the second Defendant Ranjit N. Sisodia after holding that the distress was illegal.

3. That the Learned Judge was wrong in law and fact in awarding only Shs. 800/- as General damages. Such damages should be substantially increased and be awarded against both the first and second Defendant.

Reasons Whereof the Appellant prays that his appeal be allowed and that judgment be entered against both the first and the second Respondents for such amount as damages as this Honourable Court may consider fit with costs on the Supreme Court scales and costs of this Appeal."

The landlord did not appear and was not represented when this appeal was heard, and the bailiff was represented by Mr. Gautama who, in my opinion quite rightly, was unable to resist the first two grounds of appeal by supporting that part of the judgment of the learned Supreme Court judge which exonerated the bailiff from liability. When a distress was illegal, as admittedly was the case here, it is the bailiff who is primarily liable (*Lewis v. Read* (1)). The landlord is only liable if he can be shown to have sanctioned or ratified the bailiff's wrongful act (*Carter v. St. Mary Abbots, Kensington, Vestry* (2)). An illegal distress is a trespass, and where the landlord has knowledge (as in this case) of the bailiff's wrongful acts, he is jointly liable with the bailiff as a joint trespasser, on general principles (*Souza Figueiredo & Co. Ltd. v. George Panagopaulos* (3)). There can be no doubt that the learned judge misdirected himself in holding that a bailiff who is acting in accordance with instructions from the landlord is relieved from liability in an action for damages for wrongful distress. In the circumstances of this case, both the bailiff and the landlord were liable and judgment should have been entered against both of them. The first two grounds of appeal accordingly succeed.

As regards the quantum of damages, the award of Shs. 200/- special damages has not been challenged, but counsel for the plaintiff has strongly submitted that the sum of Shs. 800/- awarded as general damages was manifestly inadequate and based on wrong principles and should be substantially increased. In this connection counsel relies on the case of *Interoven Stove Co. Ltd. v. F. W. H. Hibbard* (4) and to the dictum of Hilbery, J. ([1936] 1 All E.R. at p. 270) that in a case of illegal distress, which involves a trespass to goods, though no actual damage is proved, a court is entitled to give substantial damages, if the circumstances justify it. That case was considered by the learned judge when he assessed the damages in this case. He said:

"I do not think that there has been great damage to the plaintiff's reputation and business standing and giving the matter the best consideration that I can I think that an award of Shs. 800/- would be a fair amount under the head of general damages."

In my opinion, the learned judge correctly directed himself on the question of general damages, and acted on a right principle in fixing them at Shs. 800/- in the circumstances of this case. It may be that another judge would have awarded a greater sum, but I cannot agree with counsel that Shs. 800/- is not "substantial". It is certainly not a nominal sum, and I can see no reason why in the circumstances of this case it should be increased. The third ground of appeal accordingly fails, in my opinion.

As regards costs in the Supreme Court, counsel for the appellant submitted that the plaintiff should have been awarded costs on the Supreme Court scale. The general rule is stated in s. 11 of the Civil Procedure Act. A plaintiff who recovers a sum not exceeding Shs. 1,500/- (Shs. 3,000/- in certain cases) in the Supreme Court shall not be entitled to any more costs than he would have been

entitled to if the suit had been brought in a subordinate court, provided that the judge may, if satisfied that there was good reason for bringing such suit in the Supreme Court, make such order as to costs as to him may seem just. Dealing with this matter at the trial, the learned judge said:

> "I see no good reason for departing from the provisions of s. 11 and applying the last proviso thereof"

I respectfully agree, and can see no justification for interfering with the learned judge's exercise of discretion in the matter of costs at the trial.

To sum up, in my opinion this appeal should succeed and be allowed to the extent of the first two grounds in the petition of appeal, and the decree of the Supreme Court should therefore be altered to provide:

(*a*) that both the defendants, jointly and severally, do pay to the plaintiff the sum of Shs. 1,000/- with interest thereon at 8% from the date of filing suit until judgment and thereafter at the court rate of 6% until payment in full; and

(*b*) that both the defendants do pay to the plaintiff the costs of the suit on the subordinate court scale.

As regards the costs of this appeal, the plaintiff has succeeded to the extent of establishing that judgment should have been entered against the second defendant as well as against the first defendant, but has failed in his appeal against the quantum of general damages and against the order for costs to be paid on the subordinate court scale. In my view, the appellant should recover half the costs of this appeal from both the respondents.

Crabbe JA: I agree with the conclusions of my brother Law, and I only desire to make some observations on certain points in this appeal. The main argument of counsel for the appellant was that in view of the reprehensible conduct of the respondents, the learned judge should have awarded the appellant more than nominal damages. He submitted that on the facts the appellant was entitled to substantial damages. This argument implies in my view that the learned judge awarded only nominal damages for the illegal distress. But is that really the case? In *the Mediana* (5), Lord Halsbury, L.C., defined "nominal damages" in these terms ([1900]) A.C. at p. 116):

> " 'Nominal damages' is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term 'nominal damages' does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages."

In the earlier case of *Beaumont v. Greathead* (6), Maule, J. ([1846], 2 C.B. at p. 499) spoke of nominal damages as "a sum that may be spoken of, but that has no existence in point of quantity", and as "a mere peg on which to hang costs".

In this case the learned judge awarded the appellant damages for Shs. 800/- which, in the words of the judge, "would be a fair amount under the head of general damages". He made this award after he had clearly directed himself

that the appellant was entitled to something more than nominal damages. Considering the high-handed manner in which the respondents treated the appellant an award of Shs. 800/- damages may seem little, but the smallness of the amount will not make such damages nominal if they are arrived at by a real estimate of the harm suffered. I do not think it can be said that the damages for Shs. 800/- were nominal. But counsel's main argument on the third ground of appeal was that the learned judge was wrong both in law and in fact in awarding only Shs. 800/- as general damages, and he urged this court to increase this award substantially. The function of an appellate court on an appeal from a judge's assessment of damages seems to me to be clearly stated by Morris, L.J., in *Scott v. Musial* (7) as follows ([1959] 2 Q.B. at p. 437):

> "Where there is an appeal from the decision of a judge sitting alone, the appeal is by way of rehearing. The rehearing applies to the issue of damages as well as to other issues. But it is recognised that the fixation of damages is so largely a matter of opinion or of impression that differences of calculation or assessment are to be expected. There is, to some extent, an exercise of judicial discretion. It is for this reason that, if three judges of the Court of Appeal consider that the amount of general damages that they would have awarded would have been a figure different from that decided by the trial judge, they will not, for that reason alone, give preference to their own figure; they will only do so if satisfied that the judge has acted on a wrong principle of law or has misapprehended the facts, or has, for those or other reasons, made a wholly erroneous estimate of the damage suffered: see the speech of Lord Wright in *Davies v. Powell Duffryn Associated Collieries Ltd*. (*No*. 2) (8) ([1942] A.C. at p. 616)."

The main basis of the learned judge's award can be found in the following passage of his judgment:

> "I do not think that there has been great damage to the plaintiff's reputation and business standing and giving the matter the best consideration that I can I think that an award of Shs. 800/- would be a fair amount under the head of general damages."

With respect, the learned judge did not indicate the matter to which he said he gave his "best consideration", but clearly he does not, throughout his lengthy judgment, appear to have made any comment on the high-handed and contumelious manner in which this illegal distress was effected. He found as a fact that there were no arrears of rent due from the appellant to the first respondent. The appellant received no warning of the distress or notice that his rents had fallen in arrears. He protested at the closing of the shop, and showed the second respondent receipts of payments he had made but the second respondent would not listen to any argument, and after he had taken stock of the appellant's goods he locked his shop. According to the appellant the first respondent was waiting outside whilst the stock-taking was going on in the shop. In answer to a question under cross-examination the second respondent said:

> "We only act on the instructions of the landlord, but if the tenant says he has paid and shows me receipts I would ask the landlord. I did ask Noor Essa but he insisted I closed the premises. Even if the tenant produces receipts to show that he has paid, if the landlord insists that I close the shop or seize the goods, I will follow the landlord's instructions. The goods might have taken two lorries to take them away. Plaintiff said that he had paid the money and would show me the receipts but that if I closed the shop he would go and see his advocate. I would not consider that a threat."

This event took place between 4.15 p.m. and 4.30 p.m. on Friday, January 11, 1963, but the distress was lifted the next day at about 12.15 p.m. after the

appellant's advocate had had a telephone conversation with the respondents' advocate. The appellant, who usually traded half a day on Sunday, was not able to do his business until Monday. One witness called by the appellant said that he thought the appellant could not meet his rent and was "broke"; another witness said that after the distress had been levied he stopped having business dealings with the appellant for two to three months.

There can be no doubt, I think, that quite apart from loss of profit to the appellant, though small, the respondents' conduct must have caused the appellant great humiliation and annoyance. In my judgment, in considering the damages sufficiently adequate to compensate the appellant for the wrong done to him by the respondents, the learned trial judge should have taken into consideration the natural grief and distress which the appellant must have felt at having his shop closed in the presence of his business friends, and also the high-handed and contumelious behaviour by the respondents which might have constituted injury to the appellant's pride and self-confidence: see *Rookes v. Barnard* (9); *McCarey v. Associated Newspapers Ltd*. (*No*. 2) (10). The illegal distress in this case was in itself a trespass to the appellant's goods, and in my view *Brewer v. Dew* (11) is an authority for the proposition that in a case upon a claim for trespass to goods, where the seizure of the goods was made under a false pretence of legal claim, the plaintiff being thereby annoyed and disturbed in his business and was believed to be insolvent, the jury may give vindictive damages against the defendant.

It seems to me, with all due respect, that the learned trial judge has not shown a proper appreciation of the evidence. The respondents in this case no doubt acted in wanton disregard of the appellant's rights, and I think that it is necessary that this sort of behaviour should be discouraged. "Exemplary damages" said Lord Devlin in *Rookes v. Barnard* (9) "can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay". The appellant has not however asked for exemplary damages in this case; he has asked for only substantial damages, and, reconsidering the matter on that basis, I do not think that the learned judge's estimate of the damages suffered was wholly erroneous. The appeal succeeds to the extent indicated in the judgment of my brother Law, and there will be orders in the terms proposed by him.

Duffus JA: I have had the advantage of reading the judgments of my brothers Crabbe and Law. This clearly is a case in which the learned trial judge misdirected himself as to the liability of the bailiff, the second defendant/respondent, and I agree that the appeal be allowed insofar as his liability is concerned and judgment be entered against both the landlord, the first respondent, and the bailiff, the second respondent.

The plaintiff was awarded Shs. 800/- for general damages. The appellant is asking that these damages be substantially increased. Learned counsel for the appellant apparently regards these damages as being "nominal" but an award of Shs. 800/- cannot possibly be said to be "nominal" damages. The appellant relied largely on the decision in the case in England of *Interoven Stove Co. v. Hibbard* (4). This was also a claim for damages for an illegal distress and in delivering his judgment, Hilbery, J. said ([1936] 1 All E.R. at p. 270):

> "The distress then became a trespass to the plaintiff company's goods. An illegal distress has always been a trespass and an action would always lie. And where there is a trespass to goods, though no actual damage results, the law gives a right to recover damages not limited to actual damage sustained, but a right to recover substantial damages even though there be no proof of actual loss. The case of *Bayliss v. Fisher* (12), was cited and is an authority for that proposition. More recently the law has been alluded

> to and stated in the Court of Appeal in the case of *Owen & Smith v. Reo Motors* (*Britain*) *Ltd*. (13), which was an action for damages for trespass to goods. There Greer, L.J. says (151 L.T. at p. 274):
>
> > 'Now what damage have the dealers suffered by reason of the fact that these vehicles were removed without the opportunity being given which was provided for in the contract? I think, practically speaking, there was no damage. If they had been given the opportunity, there would still have been a loss of reputation to the dealers in their business. . . . No authority has been cited to show that punitive damages could be recovered for trespass to chattels. I prefer not to express an opinion on that somewhat difficult matter, but I do think that in this case there must be something in the nature of substantial damages'
>
> I am satisfied, therefore, that though no actual damage is proved, the court is entitled to give, if the circumstances justify it, substantial damages."

The appellant has not in this case sought exemplary damages and therefore this point does not really arise. I am of the view, though, that if he had this is not a case in which exemplary damages would have been awarded. The question of exemplary damages was very fully considered in the case of *Rookes v. Barnard* (9). Lord Devlin, with the approval of all their Lordships, dealt fully with this matter and he distinguished between exemplary damages and compensatory damages and also between aggravated and exemplary damages. In short, Lord Devlin held that exemplary damages should only be awarded in two categories of cases, apart from cases in which exemplary damages are expressly authorised by statute. The two categories are cases in which the wrong complained of was an oppressive, arbitrary or unconstitutional action by a servant of the government, or cases in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation made to the defendant.

This case would not appear to come within this definition, although I agree that this is a case in which the damages would be aggravated by the high-handed manner in which the defendants acted. The learned trial judge has not given very full reasons as to how he arrived at his figure of Shs. 800/- but it must be presumed that he correctly directed himself on the law. In fact I regard Shs. 800/-, in the circumstances of this case, as being substantial and adequate. The plaintiff was also awarded special damages of Shs. 200/- for loss of business; Shs. 800/- would, incidentally, represent the rental of the premises for nearly three months. I can see no reason for increasing this amount. I agree with Law, J.A., that the trial judge's order for the plaintiff's costs in the court below on the lower scale should be upheld. I agree, therefore, with the order proposed by Law, J.A., including his order as to the costs of this appeal.

Appeal allowed in part.

For the appellant:
MK Bhandari
Bhandari & Bhandari, Nairobi

The first respondent did not appear and was not represented.

For the second respondent:
Satish Gautama
Satish Gautama, Nairobi

Samusoni Mukono and another v Uganda
[1965] 1 EA 491 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	1 April 1965
Case Number:	176/1964
Before:	Sir Samuel Quashie-Idun P, Newbold Ag V-P and Sir Clement de Lestang JA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Baerlein, Ag.J

[1] Criminal law – Trial—Judge's summing up – Notes of summing up must appear on the record – Criminal Procedure Code (*Cap.* 24) *s.* 283 (1) (*U*).

Editor's Summary

The appellants were convicted of murder and the court held that on evidence which the trial judge accepted, there being no misdirection on his part, the appellants were properly convicted. There were no notes on the record of proceedings of the trial judge's summing up to the assessors and the court made observations on the advisability of recording notes of the summing up to the assessors.

Held – Although s. 283 (1) of the Criminal Procedure Code indicates that when the case on both sides is closed, the judge is not bound to sum up the evidence to the assessors, it is desirable that he should do so; and that when he does so, notes of the summing up should appear on the record of proceedings.

Appeal dismissed.

Cases referred to in judgment

(1) *R. v. Gibbons* (1823), 1 C. & P. 97; 171 E.R. 1117.

(2) *R. v. Clewes*, 172 E.R. 678.

(3) *Washington Odindo v. R.* (1954), 21 E.A.C.A. 392.

(4) *Anderea Kulinga v. R.*, [1958] E.A. 684.

(5) *Boateng v. R.*, 12 Selected Judgments of the West African Court of Appeal, 242.

(6) *Kakaka Wambeabea v. Uganda*, E.A.C.A. Criminal Appeal No. 158 of 1964 (unreported).

(7) *Bharat Dorsamy v. R.*, [1959] 3 All E.R. 292.

Judgment

Sir Samuel Quashie-Idun P: read the following judgment of the Court:

The two appellants and another named Petcro Molokonyi were charged before the High Court of Uganda holden at Mbale (Baerlein, Ag.J.) of the offence of murder. The facts of the case are as follows: At 3 o'clock in the afternoon of February 20, 1964, Kaaji Takale, P.W. 2 and the wife of the deceased saw the two appellants at the house where she and the deceased lived. They spoke to the deceased and left. During the night of the same day while the witness and the deceased were asleep in one room the witness heard the deceased sneeze. She woke up and was held by the appellants who asked her for money. There were others there with the appellants whom the witness did not recognise. The appellants held a panga and a knife and threatened to kill the witness if she did not give them money. The witness found that her husband had been killed. She saw the deceased's body when the second appellant flashed a torch light

at the deceased. The witness showed the appellants where the money tied in a handkerchief had been kept under the bed. The second appellant took the money. The appellants told the witness not to raise an alarm, but, after they had left the witness raised an alarm. Elimose Mongoto, P.W. 3, was the first to arrive at the house and the P.W. 2 told him the names of the people who had killed her husband. Elimose made a report to the Chiefs who arrived in the morning. Other persons also arrived at the house after hearing the alarm and the deceased's wife made a report to them. On February 22, 1964, Nekemeya Tenaba, P.W. 5, who is the Mutongole Chief, arrived at his house from duty and met the first appellant there. First the appellant told him that he had come to make a report. He told the witness that the second appellant had taken him along to kill the first appellant's uncle and that he wanted the witness to take him to the Gombolola. The first appellant also said other people who had taken part in the killing had left their bicycles in the house of the second appellant. The witness later took down in writing a second statement made to him by the first appellant after which the first appellant took the witness and others to the house of the second appellant. There the first appellant identified a bicycle which he said had been left in the second appellant's house because it was not in a good condition and so they had used another bicycle belonging to the second appellant. The first appellant identified an axe and a panga with which he said they had gone to the deceased's house. On February 21, 1964, the second appellant was arrested, cautioned and told by the police he was a suspect. He denied that he had anything to do with the killing of the deceased. On February 23 he was charged with murder and cautioned by P. W. Omaidi, a Police Corporal. The second appellant made a statement which was recorded by the police officer. In the statement the second appellant denied having taken part in the killing of the deceased. At the trial Petero Molokonyi was acquitted as the prosecution had made no case for him to answer.

The medical evidence as to the cause of death was that the deceased had suffered incised wounds one on the left shoulder and another on the base of the neck which had caused partial decapitation and that a light axe or a sword or panga could have been used in inflicting the injuries. Each of the appellants in an unsworn statement denied having killed the deceased. The learned trial judge, however, found them guilty of the charge and convicted them. They have appealed against their conviction. The following grounds were argued on behalf of the first appellant, namely:

"1. The acting trial judge misdirected himself by holding that the statements made by the first accused were admissible and were voluntarily made although P. 5 said at p. 8, line 13 – '*Many people were present when he (accused) made a report*'

2. It is the contention of the first appellant that since P. 5 expressly and impliedly admitted that the first appellant was beaten *before* he made his statements to P. 5 it was unnecessary to question P. 5 about it. Consequently the acting trial judge erred in law in allowing the statements to be put in evidence.

3. Because the learned acting trial judge erred by holding that there was sufficient evidence of identification (by P. 2 Kaaji Takale) notwithstanding material discrepancies in her evidence concerning what the first appellant was wearing at the scene of the crime and in view of the fact that conditions favouring identification at the scene of the crime were difficult.

4. The learned acting trial judge erred by not addressing his mind to the discrepancies in the evidence of P. 6.

6. The learned acting trial judge erred by holding that since counsel for the first appellant did not cross examine P. 11 about the beating up and threats

made and the circumstances in which the statement was made he (the first appellant) was a liar when he raised the point himself. On the contrary, it is the appellant's contention that this is a misdirection and the fact that the first appellant made this point himself (see p. 16, line 15) is a clear vindication of his truthfulness.

Further, the learned acting trial judge should have conducted a trial within a trial before rejecting the first appellant's statement which he made from the dock."

On behalf of the second appellant the grounds of appeal argued were:

"1. The learned acting trial judge erred by holding that there was sufficient evidence of identification (by P. 2 Kaaji Takale) notwithstanding material discrepancies in her evidence concerning what the second appellant was wearing at the scene of the crime and in view of the fact that conditions favouring identification at the scene of the crime were difficult.

2. The learned acting trial judge erred in holding that the second appellant was sufficiently identified in the light of a torch on a dark night by Kaaji Takale when the second appellant was the very person who was holding the torch in question and could not, therefore, illuminate his face so as to be recognised.

3. The learned acting trial judge erred in rejecting the unsworn evidence of the second appellant, that on the night in question he was sleeping at his home owing to his illness.

4. It is the contention of the second appellant that difficulties arising out of wrong interpretation by inexperienced interpreter may have resulted in a miscarriage of justice."

In respect of grounds 1 and 2 counsel for the appellants submitted that the evidence and the circumstances show that the first appellant was beaten before he made the alleged confession. Learned counsel referred to the evidence of P.W. 5 (Nekemeya Tanaba) who stated that many people were present when the first appellant made the report to him, that some of the people were in an angry mood and some were not, that after the first appellant had made the statement and while he was being taken to the Gombolola Headquarters many people rushed to beat the appellant. Counsel also referred to the evidence given by the witness in cross-examination when he said that the first appellant was not severely beaten before his statement to the witness and asked the court to hold that what the witness said was that the appellant had been beaten before he made his statement but that he had not been severely beaten. We are unable to construe the evidence of the witness in the manner suggested by learned counsel as it is clear to us that the answer given by the witness was a denial of a direct suggestion put to him namely that the first appellant was severely beaten. It is also clear in the evidence of the witness that although other persons were present when the first appellant made the statement to him, it was after he had made the statement and when he was being taken to the Gombolola Headquarters that people rushed to assault him. The witness made it clear in his evidence that when the first appellant made the first report to him only three persons were present. It is our view that the confession made by the first appellant to P.W. 5 was properly held by the learned trial judge to have been voluntarily made and therefore admissible in evidence. The first and second grounds of appeal therefore fail.

In respect of the third ground, learned counsel referred the court to the discrepancies which appeared in the evidence of the deceased's wife and her statement to the police regarding the dress the first appellant wore and the weapon he carried when she saw him on the night the deceased was killed. The learned

trial judge properly considered the discrepancies and expressed no surprise that nine months after making a statement to the police there should be a variance between the evidence of an unsophisticated woman and what she had previously told the police. We think that having considered the discrepancies he was entitled to accept the evidence given by the deceased's wife. She knew the two appellants and had seen them in the afternoon of the day her husband was killed. She said they came to his house and had a conversation with the deceased. The two appellants held her after they had killed her husband and demanded money from her. She raised an alarm immediately after the appellants had left and mentioned the names of the two appellants to Elimose who had arrived on hearing the alarm. Although what she told other people concerning the appellants is not evidence against the appellants, it shows the consistency of the testimony she gave later before the court and corroborates the confessional statements made by the first appellant.

In respect of ground 4, it was submitted that the learned trial judge did not address his mind to a discrepancy which occurred in the evidence of P.W. 7, Akal, who stated that he did not notice any injury on the first appellant but who admitted that the appellant appeared to have been beaten. Later, the witness said that the first appellant had blood stains on his kanzu. The fact that the witness saw blood on the kanzu (a dress) of the first appellant does not mean that his evidence was inconsistent with his former testimony that he saw no injury on the appellant. The court was also referred to the evidence of P.W. 6, Nyango, who said that the first appellant had been slightly injured and also to the evidence of P.W. 11, Kayogera, who also said that he saw blood on the appellant's kanzu and later that he saw an injury on his head. The fact that one witness did not see what another witness saw on the first appellant does not render their testimony inconsistent or false. The witnesses against whose evidence learned counsel complained were police officers who were not expected to examine the appellant to find out in detail the injuries that were on the appellant. The learned trial judge heard the evidence and considered it when he was dealing with the question of the admissibility or otherwise of the statements made by the first appellant. The fact that he did not specifically refer to the evidence in his judgment is therefore no error on his part.

It was argued in respect of ground 6 that the learned trial judge misdirected himself when he stated in his ruling that he did not believe the first appellant's evidence that he had told P.W. 11 that he was not well and that he would like to make his statement later. The reason given by the learned trial judge for not believing the first appellant's evidence was that the allegations he made in court were not put to the P.W. 11 by appellant's counsel. There is no ground for objection to the learned judge's reasoning for it is a rule of evidence as well as of practice that foundation should be laid by putting questions to a witness whose testimony is challenged, otherwise evidence given in denial might reasonably be regarded as an afterthought. There is also a submission that before deciding whether the statements of the first appellant were admissible or not, the court should have conducted a trial within a trial and in the absence of the assessors. A perusal of the record of proceedings clearly shows that the assessors retired when evidence was being given in order to determine whether or not the confessions were properly taken and that they returned to the court after the learned judge had decided to accept the confessions.

Before concluding this judgment as it affects the first appellant, we would like to emphasize that we can find no grounds for accepting the submissions that the first appellant was assaulted, intimidated or that he was induced by terror or menaces by the person who took his statements to make the various confessions he made. There is evidence that after he had made a report and a statement to P.W. 5, he was assaulted by the crowd. This was before he was taken in custody

by the police to whom he repeated the confession he had made to P.W. 5, namely that he and other persons went to the deceased's house, where the deceased was attacked, his money stolen and shared by the attackers. The fact that he had been assaulted by other persons (not those who took the confessions) is not sufficient to render the confessions inadmissible unless it can be proved that the prisoner's mind was affected by the assault, intimidation or inducement so as to make the confessions non-voluntary: *R. v. Gibbons* (1) and *R. v. Clewes* (2).

In arguing the grounds filed on behalf of the second appellant, counsel repeated the submissions he made on behalf of the first appellant in connection with the identification of the appellants by the wife of the deceased. We have dealt with the submissions earlier in this judgment and would only add that it was a question of fact for the learned trial judge and we can find no reason to interfere with that finding. We think that it is not impossible for a man holding a torch light which he flashed in a room to be recognised by a person in the room, particularly as the evidence was not that the torch was flashed at the person in the room but at the deceased who was lying on the bed.

In respect of the second appellant's third ground of appeal, it was contended that the learned trial judge should have accepted the unsworn statement of the appellant. The learned trial judge stated in his judgment that the second appellant had denied that he was one of the persons who attacked the deceased. It is therefore not correct to say that the defence put up by the second appellant was not considered before it was rejected, in view of the evidence of the deceased's wife that she saw the second appellant and other persons on the night her husband was killed and that she was held by the second appellant who demanded money from her which corroborates the statement made by the first appellant. The second appellant's defence was that on the night it was alleged he had joined in killing the deceased, he was sleeping with his wife. He did not go out because he was ill. He did not call his wife to give evidence for him and it is not surprising to us that his defence was rejected, particularly in view of the evidence of the deceased's wife to which we have referred and also the statement by the first appellant which was properly accepted in evidence against the second appellant by virtue of s. 28 of the Evidence Ordinance Cap. 9 of the Laws of Uganda.

The last submissions made by counsel related to alleged difficulties arising out of wrong interpretations during the trial. It is sufficient to say that the learned trial judge stated in his judgment that there was some difficulty about interpretations at the trial and that the original interpreter was changed. There is nothing on the record of proceedings to show that the difficulty which was encountered and which was remedied arose again or that the trial was unsatisfactory and therefore a miscarriage of justice has occurred.

It is our view that the appeals of the appellants have failed and they are accordingly dismissed. There is, however, one matter to which we would like to refer. It is that there are no notes on the record of proceedings of the trial judge's summing-up to the assessors. Section 283 (1) of the Criminal Procedure Code Cap. 24 of the Laws of Uganda states that when the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence. Although the word used in the section is "may" and indicates that the judge is not bound to sum up to the assessors, we think it is desirable that he should do so. See *Washington Odindo v. R.* (3) and *Andrea Kulinga v. R.* (4) and that when he does so, notes of the summing-up should appear on the record of proceedings. The importance of the notes of the summing-up should appear on the record of proceedings. The importance of the notes of the summing-up, both to the Appeal Court and to the appellant, cannot be over-emphasized. This was made clear in the case of *Boateng v. R.* (5) in which the Judicial Committee of the Privy Council held that although the trial judge

did not deliver a written judgment and only

accepted the opinions of the assessors and convicted the appellant, his summing-up to the assessors had covered all the points which arose for determination. Submissions are made frequently on the ground of misdirection that the summing-up did not contain some important issues for consideration. It is only when the notes appear on the record that the submissions can be maintained or answered. In a recent decision in the case of *Kakaka Wambeabea v. Uganda* (6) this court pointed out the importance of the judge's summing-up appearing on the record of proceedings, notwithstanding that the trial judge delivered a written judgment subsequently. In the case of *Bharat Dorsamy v. R.* (7), the trial judge wrongfully directed the assessors on provocation and the assessors gave their opinions that the appellant was guilty of murder. The judge then gave a reasoned judgment in which he made no mention of provocation and convicted the appellant. The case was one in which provocation should have been considered. On appeal, the Privy Council held that as the assessors had been misdirected on a vital point their opinions were vitiated; that the trial judge had disabled himself from taking proper opinions into account as he should have done and that in the circumstances the conviction must be quashed.

Appeal dismissed.

For the appellants:
JWR Kazzora
JWR Kazzora, Kampala

For the respondent:
TS Cotran (State Attorney, Uganda)
The Attorney General, Uganda

Maina Thuku alias Maina Nyaga v Republic
[1965] 1 EA 496 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	8 June 1965
Case Number:	28/1965
Before:	Sir Samuel Quashie-Idun P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Chanan Singh, J

[1] Criminal law – Murder – Provocation – Killing in heat of passion caused by sudden provocation – Whether sufficient time elapsed after provocation for passion to cool – Degree of provocation relevant factor.

Editor's Summary

The appellant saw his step-father, the deceased, beating his mother outside their house when he arrived there in a drunken state one night and tried to separate them. The deceased hit the appellant with a stick twice and told him not to interfere in a fight between husband and wife. The appellant then went into the house and slept for a few hours until he was awakened by the deceased calling him. Upon going outside he found his mother dead with a severe injury at the back of her head and saw the deceased some distance away. The appellant then lifted the body of his dead mother and put it in the shade and then took a panga from the house and chased the deceased to a house about 300 yards away. There the appellant and the deceased exchanged words which apparently made him more angry and while they were walking towards his mother's body the appellant attacked the deceased and killed him. The appellant was charged with murder and the trial judge accepted the defence that there was sufficient provocation to have caused the appellant to be in "the heat of passion" as described in s. 207 of the Penal Code, but held that sufficient time had elapsed for the appellant's anger to have subsided and that therefore the plea of provocation could not be sustained. On appeal,

Held –

(i) the events were so continuous as to make the act of killing the mother so proximate to the appellant as constructively to have been done in his presence;

(ii) the degree of provocation is a relevant factor in considering whether the heat of passion in an accused person, regarding him from the standard of the ordinary man, had had time to cool or whether the provocation would still be bearing on his mind so as to deprive him of the power of self control;

(iii) when the appellant killed the deceased he was still acting in the heat of passion without regaining his self control; accordingly the plea of provocation was available to the appellant and the conviction of murder should be reduced to manslaughter.

Appeal allowed. Conviction of murder set aside and conviction of manslaughter substituted.

Cases referred to in judgment

(1) *Tei Kabaya v. R.*, [1961] E.A. 580 (C.A.).

(2) *Goboye Parmat v. R.* (1949), 16 E.A.C.A. 140.

(3) *Kwaku Mensah v. R.*, [1946] A.C. 83.

Judgment

Duffus JA: read the following judgment of the court:

The appellant, Maina Thuku, was convicted of the murder of his step-father, Nyaga. The appellant admits that he killed his step-father but he relies on the provisions of ss. 207 and 208 of the Penal Code and pleads that the offence should have been reduced to manslaughter as he killed his step-father in the heat of passion caused by the sudden provocation of witnessing the deceased beating his mother to death. The learned trial judge accepted the defence that there was sufficient provocation to have caused the appellant to be in "the heat of passion" as described in s. 207 but he held that sufficient time had elapsed for the appellant's anger to have subsided and that the plea of provocation could not therefore be sustained.

Two questions arise here: first, was there in fact such sudden provocation as defined in ss. 207 and 208 and following on this was there, on the evidence, sufficient time for the appellant's passion to have cooled down before he attacked the deceased? Section 207 of the Penal Code states:

> "When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only."

and the relevant portion of s. 208 states:

> "(1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person . . . to whom he stands in a . . . filial relation, . . . to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed

upon the person by whom the act or insult is done or offered."

The evidence relating to this incident is to be found largely in that given by the appellant at the trial and in his statement to the police. There was, however,

the unsworn evidence by a small boy, Kigatho, apparently the appellant's son, who saw the deceased assaulting his grandmother and also that of Sub-Inspector Aloo who investigated the case and found the dead body of the appellant's mother about six yards from the house in which both the deceased and the appellant lived. She had a depression at the back of her head and blood which appeared to have come from her nose. The judge accepted as a fact that the deceased beat the appellant's mother and caused her death. The judge also appears to have accepted the appellant's evidence as to what had occurred. In his evidence the appellant said he had been drinking and returned home in a drunken state. He said, *inter alia*:

> "I was drunk. I was staggering. I did not know all those people there. I returned home after my parents had reached there. When I arrived near my home, I heard my mother cry. They were just outside the house. I stated separating them. Nyaga hit me with a stick on my head and neck and said that I should not interfere in a fight between a husband and wife. I did not ask them the reason for their fight because I was feeling dizzy as a result of being hit. When I tried to separate them again Nyaga hit me on the neck. He hit me only once on the neck and once on the head.
>
> I got into the house because I was feeling dizzy. I went to bed and slept. I slept like a dead person and I did not know what happened after that.
>
> I did not get up at all until 5 a.m. I might have gone to bed about midnight.
>
> I woke up at 5 a.m. because I was called by Nyaga Murage, the man whom I fought. I did not reply because I was still feeling sleepy. I heard someone say that he was going to headman. I got out to speak to him, Nyaga Murage. I did not see him outside. I only found a woman dead. She was my mother. I turned her over to see if she was dead. I saw that she had been hit on the head. I took her to a place about 5 yards away, that is about 2½ paces. I kept her body there, where there was no sun.
>
> I returned to my house full of anger, because I had seen my mother dead. I knew that Nyaga had killed her. I had seen them fighting and I had tried to separate them. I took a panga and went out with it. I looked to the west and saw Nyaga Murage entering the house of Gitau Wahiri."

There have been a number of reported cases from this court on the question as to whether the provocation to the other person has been done in the presence of an accused person. This court considered all these various authorities in the case of *Tei Kabaya v. R.* (1). This was a case where the provocation pleaded was first an assault on the accused himself and then an assault on his father which he did not actually witness. We would refer to the following passages from the judgment which dealt with the assault on the father and which are relevant to the facts in this case:

> "This, however, is not the only provocation to be considered. On the appellant's return with the panga he heard his father shouting and saw him bleeding from the face and, presumably, Cheruyot standing by with the stick or knife, or both as the case may be; Cheruyot says he had picked up the knife. The second accused said that he shouted that he was being killed. Cheruyot said he did not know what he was shouting as he did not understand the language. The circumstances were such that the appellant might reasonably assume there had been an unprovoked assault on his father. In our view, although such assault was not actually in view of the appellant, it was sufficiently proximate to amount to provocation under s. 209. In *Gaboye Parmat v. R.* (2), it was held in the terms of the headnote,

> ‘That although the sight of his brother’s bleeding head must have angered the appellant, there was no provocation within s. 202 of the Tanganyika Penal Code as the wrongful act was not done in the presence of the appellant.
>
> The circumstances were that the appellant’s half-brother, Kameri, had been hit by the deceased. Kameri, after regaining consciousness, went to the house where the appellant was and, his face covered in blood, told the appellant that the deceased had beaten him. The appellant then went to the deceased’s hut and killed him by a blow with a knobkerrie. The court said the provisions of s. 202 of the Tanganyika Penal Code (similar to our s. 209)–
>
> > ‘cannot possibly be stretched to cover the circumstances obtaining. Here, the appellant acted on a report he received from his brother, he then took a weapon and sought out the deceased who he found sitting in his own hut. It was no momentary act of uncontrolled passion on seeing his brother bleeding from a head wound, but a retaliatory act of revenge.’
>
> The court went on to say further:
>
> > ‘we can conceive circumstances in which the act might be done in such immediate proximity to the person accused as to make the doctrine of “constructive” presence possibly applicable.’”

The learned judge did not deal with this aspect of the case in his judgment but he found that the circumstances here were such as to be legal provocation as defined by ss. 207 and 208 of the Penal Code and we consider that he was correct and properly directed himself on the law in coming to this conclusion. The circumstances of this case show that the deceased was beating the appellant’s mother, then he was awakened by the deceased calling to him and upon going outside he found his mother dead with a severe injury at the back of her head and blood which had come from her nose and then saw the deceased some distance away entering the house of one Gitau. We regard the series of incidents here, the beating of the appellant’s mother, the assault on the appellant, and the comparatively short sleep of the appellant and his being aroused by the deceased a few hours later in the early morning and his going out and suddenly finding his mother dead, with severe injuries and blood-stains, and seeing the deceased going away, as all forming one connected series of events which culminated in his finding the dead body of his mother with the injuries which, he correctly concluded, had been given by the deceased. We think this makes the actual killing of his mother so proximate to the appellant as constructively to have been in his presence. We find, therefore, that the learned trial judge was correct in holding that this was sufficient sudden provocation within the meaning of ss. 207 and 208 as to have caused the appellant to get in such a heat of passion as would be sufficient to reduce his crime committed during such a state of mind from murder to manslaughter.

The judge then went on to find that there had been time for the appellant’s passion to cool. The time in this case started to run from the discovery of his dead mother’s body until he killed the deceased. During this time the appellant first lifted the body of his dead mother and put it, as he says, in the shade two and a half paces away, and he then took a panga and chased the deceased to Gitau’s house which was within sight and, he said, about three hundred yards away. There the deceased and the appellant exchanged words which apparently made the appellant more angry and they then walked with Gitau and another man called Migwe, going back towards his mother’s body and it was during this journey that the appellant attacked the deceased and caused his death.

The question of the degree of provocation must be a relevant factor in considering whether the heat of passion in an accused person, regarding him from

the standard of the ordinary man, had had time to cool or whether the provocation would still be operating on his mind so as to deprive him of the power of self-control. It is difficult to imagine greater provocation than that of a son witnessing his mother being beaten to death and, in this case, the discovery of the dead body of his mother and the assault on the deceased was again apparently a continuous series of events, all within a comparatively short period of time. There was the discovery, the chase of the deceased, the passage of words between them the final assault which resulted in the death of the deceased. This is a question of fact but we are of the view that the evidence does not support the finding of the learned trial judge that a considerable time had elapsed before the appellant killed the deceased but rather that it would appear, in all the circumstances, that the appellant was still acting in the heat to have regained his self-control. In this respect we would refer to the decision of the Privy Council in the case of *Kwaku Mensah v. R.* (3), ([1946] A.C. at p. 93), which dealt with this question.

We would, therefore, allow the appeal and reduce the conviction from murder to manslaughter and accordingly we set aside the sentence of death and substitute an order that the appellant be imprisoned for seven (7) years.

Appeal allowed. Conviction of murder set aside and conviction of manslaughter substituted.

For the appellant:
CN Omondi
Omondi & Gautama, Nairobi

For the respondent:
IE Omolo (Deputy Public Prosecutor (S.), Kenya)
The Attorney General, Kenya

Wanja Kanyoro Kamau v Republic
[1965] 1 EA 501 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	23 April 1965
Case Number:	138/1964
Before:	Crabbe, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Farrell, J

[1] Criminal law – Practice – Opening of case for prosecution – Prosecuting counsel should avoid reference to evidence admissibility of which is open to challenge – Opening address should be limited to statement of basic facts.

[2] Criminal law – Murder – Accomplice – Witness passively witnessing commission of offence – No attempt to prevent killing – No report made to police – Main evidence against accused of such witness – Whether witness should be regarded as accomplice.

[3] Criminal law – Evidence – Confession – Retracted confession – Corroboration – Witness passively witnessing commission of offence – No attempt to prevent crime – No report made to police – Main evidence against accused of such witness – Whether evidence of such witness capable of affording corroboration to retracted confession – What weight to be given to such evidence.

[4] Criminal law – Murder – Common intent – Two accused charged jointly with murder – Nolle prosequi entered in respect of one – After defence case closed prosecuting counsel stating that he was not alleging common intent – Whether trial judge precluded from considering whether there was common intent.

Editor's Summary

The appellant was jointly charged and convicted with one N. of murdering her husband. The main evidence against her was that of her mother who testified that she saw the appellant striking the deceased on the back of the neck with a panga; that N. struck the deceased three times on the head with a rungu; that the deceased fell down and both N. and the appellant struck him again; and that the deceased ran into the bush pursued by N. and the appellant. The mother did not report the crime to the police. The only other material evidence against the appellant was a cautioned statement made by her to the police, which she retracted at the trial and the fact that she pointed out to a chief where the deceased's remains were to be found. In his opening address the prosecuting counsel stated that the appellant had made a full confession implicating N. After sixteen witnesses had been examined and three trials within a trial had been held and two rulings given, in which it was held that two out of the three alleged confessions were inadmissible as evidence, including the confession which implicated N., the point was taken that counsel's opening statement was so prejudicial that it would be difficult to erase from the assessors' minds the impression it must have created. After some discussion as to the proper course to adopt a nolle prosequi was entered in respect of N. and the trial of the appellant proceeded. The trial judge considered whether the mother should be regarded as an accomplice and concluded that she was not, although he directed the assessors to take into account her failure to report the crime in deciding what weight to give to her evidence. The trial judge found the mother to be substantially a witness of truth and directed the assessors that they might treat the evidence of the mother as corroboration of the cautioned statement and convicted the appellant. On appeal the main grounds of appeal argued were that the judge erred both in deciding that the mother was not an accomplice and that there was corroboration of the retracted confession.

Held –

(i) in the circumstances of the case a nolle prosequi should not have been entered in respect of N., but instead the assessors should have been discharged and the trial begun de novo with fresh assessors;

(ii) a passive attitude while a crime is being committed or following the commission of a crime will not ordinarily make a person a principal offender in the former case, or an accessory after the fact in the latter case;

(iii) a mere non-reporting of a crime cannot make a person an accessory after the fact to that crime within the meaning of "an accessory" in s. 396 of the Penal Code;

(iv) while a person who aids and abets the commission of a crime or assists the guilty person to escape punishment is always an accomplice, a person who merely acquiesces in what is happening or who fails to report a crime is not normally an accomplice but the weight to be given to such person's evidence should vary according to the reason for the acquiescence; if the acquiescence was based on approval of the crime, the evidence should be treated as no better than that of an accomplice; if, however, the acquiescence was based on indifference, the evidence should be treated with considerable caution; but if the acquiescence was a result of fear then there is no reason why the evidence should not be relied upon;

(v) on the facts of the case the judge was correct in holding that the mother was not an accomplice, but her conduct was such as to indicate that she was "in sympathy with the criminals" and her evidence therefore required "the closest scrutiny"; there is no rule of law or practice which required corroboration of her evidence;

(vi) the judge's direction regarding retracted confessions was correct and the mother's evidence, not itself requiring corroboration, was capable of affording corroboration;

(vii) a statement by prosecuting counsel after the close of the defence that the prosecution was not alleging common intent does not preclude the trial judge from finding that there was such common intent;

(viii) the judge correctly directed himself on the question of common intent and he was entitled to reach the conclusion he did.

Appeal dismissed.

Cases referred to in judgment

(1) *Abdulrasul Jivraj v. R.*, [1931] 1 T.L.R. (R.) 667.

(2) *R. v. Lifa* (1946), 13 E.A.C.A. 102.

(3) *Sita Zatio v. R.*, [1957] E.A. 308 (C.A.).

(4) *Zuberi Rashid v. R.*, [1957] E.A. 455 (C.A.).

(5) *Toyi Kalihose v. R.*, [1960] E.A. 60 (C.A.).

(6) *Pyaralal Melaram Bassan v. R.*, [1961] E.A. 521 (C.A.).

(7) *Nguthari v. R.*, E.A.C.A. Criminal Appeal No. 163 of 1964 (unreported).

Judgment

Spry JA: read the following judgment of the court: The appellant was jointly charged with one Ngugi Kaimba with the murder of her husband, Kamau Karijithe.

It appears that in opening for the prosecution, learned counsel had said that the appellant had made a full confession implicating Ngugi. After sixteen witnesses had been examined and three trials within a trial had been held and

two rulings given, in which it was held that two out of three alleged confessions were inadmissible as evidence, including the confession which implicated Ngugi, the point was taken that counsel's opening statement was so prejudicial to Ngugi that it would be difficult to erase from the assessor's minds the impression it must have created. After some discussion as to the proper course to adopt a nolle prosequi was entered in respect of Ngugi and the trial of the appellant proceeded. We think, with respect, that the better course, in the circumstances, would have been to discharge the assessors and for the trial to have been begun de novo with fresh assessors.

We would emphasise that, in our opinion, prosecuting counsel when opening should avoid any reference to evidence the admissibility of which is open to challenge, particularly confessions. Indeed, in the circumstances of East Africa today, where the evidence given at trials is often materially different from that given at the preliminary inquiries, we think it advisable, as a general rule, that opening addresses in criminal trials be limited to a statement of the basic facts which the prosecution expects to prove. This would obviate the danger of assessors confusing counsel's statement of the evidence to be called with the evidence itself.

The appellant was in due course convicted of murder and it is against that conviction that she now appeals.

The main evidence against the appellant was that of a woman, Wambui Kanyoro; the mother of the appellant. She testified that she saw the deceased, Ngugi and the appellant at a place where they used to burn charcoal. There was apparently some argument about money between the appellant and the deceased and the appellant struck the deceased on the back of the neck with a panga. The Ngugi struck the deceased three times on the head with a rungu. The deceased fell down and both Ngugi and the appellant struck him again. The deceased got up and ran into the bush pursued by Ngugi and the appellant. The witness went home.

The only other material evidence against the appellant was a cautioned statement made by her to an Inspector of Police, which she retracted at her trial, and the fact that she pointed out to a chief who was investigating the disappearance of the deceased where his remains were to be found. Those remains were in an advanced stage of decomposition and had apparently been partly eaten by wild animals, so that the pathologist who examined them was unable to give any opinion as to the cause of death.

The learned trial judge, in his very careful judgment, considered whether Wambui was to be regarded as an accomplice. He concluded that she was not, although he directed the assessors to take into account her failure to report the crime in deciding what weight to give her evidence. The first ground of appeal was against that finding. Counsel for the appellant cited two East African cases (both derived from Tanganyika), and referred to the commentaries on the Indian Evidence Act, 1872, in support of his submission that the learned judge had misdirected the assessors and himself. The first of the two cases was *Abdulrasul Jivraj v. R.* (1), which may be taken as authority for the general proposition

> "that where a witness admits that he was cognizant of the crime as to which he testifies and took no means to prevent the commission of the offence, his evidence should be regarded as no better than that of an accomplice. Such a ruling must rest upon the view that where in the circumstances described a man is quiescent and takes no steps to communicate his knowledge with a view to preventing the commission of the projected crime, he must be taken to be in sympathy with the criminals and so to be a man upon whose evidence a court should only act after the closest scrutiny".

The court went on, however, to say such an inference should not necessarily be drawn in the case of unsophisticated persons.

R. v. Lifa (2) was a case in which a woman witnessed a murder but omitted to report it and, indeed, denied knowing what had happened. The court observed:

> "All this, however, happened in a very short time and while she was under the influence of the accused, her lover, and a female relative of his. Not long afterwards, however, she reported the true facts to the Chief as a result of which the accused was arrested. The delay in reporting the matter was so short that we do not consider that it was sufficient in the circumstances to make her an accessory after the fact as defined in the Penal Code."

Counsel for the appellant argued from this passage that where the delay in reporting is substantial, as in the present case, the witness ought to be treated as an accomplice.

We think it is quite clear that a passive attitude while a crime is being committed or following the commission of a crime will not ordinarily, of itself, make a person a principal offender, in the former case, or an accessory after the fact, in the latter.

The law of Kenya, like that of Tanganyika (*Sita v. R.* (3)), does not use the expression "accessory before the fact", but by s. 20 of the Penal Code (Cap. 63) makes every person who counsels or procures or aids or abets the commission of an offence a principal offender. *Zuberi Rashid v. R.* (4) is authority for saying that mere passivity may amount to abetment in special circumstances and result in conviction as a principal offender but it lays down the general rule that

> "it is not sufficient to constitute a person a principal in the second degree that he should tacitly acquiesce in the crime, or that he should fail to endeavour to prevent the crime or to apprehend the offenders, but that it is essential that there should be some participation in the act, either by actual assistance or by countenance and encouragement."

An accessory after the fact is defined in s. 396 of the Penal Code and it appears to us that the mere non-reporting of a crime cannot make a person an accessory after the fact to that crime within the meaning of that section. We think *R. v. Lifa* (2) is to be explained by the fact that the witness in that case not merely failed to report the crime but actually made a false statement, and that it was the combination of those facts that might have been, but in fact was not, held to constitute an attempt to assist the guilty party to escape punishment.

It follows from these authorities, in our view, that while a person who aids and abets the commission of a crime or assists the guilty person to escape punishment is always an accomplice, a person who merely acquiesces in what is happening or who fails to report a crime is not normally an accomplice but that the weight to be given to such a person's evidence will vary according to the reason for the acquiescence. If it was apparently based on approval of the crime, the evidence will be treated as no better than that of an accomplice; if it was based on indifference, the evidence will be treated with considerable caution; but if, for example, it was the result of fear, there is no reason why the evidence should not be relied on.

Applying these principles to the present appeal, Wambui was a person who passively witnessed a crime and who failed to report it. On her own evidence, she made no attempt to prevent the killing of the deceased; she did not attempt to raise an alarm nor did she try to dissuade the killers; she merely asked casually why the deceased was being killed and then went home. She made no report of the crime until questioned by the police and when asked why she had

not reported the matter, she said that Ngugi had asked her not to. On these facts, we feel that while the learned judge was correct in holding that Wambui was not an accomplice, her conduct was such as to indicate that she was "in sympathy with the criminals" and her evidence therefore required "the closest scrutiny". We do not, however, think that it was evidence which, under any rule of law or practice, required corroboration.

The learned judge scrutinised the evidence of Wambui with great care and, while noting various discrepancies, found her to be substantially a witness of truth. It is apparent that the assessors were of the same opinion.

As we have earlier said, the other material evidence against the appellant was her own cautioned statement, which she retracted at the trial. In relation to this, the learned judge directed the assessors that it is dangerous to rely upon a retracted confession in the absence of corroboration, but that they might do so if fully satisfied that the confession must be true. He further directed them that they might properly treat the evidence of Wambui as corroboration of the cautioned statement.

It was argued for the appellant that these were misdirections and that the learned judge had erred in finding that there was corroboration of the retracted confession and in convicting on it.

We think that the learned judge's direction regarding retracted confessions was correct (*Toyi Kalihose v. R.* (5); *Pyaralal Melaram Bassan v. R.* (6)) and that Wambui's evidence, not itself requiring corroboration, was capable of affording corroboration.

In her cautioned statement, the appellant said that she went with her husband to the place where he burned charcoal and that as he stooped down, she cut him on the back of the neck with a panga. She said that she cut him twice more and then hid his body in the bush. She made no mention of Ngugi being present.

Both Wambui's evidence and the appellant's cautioned statement referred to an earlier quarrel between the appellant and her husband but neither contained any statement of fact capable in law of amounting to provocation.

As is immediately apparent, Wambui's evidence corroborates the appellant's statement that she struck her husband on the back of the neck with a panga but whereas the cautioned statement clearly amounts to a confession of murder by the appellant alone, Wambui's evidence leaves it in doubt whether the deceased was actually killed by the appellant or by Ngugi and, as we have said, the medical evidence affords no assistance.

At the trial, the appellant made a statement from the dock, admitting that she had a quarrel with her husband at the place where they burned charcoal and that she had hit him with the back of a panga, but she said that she left him there and she denied killing him.

The learned judge held that there was no substantial conflict between the evidence of Wambui and the appellant's cautioned statement, the only difference being the omission from the latter of any mention of Ngugi, and in that respect it is clear that he preferred the evidence of Wambui whom he regarded as a witness of truth, notwithstanding her deplorable conduct at the time of the murder.

This reliance on the evidence of Wambui, which left in doubt the question who had struck the fatal blow, led the learned judge to consider whether the evidence indicated that the appellant and Ngugi had acted in pursuance of a common intention (within the meaning of s. 21 of the Penal Code) to kill the

deceased. He directed the assessors and himself that there was no evidence to show that there was any common intention at the time when the appellant struck the first blow and he observed that if the appellant had subsequently

gone away or dissociated herself from the subsequent acts of Ngugi, there would be no basis for holding that there was ever a common intention. If, however, after Ngugi had assaulted the deceased, the appellant had struck further blows, that would be evidence of a common intention at that stage.

Counsel for the appellant drew our attention to the fact that learned prosecuting counsel, in his closing address, had said that the prosecution were not alleging a common intention and he argued that this precluded the learned judge from basing his decision on a finding that there had been such a common intention. We do not, with respect, think there is any merit in this submission. Counsel's statement, which we find difficult to understand, was made after the close of the case for the defence and cannot, therefore, have influenced the conduct of the defence.

We think this case can clearly be distinguished from a recent case in which a somewhat similar situation arose. That was the case of *Nguthari* v. R. (7). In that case, as in this, there were originally two accused jointly charged and in the course of the proceedings a nolle prosequi was entered in respect of one. This was at a comparatively early stage in the proceedings, and the circumstances were such as clearly to imply that the person discharged had not participated in the offence. In the judgment of this court, delivered by de Lestang, J.A., it was said–

> "As the prosecution case at the trial was solely that the fatal injury was inflicted by the appellant alone, common design was never an issue at the trial and it is felt that it would not be right for this court to decide the fate of the appellant on such an issue."

In the present case, on the contrary, it was clearly the prosecution case, as well after the nolle prosequi had been entered as before, that the appellant and Ngugi were jointly concerned in the killing.

We think the learned judge directed himself correctly on the question of common intent and that he was entitled to reach the conclusion he did.

The only other point argued on the appeal was that the opening address by prosecuting counsel with its reference to a confession or confessions was prejudicial to the appellant. We do not, of course, know what counsel said, but as counsel for the defence conceded at the trial that there was no prejudice and as one confession made by the appellant was admitted in evidence, we think there is no substance in this ground of appeal.

Appeal dismissed.

For the appellant:
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Zaher Ahmed & Co, Nairobi

For the respondent:
JB Karugu (State Attorney, Kenya)
The Attorney General, Kenya

Abasi Kibazo v Uganda
[1965] 1 EA 507 (CAK)

Division: Court of Appeal at Kampala

Date of judgment:	1 April 1965
Case Number:	189/1964
Before:	Sir Samuel Quashie-Idun P, Newbold Ag V-P and Sir Clement de Lestang JA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Sir Udo Udoma, C.J

[1] Criminal law – Rape – Evidence – Complainant – Corroboration – Contradiction in complainant's evidence and statement made to police – Complainant's evidence in some important respects false – Misdirection.

Editor's Summary

The appellant was convicted of rape mainly on the evidence of the complainant. There were contradictions in her evidence and the statement she made to the police, and the evidence of the medical assistant who had examined her. In other respects, the evidence of the complainant was false. The trial judge found that there was abundant corroborative evidence implicating the accused from the fact that the appellant and the complainant were together at the time in a house where the assault was alleged to have taken place; and that afterwards the complainant went straight to her home and made a report to her mother.

On appeal,

Held –

(i) the trial judge placed a far greater reliance on the evidence of the complainant than was desirable in view of the contradictions and falsehoods in her evidence;

(ii) in the circumstances it was unsafe to allow the conviction to stand and the conviction should be quashed.

Appeal allowed. Conviction quashed.

Cases referred to in judgment

(1) *R. v. Zielinski* (1950), 34 Cr. App. R. 193.

(2) *R. v. Alan Redpath* (1962), 46 Cr. App. R. 319.

(3) *R. v. Bradley* (1910), 74 J.P. 247; 4 Cr. App. R. 225.

(4) *R. v. Harling* [1938] 1 All E.R. 307.

April 1. The following judgments were read:

Judgment

Sir Samuel Quashie-Idun P: The appellant was convicted by Sir Udo Udoma, C.J. of the offence of

rape and sentenced to six years' imprisonment.

The facts of the case are as follows. The complainant, Hadija Namirembe, who was looking for employment was introduced to the appellant in 1963 by the appellant's aunt, Hajati Fatuma, and the appellant was requested to assist the complainant to obtain employment. On July 9, 1964, the appellant visited the house of Hajati Fatuma who sent for the complainant. The complainant's father was also in the house. Hajati Fatuma told the complainant that the appellant had secured an employment for her at Kampala. At the request of the appellant the complainant went out with the appellant to obtain certain books from the appellant's house which he said he would like the complainant to read. The appellant took the complainant to a house. They found the door

of the house locked and the appellant told the complainant to wait outside the door while he, the appellant, went in search for the owner of the house. Later the appellant returned with the owner of the house, Mulani Swahabab, who opened the door. The appellant and the complainant were led into a room by Swahabab who shortly afterwards left the room. According to the complainant, the appellant then pushed open a door leading into another room from which he brought out a bag containing some papers which he handed over to the complainant. As the complainant stretched out her hand to take the papers, the appellant caught hold of her hand and pulled her into the other room. The complainant said she fell down on the floor of the room. A struggle ensued between the complainant and the appellant during which the complainant said she raised an alarm. The appellant told her not to shout as the complainant's father had already "given her" to the appellant. The appellant then covered the complainant's mouth with his hand. The struggle continued while the complainant lay with her face on the ground and the appellant tried to turn her over. The appellant, having failed to turn the complainant over, lay on her back and inserted his penis into her anus. The complainant felt pains in her anus and she pleaded with the appellant to allow her to lie on her back. The appellant then slackened his hold on the complainant who then turned round facing the appellant as she lay down. The appellant then held the complainant's two hands together over her head, put his knee between her legs and pushed them open. According to the complainant she became weak and the appellant then had sexual intercourse with her. She was totally weak as a result of the struggle and could not resist. She felt severe pains while the appellant was having intercourse with her. When the appellant got up, he went outside the room, returned and asked the complainant to go and wash herself, pushed her outside the house where there was a basin of water and asked her to wash her private parts. The complainant refused to do so. The appellant then washed the complainant's private parts with the water and went with her back into the room. The appellant them asked the complainant if she would report the incident to anyone and she said she would not. The appellant then gave her Shs. 2/-for her transport home. The owner of the room, Swahabab, returned to the room just at this time, and, according to the complainant, the appellant told Swahabab that he, the appellant, had committed an offence. Swahabab then replied, "Don't tell me that, don't bring the devil to me, I am going to say my prayers".

The complainant went home and made a report to her stepmother. Later the complainant's father arrived and took her to the Police Station. She was taken to the hospital where she was examined by a medical assistant who gave evidence for the prosecution. At the time she gave evidence the complainant gave her age as 18 years and also stated that she was a virgin until she was assaulted by the appellant. She said she bled from her vagina and that her dress was bloodstained. This evidence was false as the medical assistant who examined her on the day she was alleged to have been raped, told the court in his evidence that she was not a virgin. The dress she wore at the time of the alleged assault which she also said was bloodstained, was found on examination not to have contained blood. Under cross-examination, the complainant stated that although she had known the appellant for two years he was not her friend. The day on which she was assaulted was her second time of meeting the appellant. She denied at first having written five letters to the appellant and said that she had written a letter to him asking him to assist her in finding employment. Later, still under cross-examination, she admitted that she had written other letters to the appellant and that some of them were love letters. She added:

> "I was not in love with the accused. I wrote some love letters to the accused because Hajati Fatuma had told me that after the accused had secured a job

> for me he would marry me but I did not believe that the accused would marry me. I wrote love letters to the accused in order to persuade him to find a job for me."

In her evidence Fatuma told the court that she knew that both the accused and the complainant were arranging to marry and that she, the witness, was making the arrangement for them. She also said that while the complainant and the appellant were in her house she did not hear them talk about marriage, but, that she heard the complainant ask the appellant, "Why don't you reply to my letter?"

The complainant also admitted under cross-examination that she told the police as follows in her statement:

> "He (appellant) pulled me in the bed and shut the door and then used me."

Later, still under cross-examination, she said it was not correct that she said so to the police and that what she said was that she was put near a bed.

The appellant gave evidence at the trial. He denied having had sexual inter-course with the complainant and stated that the complainant had given false evidence against him because he had refused to marry her and had kept her waiting for a long time for the marriage and that she felt he had let her down.

In his judgment the learned Chief Justice stated as follows:

> "The court must therefore warn itself of that danger in this case. Having so warned myself and carefully considered the evidence, I am convinced that Hadija Namirembe (complainant), whose demeanour I have watched in the witness box, is a witness of truth. She struck me as intelligent and honest. She was impressive in the witness box and gave her evidence unhesitatingly and frankly, and even when she made mistakes she was quick to point them out.
>
> If her evidence had stood alone I would still have been inclined to accept her story and to act upon it. As it is her evidence has been reinforced by the medical evidence given by Erifasi Matwaro (P.W. 2), particularly on the issue of sexual intercourse. I agree with the submission that the evidence of her complaints to her parents cannot amount to corroboration. It is clearly evidence of the consistency of her conduct with the story told by her in this Court and it must, accepting it as I do, negative her consent. . . .
>
> I am of the opinion that the evidence of Hadija Namirembe (P.W. 3) has been amply corroborated. I think corroboration of her evidence on the issue of sexual intercourse may, in addition to the medical evidence, be found in the evidence of her parents."

The learned Chief Justice also found that there was abundant corroborative evidence implicating the accused. He referred to the evidence that the complainant and the appellant were together in Hajati Fatuma's house, that they went together to Swahabab's house, that after they had left Swahabab's house the complainant went straight to her home and made a report to her mother. The learned Chief Justice concluded:

> "These circumstances must lead irresistibly to the conclusion which a reasonable Court must draw, and which I do now draw, that it was the accused who had had unlawful sexual intercourse that day with Hadija Namirembe (P.W. 3) without her consent in the house of Mulani Swahabab (D.W. 2)".

A number of grounds of appeal were filed on behalf of the appellant but his counsel argued the following grounds, namely:

> "1. That considering all the circumstances of the case the judge erred in accepting the evidence of the complainant P.W. 3.

2. That the judge erred in ignoring the contradictions contained in the evidence of the complainant P.W. 3 especially with regard to the love affair between her and the accused, blood which she alleged to have stained her dress, and the statements she made regarding whether rape took place on the bed or on the floor.

4. That the judge misdirected himself in holding that P.W. 2's opinion with regard to the injuries sustained by the complainant was to the effect that they could only have been caused by sexual intercourse had without consent.

5. That the judge erred in holding that the depressed appearance of the complainant when she came to her parents amounts to corroboration. There was evidence from the accused's defence that the complainant was depressed and annoyed by the accused's decision not to marry her. This could have caused her depressed appearance before her parents."

Learned counsel argued grounds 1, 2 and 5 together and submitted that in view of the discrepancies in the evidence of the complainant to which we have referred earlier in this judgment, the learned Chief Justice erred in ignoring these contradictions and accepting the evidence as he did.

With the greatest respect to the learned Chief Justice we think he placed a far greater reliance on the evidence of the complainant than was desirable in view of the contradictions, and in some respects, some false evidence she gave before the court. There was her evidence that before the alleged assault she was a virgin, that she bled from her vagina as a result of the rape upon her thereby implying that her hymen had been ruptured and that her dress was stained with blood. All this was proved to be false and we would hesitate to describe any person who gives such evidence as being honest and impressive. We would also hesitate to describe the admissions extracted from her under cross-examination as mistakes. It does not appear that the learned Chief Justice considered the apparently false evidence and contradictions in his judgment although he did state that he had warned himself and had carefully considered the evidence before arriving at his conclusion.

Apart from the fact that the evidence which was led to prove the charge came from the complainant alone and that she gave evidence which was false, there was the contradiction in her evidence and the statement which she made to the police. She told the police that intercourse took place on the bed, while in her evidence she said she was raped on the ground.

We accept the learned trial judge's finding based on the authorities of *R. v. Zielinski* (1) and *R. v. Alan Redpath* (2) that in sexual offences the distressed condition of the complainant is capable of amounting to corroboration of the complainant's evidence, but we think that this would depend upon the circumstances and the evidence.

In the case of *R. v. Alan Redpath* (2) the Lord Chief Justice stated as follows in his judgment:

> "It seems to this court that the distressed condition of a complainant is quite clearly capable of amounting to corroboration. Of course, the circumstances will vary enormously, and in some circumstances quite clearly no weight, or little weight, could be attached to such evidence as corroboration. Thus, if a girl goes in a distressed condition to her mother and makes a complaint, while the mother's evidence as to the girl's condition may in law be capable of amounting to corroboration, quite clearly the jury should be told that they should attach little, if any weight to that evidence, because it is all part and parcel of the complaint. The girl making the complaint might well put on an act and simulate distress."

It is to be observed that in the two cases relied upon by the learned Chief Justice there was no allegation of the complainants having given evidence which was proved to be false, and therefore the consistencies of their testimony were accepted as a corroboration. In the present case the complainant gave false evidence regarding her condition before the assault and during the assault.

Although the complainant was not examined by a qualified doctor, and we think that a medical assistant is not qualified to give expert evidence on what he found on the complainant, the learned trial judge found as a fact that sexual intercourse had taken place between the complaint and the appellant. He went further and came to the conclusion that sexual intercourse had taken place without the consent of the complainant. As the charge against the appellant was rape, the onus was on the prosecution to prove that sexual intercourse took place without the consent of the complainant. The evidence of the complainant as to the injury she suffered was that she bled from her vagina. This has been proved to be false. The medical assistant stated that he found fresh bruises in the vagina and that in his opinion a male organ had penetrated into the vagina. The issue before the court was not only that the complainant had been raped, but also that the person who raped her was the appellant.

Counsel for the appellant submitted in respect of ground 4 that the learned Chief Justice erred in accepting the opinion of the medical assistant and acting upon it. We have already stated that the medical assistant, who was not a qualified doctor, should not have been allowed to express an opinion without laying down a foundation of sufficient experience enabling him to speak with authority on the subject. The medical assistant also stated that it was quite possible that the bruises could have been caused by a fall, or by a violent bathing in the river with swift current. The learned Chief Justice, however, accepted the opinion of the witness that in view of the bruises found on the complainant, the intercourse with her took place by force and without her consent. But such bruises have been known to occur to women who have given their consent to sexual intercourse depending, of course, on the size of the male organ and the manner in which intercourse takes place. It is noted that no objection was taken against the medical assistant giving evidence and beyond expressing the view that it is highly desirable that such evidence as he gave should come from a qualified medical practitioner, we do not think that the learned Chief Justice can be blamed in acting on the evidence.

The question, however, is whether in deciding to act on the evidence, the learned Chief Justice considered other matters which emerged from the evidence of the complainant. We have already referred to the discrepancies and the contradictions in the evidence of the complainant and also to the false evidence she gave that she was a virgin before she was assaulted.

The issue of consent or no consent is an important one and deserves very serious consideration. Thus in the case of *R. v. Bradley* (3) it was held by the Court of Criminal Appeal, quashing a conviction for rape, that there was not sufficient evidence before the jury to justify them in bringing a verdict that the prosecutrix did not consent. One of the matters which influenced the Court of Appeal was an inconsistency in the girl’s evidence at the Police Court and at the trial. The decision in this case was regarded as justifying the conclusion that in cases of offences against women the Court of Appeal will not necessarily treat the verdict of a jury upon conflicting evidence as final.

In the case of *R. v. Harling* (4), it was held that in every charge of rape the fact of non-consent must be proved to the satisfaction of the jury. This implies that a jury should be satisfied without reasonable doubt on the issue of consent or no consent. Nowhere in the judgment of the learned Chief Justice does he

appear to have addressed his mind to the question of reasonable doubt on the issue of consent.

To revert to the evidence which the complainant gave, she said that after she had been raped, the appellant took her outside the room and asked her to wash her private parts and that when she refused to do so, the appellant washed her private parts. It seems to us quite strange that a woman who has been assaulted in the manner described by the complainant and who must have suffered indignation, would agree to the assaulter washing her private parts. She does not say that this was done with force and it must be assumed that she must have stooped down for her private parts to be washed. This, surely, was a fact which should have been considered by the learned Chief Justice on the issue of consent. There is still another aspect of the case which has to be mentioned. The complainant told the court that when the owner of the house, Swahabab, returned to the room, after she had been raped, the appellant told him that he had committed an offence. This would, in law, amount to an admission by the appellant. Swahabab was not called as a witness for the prosecution and it was explained to this court that his evidence could not have been helpful to the prosecution. He was, however, called by the defence at the trial and he denied that the appellant made any admission to him. He also added that when he returned to the room he did not find anything strange and that he met both the complainant and the appellant sitting down. Although the learned State Attorney told this court that the evidence of Swahabab was rejected, we can find nothing in the learned Chief Justice's judgment that he dealt with that evidence which was important to the defence.

We are of the opinion that for the reasons we have stated it was unsafe to allow the conviction to stand. We therefore allowed the appeal, quashed the conviction and now give our reasons for doing so.

Appeal allowed. Conviction quashed.

For the appellant:
AB Ssengoobe
Mbazira & Ssengoobe, Kampala

For the respondent:
TS Cotran (State Attorney, Uganda)
The Attorney General, Uganda

Republic v Saidi Ali
[1965] 1 EA 512 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	17 September 1964
Case Number:	177/1964
Before:	Reide, J
Sourced by:	LawAfrica

[1] Criminal law – Plea – Equivocal admission – Irregularity in recording plea of guilty curable under Criminal Procedure Code (*Cap.* 20) *s.* 346 (*T*).

[2] Criminal law – Sentence – Carnal Knowledge of girl under 12 *– Infliction of corporal punishment – Accused's age "border line" – Necessity for formal finding as to age of accused.*

Editor's Summary

The accused was charged with having carnal knowledge of a girl under the age of 12 years contrary to s. 136 of the Penal Code. A medical certificate produced in court gave the accused's age as being about 16 years and that of the girl about 9 years. The accused, in reply to the charge, said, "It is true that I had sexual intercourse with the girl" and this was entered as a plea of guilty. The accused was not asked to plead to the statutory defence contained in the proviso to s. 136. The court sentenced the accused to ten strokes of corporal punishment and ordered compensation. In revision,

Held –

(i) the magistrate ought not to have accepted a plea of guilty without the accused being given an opportunity to take advantage of the defence that he reasonably believed the girl to be over 12;

(ii) in view of the acceptance by the accused of the girl's age as being about nine the irregularity in accepting a plea of guilty was curable under s. 346 of the Criminal Procedure Code;

(iii) defilement of a girl under 12 was a crime in an adult punishable with corporal punishment in any event, but the mode of infliction differed according to whether the offender was a juvenile or an adult. In view of the fact that a person who is sixteen years old is not under the age for the purposes of the Children and Young Persons Ordinance (Cap. 13) and that the accused's age was "border line" the magistrate should have made a formal finding about the accused's age.

Order for compensation set aside.

No cases referred to in judgment

Judgment

Reide J: The accused was charged with having carnal knowledge of a girl under the age of 12 years contrary to s. 136 of the Penal Code. When called upon to plead he said "It is true that I had sexual intercourse with the girl", and this was forthwith entered as a plea of guilty. In view of the proviso to s. 136, which reads:

> "Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court . . . that the person . . . charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of twelve years",

a plea of guilty should not have been accepted unless accused had pleaded in respect of these matters as well. However, the prosecution having put in a medical certificate that the girl's age was about 9, and the accused having agreed unequivocally with the prosecution's outline of the facts, the irregularity is curable under the provisions of s. 346 of the Criminal Procedure Code. A medical certificate was produced to the court giving the accused's age as about 16 years. A person who is 16 years old is not under that age and so not a young person for the purposes of the Children and Young Persons Ordinance (Cap. 13), and the magistrate appears to have heard the case on the footing that the accused was an adult. Since the accused's age was "border-line" the magistrate should have made a formal finding about it. He sentenced the accused to ten strokes of corporal punishment. Defilement of a girl under 12 is a crime in an adult punishable with corporal punishment in any event, but the mode of infliction of that punishment differs according to whether the offender is a juvenile or an adult.

I ought to mention this passage in the magistrate's sentence:

> "Taking into consideration of the accused's age, I do not intend to place him in gaol. There he will be trained to be a criminal".

No doubt what the magistrate meant to say was something to the effect that for such a young man to go to prison for the first time might do him more harm than good and perhaps result in his becoming a recidivist. I am sure that he did not mean to imply that the accused would undergo a course of instruction in crime in prison. Nevertheless, the remark was unhappily expressed.

After sentencing the accused the magistrate purported to make the following order:

> "It is confirmed that accused's father has got some cattle and will be able to pay compensation to the parents of the complainant. It is therefore ordered

> that accused or his father pays two cattles or Shs. 200/- a compensation to the complainant, to be received by her father or guardian."

With respect, it would seem that the magistrate supposed himself for the moment to be sitting in a local court before the coming into force of the Magistrates Courts Act. Orders for compensation are controlled by s. 176 of the Criminal Procedure Code, which the magistrate should study. No question of compensation arose here, but supposing that it had done, then it should be noted that (1) compensation cannot be ordered to be paid to a complainant's father or guardian, or (2) to be paid by an accused's father (except under the provisions of s. 21 of the Children and Young Persons Ordinance), and (3) that compensation must be in money. The purported order is accordingly illegal and is set aside. Any property or cash which has been passed under its terms to the complainant's father or guardian is to be restored to the owner.

Order for compensation set aside.

Peter Wanyoike Gathure v A Beverly
[1965] 1 EA 514 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	16 December 1963
Case Number:	138/1963
Before:	Miles, J
Sourced by:	LawAfrica

[1] Trespass – Forcible entry by bulldozer to remove squatter dwelling – Sufficiency of notice – Whether undue force used.

[2] Prescription – Adverse possession of land registered under the Registration of Titles Ordinance (*Cap.* 281) *– Date from which prescription impossible under Trust Land Ordinance, Cap.* 288, *s.* 71.(*K*).

[3] Limitation – Land – Adverse possession – When period of limitation commences on registered land.

[4] Land – Possessory title by native tribes from time immemorial – Whether protection under Crown Lands Ordinance, 1902, *s.* 30 *and s.* 31 *survives.*

Editor's Summary

The plaintiff, a squatter, sued the agent of the registered owner of the suit premises in trespass for the destruction of 5 of his huts, crops and chattels by a bulldozer used to evict him on October 27, 1962. He asserted that he and his ancestors had been on the land since time immemorial, that such possession was protected under the Crown Lands Ordinance, 1902, as amended from time to time, that (by amendment allowed at the trial) he had acquired a title to the suit premises by prescription, that he had possession in fact sufficient to maintain trespass and that the force used was excessive. The defendant contended that

the plaintiff arrived in 1956; that any native rights that may have existed were extinguished in fact and in law in 1939 under s. 71 of the Trust Land Ordinance (Cap. 288); that it was not possible to acquire an adverse title by prescription over land registered under the Registration of Titles Ordinance; that time would run afresh for the purposes of limitation each time there was a transfer or a transmission of the land or an interest in it entitling the proprietor to be treated as if he had been issued with a certificate of title; that the last such event was an assent to bequest to the defendant's wife in December 1957 when the plaintiff failed to bring his adverse interest, if any, onto the title and that the force used, after notice, was reasonable in the circumstances.

Held –

(i) the plaintiff had not established that the suit premises formed any part of any land occupied by native tribes deemed to be excluded from Crown Leases under s. 31 (1) of the Crown Lands Ordinance, 1902;

(ii) the plaintiff, on whom the onus lay, could not show by the Governor's written certificate that his or his family's rights to the land had been preserved under s. 71 (1) (ii) of the Trust Land Ordinance (Cap. 288);

(iii) the case of *Tayabali Adamji v. Abdul Hussein Adamji Alibhai* (1) was a binding authority for the proposition that it was possible to acquire an adverse title in the case of registered land;

(iv) for the purposes of limitation insufficient time had run in the plaintiff's favour from December 1957 when the last act of the parties constituting a transfer within the meaning of s. 36(1) of the Registration of Titles Ordinance was registered;

(v) sufficient notice of the eviction had been given; no more force was used than was reasonably necessary and every precaution had been taken to avoid damage to the property and possessions of those concerned: *Hemmings v. Stoke Poges Golf Club, Ltd*. (2) followed.

Suit dismissed.

Cases referred to in judgment

(1) *Tayabali Adamji Alibhai v. Abdul Hussein Adamji Alibhai* (1938), 5 E.A.C.A. 1.

(2) *Hemmings v. Stoke Poges Golf Club, Ltd*., [1920] 1 K. B. 720.

Judgment

Miles J: In this case the plaintiff claims damages for trespass against the defendant. His case is that he is and was at all material times the owner and occupier and in possession of land and premises on plot LR. 4898 in the Kiu/Rira Valley near Kahawa in Thika District, which land is shown on the plan annexed to the plaint and coloured red. He alleges that on or about October 27, 1962, the defendant with his servants or agents wrongfully entered the plaintiff's land and demolished five houses, destroyed and damaged other crops and household goods and property and uprooted standing crops and trees.

The defence in essence is that the plaintiff was not at any material time the owner of the suit premises and that if he was in possession thereof his possession was wrongful. The defendant justifies the acts complained of on the ground that he was authorised to do them by the true owner of the suit premises who was his wife. The allegation that household goods or crops were damaged or that any standing crops or trees were uprooted is denied.

In further particulars of the claim delivered by the plaintiff on April 16, 1963, the plaintiff claimed to be the sole owner of the suit premises and to be in possession thereof by virtue of a perpetual interest in fee simple. His occupation is alleged to be based "on the African law and custom and laws of Kenya."

I come now to the facts. The plaintiff stated in evidence that he was born on the suit premises in 1919 but that his family had owned the land from time immemorial. At the time of his birth the land was being

occupied by his grandfather, Gakobo, to whom it belonged. Gakobo died in or about the year 1925 and the plaintiff alleges that he was buried on the land in question. The plaintiff claims that the land was left to him by Gakobo.

The plaintiff's father, Gathure, supported the plaintiff's evidence and said that he was told by his father that the land was left to the plaintiff and not to him because the plaintiff was named after Gakobo. He alleges that he was given a letter by Gakobo. This has not been produced. He also says that Gakobo told him that he should give the letter to the plaintiff when he saw the red smoke between the Thirrika and Theta Rivers. He alleges that he duly complied with these instructions.

The plaintiff's father states that many years ago a European named Taylor came to Gakobo and asked for permission to graze his cattle on this land. Gakobo refused and there was a conference with the then District Commissioner as a result of which Gakobo agreed to allow Mr. Taylor to graze on the land for 40 seasons. Gathure alleges that a written agreement was drawn up to this effect. Evidence was given by two elderly Kikuyu, Gichui M'Banga (P.W. 3) and Njoroge Gicharu (P.W. 4) which substantially corroborates the evidence of the plaintiff and his father. They also claim to have been present when the agreement between Gakobo and Mr. Taylor was negotiated.

The copy or alleged copy of the agreement in question has been produced. It is dated December 24, 1904. (Ex. 1).

The authenticity of this document has been challenged by the defendant and it was submitted for analysis to Mr. Nefdt, an experienced handwriting expert. Mr. Nefdt stated that the paper was of a porous nature and any writing done with an ordinary pen and ink would present a very smudged appearance, whereas the writing on this document is clear and sharp. Mr. Nefdt expressed the opinion that the writing had been effected with a ball-point pen, which is quite characteristic and distinct from writing with an ordinary nibbed pen. He carried out solubility tests on the ink which showed it to be oil-bound and not a pigmented solution. His conclusion is that the document could not have been executed in 1904 because ball-point pens did not come into general use until 1940 to 1942.

The document contains what appear to be rubber stamp impressions. These were described by Mr. Nefdt as very crude efforts made by a crudely manufacture home-made stamp probably of wood. Mr. Nefdt's final conclusion was that the writing had been effected within a period of five years at the most.

Evidence was given for the defendant by Mrs. Beverly who is his wife. She said that she was the owner of the land in question and she produced the title deeds. I will deal later with the history of the devolution of the land. Her case is that it was left to her by her uncle free of encumbrances. She states that the suit premises consisted entirely of swamp land through which the River Kiu runs. She said that she had lived at her uncle's home near Kahawa Station from 1932 to 1956 and she was familiar with the land and used to ride all over it. She added that her uncle used to take his water from the swamp.

From 1932 to 1956 Mrs. Beverly says that she saw no one living on this land and she would have noticed it if there had been any sign of human habitation.

In 1938 the land was leased to Sukari, Ltd. and sugar cane was planted after drainage operations had been carried out. Mrs. Beverly left Kahawa in 1956. The land had been left to her in the year 1953 although the assent to the bequest was not given until December 1957. She said that she had never heard of Gakobo or any member of that family. She is positive that nobody lived on the suit premises prior to 1938.

Evidence was also given by Mr. Tarlton (D.W. 3), who until recently was a professional hunter. He is 60 years of age and first came to this neighbourhood in January 1904. He is familiar with the suit premises and the land in question having hunted over it for many years. He is positive that there was no

habitation

on this land when he was a boy. The last time that he was on the land was just before the War and there was no habitation then. He also had never heard of Gakobo. I would add that Gakobo appears to have been a person of outstanding stature, his height having been stated as being as much as eight feet.

The defendant said that he was married to his wife in 1945 and was living at Kahawa after that year at the home of his wife's uncle, Thomas Russell. He says that he first heard of people coming to live on the suit premises in 1961.

It remains to mention that evidence was given on behalf of the plaintiff by one Mungai Karanja, a contractor, who says that he built the 5 houses belonging to the plaintiff which were destroyed. He says that two to them were built in 1945 and the other three in 1953, 1958 and 1959 respectively. He confirms the plaintiff's evidence as to the date of construction of these houses and the price paid. He says that in 1945 he demolished some old houses which were there and constructed new ones out of the old materials. When shown a map he was unable to point out the land upon which he had built the houses and he was able to produce no books of account or any other documents containing any reference to the transactions. He alleged that he had lost them during the emergency.

The conclusion to which I have come is that the plaintiff first came on to the land sometime after 1956, certainly no earlier. From 1938 to 1952 the land was being occupied by Sukari, Ltd. and used for planting sugar cane. It is extremely unlikely that they would have permitted anybody to live on the land during this period. The company went into liquidation in about 1952 and no witness has been called from this company. It is in my opinion even more unlikely that anybody would be living on the land before it was drained. I must add that one can hardly be impressed by a case which is bolstered up by a forged document. I find accordingly that neither the plaintiff nor any member of his family were living on the suit premises prior to 1956.

This is sufficient to dispose of the plaintiff's case so far as his title to the land is concerned, but it is perhaps desirable that I should deal with the legal position of the plaintiff upon the footing that, contrary to my finding, he and his family had been in possession of the suit premises from time immemorial. Before considering the law, however, it would be convenient to set out the devolution of the property as disclosed by the title deeds and the entry in the Registry of Lands. The first instrument is a Crown lease to W.M. Taylor dated May 25, 1905. On February 10, 1906, this lease was assigned to T. A. Wood. On May 1, 1914 a 10-year lease was granted to E. Hagenson. On October 12, 1921, the land was surrendered to the Crown in consideration of a new grant, and on October 13, 1921, there was a re-grant by the Crown to T.A. Wood (1.R. 178). This was registered on October 28, 1921. On August 25, 1924, the land was transferred by sub-sale to Thomas Russell under a tripartite agreement. On October 28, 1924, a certificate of title of plot No. 4898 was granted to Thomas Russell. On January 1, 1938, there was a lease for 14 years to Sukari, Ltd. On December 16, 1953, probate of Thomas Russell's will was granted. On December 27, 1957, the executor of Russell's will assented to the bequest of the land to Mrs. Beverly.

I now come to the law. Counsel for the plaintiff puts his case in two ways. First, he says, assuming that the plaintiff has established that he and his ancestors were in occupation of the suit premises from time immemorial, their rights are protected by statute. He submits that at the time of the first grant to Taylor in 1905 the land was subject to the Crown Lands Ordinance, 1902. Furthermore he draws attention to the fact that under the express terms of the re-grant to Mr. Wood in 1921 the grant was subject to the provisions of the Crown Lands Ordinance, 1902.

Crown land is defined in s. 5 of the Ordinance as follows:

> " 'Crown land' shall mean all public lands in the Colony which are for the time being subject to the control of His Majesty by virtue of any treaty, convention, or by virtue of His Majesty's protectorate, and all lands which shall have been acquired by His Majesty for the public service or otherwise howsoever, and shall include all lands occupied by the native tribes of the Colony and all lands reserved for the use of the members of any native tribe."

The definition was amended in 1938 when the Kikuyu Land Unit was created. The position therefore was that in 1902 all land in Kenya was Crown land. The particular provisions upon which counsel for the plaintiff relies are ss. 30 and 31.

Section 30 provides that:

> "In all dealings with Crown land regard shall be had to the rights and requirements of the natives, and in particular the Commissioner shall not sell or lease any land in the actual occupation of the natives."

Section 31 (1) provides:

> "The Commissioner may grant leases of areas of land containing native villages or settlements without specifically excluding such villages or settlements, but land in the actual occupation of natives at the date of the lease shall, so long as it is actually occupied by them, be deemed to be excluded from the lease."

I would observe, so far as the facts are concerned, that had there been any native settlement in existence one would surely have expected to find some reference to it in the various documents of title.

Counsel for the defendant contends that any rights which may have been acquired by natives under these sections were extinguished by s. 71 (1) of the Trust Land Ordinance, Cap. 288, Laws of Kenya, which reads as follows:

> "71 (1) With effect from the commencement of this Ordinance, all native rights existing at the commencement of this Ordinance in any land in Kenya situate outside the boundaries of the special areas, the special reserves, the temporary special reserves and the special leasehold areas, irrespective of whether such right relate to tribal, group, family or individual holdings, are hereby declared to be extinguished; and the provisions of ss. 30 and 31 of the Crown Lands Ordinance, 1902, shall no longer have effect in respect of land alienated under the said Ordinance:
>
> Provided that:
>
> (i) nothing in this section contained shall be deemed to apply to–
>
> (*a*) rights enjoyed by individual Africans under any specific title granted to them;
>
> (*b*) rights of resident labourers secured by contract under the Resident Labourers Ordinance until the termination of the contract;
>
> (*c*) existing rights in any areas in respect of which forest concessions have been granted by the Government; or
>
> (*d*) native rights in the Protectorate;
>
> (ii) nothing contained in this section or in s. 50 of this Ordinance shall be deemed to restrict the enjoyment of such rights as may be established to the satisfaction of the Governor on or before the appointed date and which have been extinguished under this section in respect of the land on which any African resides until such African has been ordered by the Governor under s. 50 of this Ordinance to remove himself from such land.

Counsel for the plaintiff has referred to the second 'proviso to' this subsection which is in the following terms:

> (ii) "Nothing in this section contained shall be construed as affecting any African tribes or communities for whom no specific land unit is provided by this Ordinance in regard to any right which such tribes or communities may have to occupy areas of unalienated Crown land, other than land situated in the area formerly known as the Highlands and defined in the Seventh Schedule (now repealed) to the Crown Lands Ordinance, in which they are resident at the commencement of the Ordinance".

This proviso is not altogether easy to construe.

I am informed that no date has been appointed under this section. I am of opinion that the plaintiff cannot bring himself within the proviso unless he produces evidence that he has established rights to the satisfaction of the Governor. The onus in this respect is on him and not upon the defendant. It is common ground that this land is outside the boundaries of the special areas and other areas referred to in sub-s. (1) and the result is that under the plain and express words of s. 71(1) any rights which the plaintiff or his ancestors might have acquired have become extinguished.

Counsel for the plaintiff's next argument is that the plaintiff has acquired a right by prescription. This claim was not originally pleaded in the plaint or alleged in the further and better particulars, but I permitted counsel for the plaintiff to amend his reply and raise it by way of amendment. Counsel for the defendant contends that it is not possible for a prescriptive right by adverse possession to be acquired over registered land and he relies upon s. 23(1) of the Registration of Titles Ordinance (Cap. 281), Laws of Kenya, which provides that:

> "The certificate of title issued by the registrar to any purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of such proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party."

There is no question but that Mrs. Beverly, the defendant's wife, is the registered owner of the land.

Counsel for the defendant submits that the only grounds upon which her rights can be challenged are fraud or misrepresentation. This argument is negatived by the decision of the Court of Appeal for Eastern Africa in the case of *Tayebali Adamji Alibhai v. Abdulhussein Adamji Alibhai* (1). It was there held:

> "1. That certificates of ownership issued under the Land Titles Ordinance (Cap. 143), must be regarded as conferring an absolute and indefeasible title to the property referred to therein subject to no other interests than those mentioned therein.
>
> 2. That no period of prescription as against the title shown in a certificate of ownership could begin to run prior to the date of the grant of certificate.
>
> 3. That the period of prescription applicable to the case is that prescribed by s. 41 of the Limitation Ordinance, 1934, namely twenty years."

This case would appear to be authority for the proposition that it is possible to acquire an adverse title by possession even in the case of registered land.

The question therefore which arises in the instant case is from what date would the period of prescription begin to run. Counsel for the defendant contends that the assent to the bequest to Mrs. Beverly was a transfer of the land and that accordingly s. 36 (1) of the Registration of Titles Ordinance applies. This is in the following terms:

> "36 (1) If a transfer purports to transfer the whole of the land mentioned in any grant or certificate of title, the registrar may, instead of cancelling such grant or certificate as provided by ss. 22 and 35 of this Ordinance, enter in the register and endorse on the grant or certificate a memorandum of such transfer, and deliver the grant or certificate so endorsed to the transferee, and every grant or certificate with such memorandum shall be as effectual for the purpose of evidencing title, and for all other purposes of this Ordinance, as if the grant or old certificate had been cancelled and a new certificate had been issued to the transferee in his own name, and such process in lieu of cancellation may be repeated upon every transfer of the whole of the land, but when in the opinion of the registrar any grant or certificate cannot for want of space or other cause conveniently bear any further endorsement, he may require cancellation and the issue of a new certificate."

The effect of this is that the entry of a memorandum operates for the purpose of evidence of title as if the grant or old certificate had been cancelled and a new certificate had been issued to the transferee in his own name. A transfer is defined under s. 2 of the Ordinance as:

> "the passing of such land or charge by act of the parties and not by operation of law, and also the statutory instrument by which such passing is effected."

In my opinion the assent to the bequest was an act of the parties and constituted a transfer within the meaning of s. 36(1). In accordance with the decision in the case of *Tayebali Adamji Alibhai v. Abdulhussein Adamji Alibhai* (1) the period of prescription would begin to run from the date of the assent, namely December 27, 1957. The result is that the prescribed period has not yet elapsed. My conclusion therefore is that both on the facts and the law the plaintiff has failed to establish that he has any right, title or interest in the suit premises sufficient to enable him to maintain an action for trespass.

It has now to be considered whether in these circumstances the action of the defendant was illegal. Now the evidence is that on the day in question, which was October 27, 1962, the defendant obtained the services of a bulldozer which entered the suit premises from another part of plot 4898 belonging to the defendant's wife, and proceeded to demolish all houses on the land. The defendant states that before he took this course, which he did upon the express authority of his wife, he consulted the District Commissioner who was unable to offer any assistance but did give him certain advice, and he attended three barazas which were held on the land near the suit premises. The first was sometime in February or March, 1961, and was called by the District Officer, Ruiru, and the Chief and some tribal police, were present. It was held on the south a side of the plot about half a mile from the plaintiff's house. According to the defendant the District Officer told the persons assembled, who had been called by the tribal police, that they were there illegally, but the occupants said they had nowhere to go. The defendant says that nobody claimed to have any right to remain on the land.

The defendant called another baraza in the middle of 1961 when he suggested to the occupants that they should pay rent but this was refused. The third meeting was called by the District Officer early in 1962. The Chief was again present together with a number of the occupants of the land. The District officer informed them that if they were landless people and applied to the

District Commissioner, Thika, arrangements would be made to find them other land.

There is no evidence that the plaintiff himself was present at any of these barazas but I have no doubt that his relatives were and it is inconceivable that he would not have become aware of what had taken place.

Finally, the defendant prior to the demolition wrote out 50 or 60 notices which he intended to post on every habitation in the area in question. He gave these for distribution to an African who has not been traced, and there is, therefore, no evidence before me that any notice was posted on the plaintiff's house.

In *Hemmings v. Stoke Poges Golf Club* (2), it was held that a trespasser on land can be forcibly removed provided no more force is used than is necessary for the purpose. It is true that in that case notice to quit was given but it was this which made the plaintiff a trespasser. The ratio decidendi is expressed by Scrutton, L.J. ([1920] 1 K.B. p. 746):

> "It seems to me that when the grievance complained of is the removal by no more force than is necessary of a trespasser and his property from premises which the landlord has a right to enter for that purpose the justification covers not only the entry but the forcible expulsion which is the object of the entry, and which makes the entry a forcible one."

I am satisfied upon the evidence of the defendant, which is supported by that of Mr. McDonnell, a cameraman who apparently went to the scene to obtain pictures for the Kenya Broadcasting Corporation on the day in question, that all the possessions of the occupants inside the houses had been removed and taken to a place of safety before the houses were demolished. Mr. McDonnell says that if this had not been the case he would have noticed it because it was, as he put it, "my job to observe things like that". I am satisfied that adequate notice was given to all the occupants, that no more force was used than was reasonably necessary, and that every precaution was taken to avoid damage to the property and possessions of those concerned.

My conclusion therefore is that the plaintiff's claim fails both on the facts and the law, but in order to save the parties the expense of a new trial I will assess the damages which I would have awarded. I have already found that there was no damage to any of the property in the plaintiff's house, at any rate so far as the furniture was concerned. The plaintiff would be entitled to the value of the houses demolished. The plaintiff's evidence as to this, which is supported by the builder, is that the houses constructed in 1945 cost Shs. 6,000/- and the other three houses Shs. 2,000/- each. On October 27, 1962, they would of course have considerably deteriorated in value and I think a fair sum to award in respect of them would be Shs. 400/- each making a total of Shs. 2,000/-. The measure of damage is their value on October 27, 1962, and not the cost of replacing them. The plaintiff claims that there were 20 bags of beans and 4 bags of maize in the store. There is no evidence to contradict this and it may be that they were destroyed. The plaintiff says that the price was Shs. 100/- for a bag of beans and Shs. 25/- for a bag of maize. I will assess these items at a total of Shs. 2,100/-. The plaintiff claims that there were some standing crops also destroyed, but this is negatived by the evidence of the defendant and of Mr. McDonnell. At the time in question the harvest had been completed. The plaintiff would in addition be entitled to general damages which I assess at Shs. 4,000/-.

My findings on the issues are:

Issue 1: No.

Issue 2: Yes.

Issue 3: Yes, subject to the qualification stated, i.e. that he did not destroy or damage household goods and property or uproot standing crops or trees.

Issue 4: Yes.

Issue 5: No.

Issue 6: Yes.

Issue 7: Shs. 8,100/- if liability had been established.

For the reasons stated the plaintiff's claim is dismissed with costs.

Suit dismissed.

For the plaintiff:
VV Patel and GL Patel
GL Patel, Nairobi

For the defendant:
HN Armstrong
Hamilton Harrison & Mathews, Nairobi

R H Bhanji and another v L Bortot
[1965] 1 EA 522 (HCT)

Division:	High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	26 November 1964
Case Number:	13/1964
Before:	Sir Ralph Windham CJ
Sourced by:	LawAfrica

[1] Rent restriction – Application by landlord to Board for assessment of standard rent – Application not served on tenant – Standard rent assessed in tenant's absence – Whether such standard rent binding on tenant – Whether tenant a "party" to the proceedings.

Editor's Summary

The appellants who were landlords claimed from the respondent, a tenant, the sum of Shs. 724/- per month, being standard rent for a flat fixed by the Rent Restriction Board. The respondent refused and was served with a three months notice to quit. On expiry of this notice the appellant applied to the Board for vacant possession of the flat under s. 19 of the Rent Restriction Ordinance. The Board dismissed the

application on the ground that the standard rent of the flat had never been lawfully fixed because the application to the Board for determination of the standard rent was never served on the respondent. The flat in question was one of six flats and the applications for fixing of the standard rent were duly served on all tenants except the respondent. They duly appeared and made their representations and the Board fixed the standard rent of each of the six flats at Shs. 724/- per month. On appeal, it was contended for the appellants that although the fixing of the standard rent was determined *ex parte* so far as the respondent was concerned, he was duly notified by two letters, which he admitted, that his standard rent had been fixed at Shs. 724/- per month and that he was given three months notice to quit. It was, therefore, argued that the respondent, having thus become aware of the *ex parte* fixing of his standard rent, ought to have applied under O. 9, r. 13 of the Civil Procedure Rules to have it set aside as an *ex parte* decree, and that since the respondent never took this step the Board's decision became final and binding upon him as a decree by virtue of s. 11(i) of the Rent Restriction Ordinance, 1962.

Held –

(i) nobody could, for the purpose of being bound by a judgment or decree, be considered a party who had not been notified and was not aware of the proceedings, and who consequently had been given no opportunity of contesting those proceedings;

(ii) as the respondent had not been notified that he had been made a party to the original application, the fixing by the Board of the present respondent's standard rent was not binding upon him: *Suleman Dewji v. E. S. Udwardia* (3) followed;

(iii) Order 9 r. 13 did not apply to a determination of standard rent by the Board which could not lawfully be made *ex parte* and therefore was bad ab initio and could not be made good by any laches.

Appeal dismissed. Board directed to rescind its order assessing the standard rent of the respondent's flat at Shs. 724/- per month and to make a fresh assessment.

Cases referred to in judgment

(1) *Winchester Court, Ltd. v. Miller*, [1944] 2 All E.R. 106.

(2) *Lazarus-Barlow v. Regent Co., Ltd*., [1949] 2 All E.R. 118.

(3) *Suleman Dewji v. E. S. Udwardia*, Tanganyika High Court Miscellaneous Civil Appeal No. 10 of 1960 (unreported).

Judgment

Sir Ralph Windham CJ: The appellants were the applicant-landlords, and the respondent was the respondent-tenant, in application No. 643 of 1963 before the Rent Restriction Board, Dar-es-Salaam, dated November 8, 1963, for vacant possession of a residential flat, one of a block of six such flats each let to separate tenants, the application being made under s. 19 of the Rent Restriction Ordinance, 1962, on the basis of the expiry on August 1, 1963, of a three-months' notice to quit, and of the refusal by the respondent to pay rent at the rate of Shs. 724/- per month, this being what the applicants averred to be the standard rent for the flat lawfully fixed as such by the Board on March 1, 1963, with effect from September 1, 1962.

In a considered ruling dated August 22, 1964, the Board dismissed the application No. 643 of 1963 on the ground that the standard rent of the flat in question had never been lawfully fixed at all. Their reason for so holding was that the appellant's application to the Board, No. 403 of 1962, for determination of its standard rent, was never served on the respondent, with the result that the standard rent was fixed without the knowledge of the respondent and without his having been afforded the opportunity of putting forward arguments which might well have caused the Board to revise their valuation and to fix the rent at a figure lower than that at which they did proceed to fix it. The Board accordingly held that the proceedings in Application No. 403 of 1962 were abortive and that the standard rent of the suit premises had never been lawfully determined, with the result that they held that Application No. 643 of 1963 was misconceived and must be dismissed.

It is conceded on behalf of the appellants that Application No. 403 of 1962 never was served on the respondent and that he never did have an opportunity of appearing before the Board to put forward his arguments relevant to the fixing of the standard rent. This non-service upon him would appear to have been due to an oversight. The appellants' applications for the fixing of the standard rent of the other five flats in the same block, namely Applications Nos. 401, 402, 404, 405 and 406 of 1962, were duly served on the tenants of those other flats, and they duly appeared before the Board and made their

representations, after hearing which the Board fixed the standard rent of each one of the six flats at Shs. 724/- per month.

I would here record, although it is not relevant to the basis of my decision, that learned counsel for the respondent informs me, and I accept his assurance,

that if he or his client had been given the opportunity, he would have advanced legal submissions relevant to the assessment of standard rent, which were not advanced on behalf of any of the other five tenants.

In answer to this, learned counsel for the appellants contends that, although the fixing of the standard rent was determined *ex parte* so far as the respondent was concerned, the respondent was duly notified, by letters dated April 8 and 11, 1963, which he admits having received, that his standard rent had on March 1 been fixed at Shs. 724/- per month as from September 1, 1962, and that he was being given three months' notice to quit by the end of July. It is accordingly argued that the respondent, having thus become aware of the *ex parte* fixing of his standard rent, ought to have applied under O. 9, r. 13 of the Civil Procedure Rules to have it set aside as an *ex parte* decree, and that since the respondent never took that step the Board's decision became final and binding upon him as a decree by virtue of s. 11(1) of the Rent Restriction Ordinance, 1962. He relied on a number of English decisions, including a dictum of Scott, L.J. in *Winchester Court Ltd. v. Miller* (1), ([1944] 2 All E.R. at p. 108), and the judgments in *Lazarus-Barlow v. Regent Co., Ltd*. (2) to the effect that the fixing of standard rent operates as a judgment in rem.

The Board, in its ruling now under appeal, considered the effect of the above decisions and concluded, rightly in my view, that the more correct proposition of law, as laid down in the *Lazarus-Barlow* case (2) in which the earlier decisions (though not Scott, L.J.'s dictum) were considered, is that the Rent Acts operate in rem rather than that judgments under the Acts operate in rem. With regard to judgments under the Act, even if the fixing of standard rents be included among them, there is no good ground for holding that they bind persons other than parties to the proceedings and their privies. This is made clear in the judgment delivered by Evershed, L.J. ([1949] 2 All E.R. at p. 123). To this it is argued for the appellants that the present respondent was a party in Application No. 403 of 1962, he having been made the respondent in that application. But that, to my mind, is to take an unrealistic and unreasonable view of the word "party" in considering who is to be bound by a judgment or decree. Clearly nobody can for that purpose be considered as a party who has not been notified and is not aware of the proceedings in which he is cited as a party, and who has consequently been given no opportunity of contesting those proceedings. In this connection I would refer to an unreported judgment of this Court, *Suleman Dewji v. E. S. Udwardia* (3), in which a similar though not identical point arose, and in which, after considering the *Lazarus-Barlow* case (2), I said:

> "On the strength of that decision it is contended that the Board's determination of the standard rent in the present case, carrying with it the automatic result of the decontrolling of the premises by operation of paragraph 3(*c*) of the Rent Restriction (Exemption) Order, 1958, is not binding on the respondent because that respondent was not a party to the proceedings. To this contention there is, as I see it, more than one answer. In the first place, unlike the case of *Lazarus-Barlow* (2), the present respondent cannot properly be said to have been, in 1959, 'interested in the premises' at all. He had long since ceased to be a tenant of them. It is true that it was in his interest that the premises should remain controlled for as long as possible. . . . But this cannot be said to be an interest save in a very indirect sense, and certainly does not amount to an 'interest in the premises'. An 'interest' in premises means some vested or contingent right to ownership or possession or occupation of them, or to hold them as security or receive rent or other profit directly derived from them. Such the respondent did not and does not possess. And for this same reason he was not a necessary party to be joined in the application to the Board for the fixing of the standard rent, and could not properly have been so joined."

It is clear from the above passage that in the view of this court, if the respondent in that case had been "interested in the premises", as the respondent in the present case manifestly is, then the Board's determination of the standard rent would have been held not binding on him because he was not a party to the proceedings. I adhere to the view which I adopted in that case, with the result that, interpreting as I have done the expression "party" to mean one who has been notified that he has been made a party, the fixing by the Board of the present respondent's standard rent was not and is not binding upon him.

With regard to the contention of learned counsel for the appellants that, upon receiving the letters of April 8 and 11, 1963, the respondent ought to have applied under O. 9, r. 13 of the Civil Procedure Rules to set aside the Board's *ex parte* determination of the standard rent of his flat, the answer, I think, is that even assuming the determination to be a "decree", the kind of *ex parte* decree to which O. 9, r. 13, applies and is intended to apply, is one which, when it was made, could lawfully be made *ex parte*. Indeed there appears to be Indian authority, cited in Chitaley's Code of Civil Procedure, (2nd Ed.) Vol. II, at p. 1446, note 6, but of which I have been unable to find the report, in support of the proposition that "the present rule" (i.e. O. 9, r. 13) "is limited to decrees made *ex parte* under the provisions of O. 9". Be that as it may, I am satisfied that the rule does not apply to a determination of standard rent by the Board, which could not lawfully be made *ex parte* to begin with, and which accordingly was in my view bad ab initio and which could not be made good by any laches.

That the Board cannot lawfully fix a standard rent without the tenant being given the opportunity of challenging the valuation on which it is proposed to base it, is in my view made clear not only by consideration of natural justice but by the provisions of s. 28 of the Ordinance, which provides as follows:–

> "28. Where, for the purpose of determining or assessing the standard rent, a valuation of premises has been made by a Board, a landlord or tenant or their representatives shall be entitled to receive written notification from a Board that the details of such valuation are available for their information and that before the standard rent is determined or assessed, they may, if they wish, appear before the Board on a date to be specified in the notification and object to the valuation."

For these reasons this appeal must be dismissed with costs. In order to save time and expense I further direct the Rent Restriction Board, in exercise of their powers under s. 7(1) (*r*) of the Ordinance, to rescind their order dated March 1, 1963, made under s. 7(1) (*b*), assessing the standard rent of the respondent's flat at Shs. 724/- per month, and to make a fresh assessment of the same, which may or may not be at the same figure as the assessment hereby rescinded, after having duly complied with s. 28 of the Ordinance.

Appeal dismissed. Board directed to rescind its order assessing the standard rent of the respondent's flat at Shs. 724/- *per month and to make a fresh assessment.*

For the appellants:
NRD Sayani
Sayami & Co, Dar-es-Salaam

For the respondent:
WJ Lockhart-Smith
WJ Lockhart-Smith, Dar-es-Salaam

Mwangi Nyongah v Republic
[1965] 1 EA 526 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	26 April 1965
Case Number:	12/1965
Before:	Sir John Ainley CJ and Madan J
Sourced by:	LawAfrica

[1] Criminal law – Theft – Appellant charged with obtaining by false pretences – False pretence not proved – Evidence that money paid to appellant on dishonest promise as to future – Whether this amounts to stealing.

Editor's Summary

The appellant was charged with obtaining Shs. 35/- by false pretences contrary to s. 313 of the Penal Code in the magistrate's court at Eldoret, and the particulars stated that the accused falsely pretended that "he was the Director of an Air Training Centre called Nationalization Council of African Air Training and that the said James Njuguna Gakabu (complainant) was to be enrolled as a pilot trainee". In his evidence the complainant, James, made no reference either to a Council of African Air Training, a Nationalization Council of African Air Training or indeed to any organisation. But he stated that he gave the accused Shs. 35/- as he believed when told by the accused that he would teach him "air training" and that at the end of the training he would be a pilot. The trial magistrate found that there was no adequate evidence of a false pretence and held that the charge had not been established. But he proceeded to convict the appellant of theft contra s. 275 of the Code. The appellant thereupon appealed.

Held –

(i) "obtaining" in the offence of false pretences does not merely mean "gaining possession";

(ii) it is settled law that in false pretences there is no obtaining unless the dupe intends to pass the property in the thing given to the accused, while in stealing there is no theft in the taking, however fraudulent were the means by which delivery was obtained, if the dupe of his own free will passes not only possession, but the right of property;

(iii) the complainant James had quite obviously passed the property in these Shs. 35/- to the appellant and since he did not pay them over with a direction that the money should be used in any particular way there was no conversion; whatever the taking or obtaining could be called, it could not be called stealing.

Appeal allowed. Conviction quashed and sentence set aside.

No cases referred to in judgment

Judgment

Sir John Ainley CJ: read the following judgment of the court: In this case the appellant was charged with the offence of obtaining Shs. 35/- by false pretences contrary to s. 313 of the Penal Code.

He was convicted of stealing that sum contrary to s. 275 of that Code, and from that conviction he appeals.

The particulars of the offence read:

> "Mwangi Nyongah – on or about June 15, 1963 at Thika in Central Region – with intent to defraud obtained Shs. 35/- from James Njuguna Gakabu by falsely pretending that he was the Director of an Air Training Centre called

> Nationalization Council of African Air Training and that the said James Njuguna Gakabu was to be enrolled as a pilot trainee."

The learned Magistrate very reasonably found as a fact that upon June 15, 1963, James handed Shs. 35/- to the appellant and was given by the appellant a receipt headed

> "The N. Council of African Air Training"

which acknowledged the payment of Shs. 1/- for some rather obscure purpose, the payment of Shs. 10/- "being payment of entrance fee, and the payment of Shs. 24/- being an "annual subscription".

The receipt was signed illegibly by the appellant, so the Magistrate reasonably found, above the words

> "For Treasurer, N.C.A.A.T."

It might be expected that such a payment, so evidenced, would be preceded by some detailed discussion between the appellant and James concerning a council of African Air Training or the Council of African Air Training, the appellant's position in the concern, and so on.

James, however, succeeded in avoiding any reference to a Council of African Air Training, to a Nationalization Council of African Air Training or indeed to any organization.

He very clearly did pay Shs. 35/- to the appellant in the belief or hope that he would eventually be taught to fly an aeroplane, and it is equally clear that neither the appellant nor anyone else has taught him to do so, but what precisely was said to him by the appellant it is not easy to gather.

In examination in chief he said, "I was called by the accused to his office. He told me he wanted Shs. 35/- from me and he would teach me air training. I asked him what I'd be at the end of the training and he said I would be a pilot. I believed him and I gave the accused Shs. 35/-."

Under cross-examination he said, "When I gave Shs. 35/- to the accused the accused told me to wait for my air training courses. The accused told me he would teach me air training after I'd paid Shs. 35/-. . . . I did not report the matter of Shs. 35/- before November, 1964, I had been still waiting. The accused had told me that the training was to be probably at the end of this year (1964). . . . he told me to wait up to the middle of 1964 . . after June 1964 I still waited as I didn't know if accused was operating or not".

In re-examination James was asked, "What made you pay Shs. 35/- to the accused". The answer was, "It was because the accused told me to pay it to train me for air training. The accused did not tell me his position in the Air Training".

The learned magistrate now took a hand. He received the answer, "The accused called me to his office – he was alone. The first thing was that the accused said, 'Well if you pay me Shs. 35/- I will train you to be a pilot'. I then gave accused Shs. 35/-".

The witness Rafael (P.W. 3) who heard some of the discussion approached more closely the idea that the appellant spoke of an organization, but he also avoided any reference to anything called the Nationalization Council of African Air Training or to an existing organization. He said, "The accused said that he was to organize an Air Training and that he had persuaded James to enrol with Shs. 35/-. James contributed Shs. 35/-". Again he said, "The words I heard were that the accused said he was to start an Air Training and P.W. 1 was asked to contribute 35/- to be enrolled as a student – that is shortly what I heard".

At this stage it must be noted that from the evidence of James and Rafael, the only persons, apart from the appellant who knew what was said and done

it is not at all easy with any certainty whatever to spell out a representation as to an existing organization, much less a representation that the appellant was "the Director of an Air Training Centre called Nationalization Council of African Air Training".

Oddly enough, however, the appellant when charged by a Chief Inspector of Police that he obtained Shs. 35/- from James "by falsely pretending that you were the director of Nationalization of African Air Training providing training course in aviation to the Africans and that the said James would be trained as a pilot" said – "James paid Shs. 35/- to me in order to become a member of this society. Thousands of people have contributed towards this society. I have been collecting these sums with the object of constructing an Air Training College in East Africa."

The appellant denied making this statement, but the learned Magistrate most reasonably believed that he did make it.

Now that the appellant was deeply concerned with something called the Nationalization Council of African Air Training is apparent from the evidence of the Deputy Registrar of Societies, not be it noted once more from the evidence of James or Rafael.

The Council, Society or concern existed on paper in 1962. The appellant, as Chairman, applied for registration of the concern under the Societies Act, in April, 1962. There were discussions as to the details of the constitution of the concern and eventually on April 24, 1963, registration was refused. The appellant was clearly aware of this on April 25, 1963. Under the Act the Nationalization Council of African Air Training became an illegal society on April 24, and remained so. If the society, concern, or council whatever it may be called functioned, operated or did business after that date those who brought that about were acting illegally. To say that the Council was a properly established affair capable of doing business would have been to tell a lie.

If then the appellant represented to James in June, 1963, that he was in control of a going concern so established, so placed financially, and so organized that the purchase or hiring of aeroplanes, the engagement of instructors, the renting of an air field, in short the provision of the wherewithal to teach James to fly, was in sight, then there was without doubt a false representation of existing facts.

The difficulty with James was of course that he was either incapable of explaining what took place, or his mentality was such that he scarcely required arts of deception to be practised on him before parting with his money. He asked, "What shall I be when trained?", not, it seems, "What organization lies behind your promise to turn me into a pilot for Shs. 35/-".

It does seem inherently probable that some representation as to existing facts was in the mind of the appellant, and he may well have intended to convey to James that there was in existence an organization capable of moving towards the provision of flying tuition. But James did not say that he did not say that he did so, and Rafael used the expression "The accused said that he was to organize Air Training".

The learned magistrate saw the difficulties very clearly. Referring to the question whether there was a false representation of existing facts he said. "This aspect of the evidence is somewhat nebulous. It is clear from the conversation that the accused promised, in the future, to teach P.W. 1 how to fly but as to the presence of an existing fact I am in some doubt. This being so I agree with the submission made by learned counsel and accept that this necessary ingredient of the charge has not been made out beyond all reasonable doubt although I am quite satisfied that the other ingredients for a charge of false

pretences have been fully made out. Nevertheless, this deficiency must go to the root of the charge and, accordingly, I do not consider that the present charge has been established."

This passage is a little obscure, though it is admittedly difficult to be other than obscure when dealing with the law of false pretences and stealing. The learned Magistrate fairly clearly found that there was not adequate evidence of a false pretence as defined by s. 312 of the Penal Code. That is to say he found that there was no representation made by words, writing or conduct of a matter of fact either past or present, which was false in fact, and known to be false, or not believed to be true by the maker.

Having negatived that "ingredient" there was not much left of the offence of false pretences which consists of an "obtaining" by means of a false pretence made with a fraudulent intent.

Perhaps the learned magistrate meant to say that he was satisfied that the appellant had an intent to defraud and "obtained" the Shs. 35/-. Here it must be noted that "obtaining" when the offence of false pretences is under consideration does not mean merely "gaining possession".

However, he went on to say, "Now I have found that P.W. 1 paid Shs. 35/- to the accused to join the organization and to be taught to fly. It is clear that at the time when the money was paid Mwangi Nyongah the accused well knew that this proposed society was illegal and could not operate nor would it be allowed to. It is equally clear that the accused never did carry out his undertaking and in fact never could carry it out. The accused, however, has not said in his defence that he genuinely intended to do what he promised. He has simply denied ever receiving the money at all. In such circumstances the only possible finding open to this Court is that the accused did take the money with the intention of permanently depriving P.W. 1 of it in such circumstances as to amount to stealing". The conviction of theft followed.

Now there are indications in that passage that the Magistrate did suppose that there had been a representation of an existing fact, but perhaps what he is really saying is this that the appellant induced James to part with his money by making a promise which he had no intention of fulfilling, and that this was all there was to it. If the learned Magistrate really believed that the appellant held out "this organization" that is to say the Nationalization Council of African Air Training as a concern in being and capable of providing air training, he would scarcely we think have acquitted the appellant of the offence of false pretences.

We think that the learned magistrate rightly acquitted of that offence, because, as he said, the evidence of the representation was indeed nebulous. But he cannot, as it were, be allowed to have it both ways. On what appears to be the settled law that in false pretences there is no obtaining unless the dupe intends to pass the property in the thing given to the accused, while in stealing there is no theft in the taking, however fraudulent were the means by which delivery was obtained, if the dupe of his own free will passes not only possession, but the right of property.

A dishonest promise as to future conduct may of course result in a taking which is stealing. There are a large number of cases quoted in Archbold's Criminal Pleading Evidence and Practice indicating how this can occur, though not all are easy to reconcile with known principles.

However, in the present case James quite obviously passed the property in these Shs. 35/- to the appellant. He did not pay them over with a direction that the money should be used in any particular way, and there was no conversion. Whatever the taking or obtaining can be called, it cannot to our minds be called

stealing under our law and we consider that we are bound to say that the conviction cannot stand.

We allow the appeal, quash the conviction and set aside the sentence.

Appeal allowed. Conviction quashed and sentence set aside.

For the appellant:
CV Patel
Patel & Patel, Eldoret

For the respondent:
IE Omolo (Deputy Public Prosecutor (S.) Kenya)
The Attorney General, Kenya

Jessie Nyokabu v Public Trustee (sued as the Administrator of The Estate of S J Kagondu)

[1965] 1 EA 530 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	13 November 1964
Case Number:	348/1964
Before:	Rudd J
Sourced by:	LawAfrica

[1] Fatal accident – Damages – All parties Kikuyu – According to Kikuyu custom deceased's elder brother required to support widow and children – Compensation also payable to deceased's relatives according to custom – Whether customary law ground for mitigation of damages.

[2] Native law and custom – Fatal accident – Election between statutory damages and customary compensation.

Editor's Summary

The plaintiff, a widow, claimed under the Fatal Accidents Act on behalf of herself and her minor children by her deceased husband who was killed in a motor accident. The suit was brought against the Public Trustee as administrator of the deceased driver of the motor vehicle. All parties to the action were Kikuyus. Negligence on the part of the deceased driver was admitted and so was the cause of death and the dependency of the plaintiff and her children. The deceased husband had left two brothers, the elder of whom had a wife and children of his own and by Kikuyu custom this brother became responsible for the welfare of the plaintiff and her children. According to Kikuyu customary law the deceased's relatives

were also entitled to compensation on a fixed scale and if such compensation were paid or decreed it would wipe out and eliminate any claim under the Fatal Accidents Act. It was therefore argued on behalf of the defendant that these two points must be considered in mitigation of damages.

Held –

(i) the brother's obligation was not an absolute obligation to support the plaintiff and her children from his own resources and it was not an obligation to spend any particular amount; it was merely and obligation to protect and in case of necessity to give what support he could;

(ii) the court was of the opinion that the deceased's brother was entitled to demand that the plaintiff and her children get their full damages in order to ease the burden on him;

(iii) the existence of an alternative right under tribal customary law involved the plaintiff in an election which forbade the injured parties from getting relief under the customary law and also relief under the Act;

(iv) in the circumstance, the fact that an alternative relief could have been claimed from the same party was not good ground for mitigation of damages.

Judgment for the plaintiff. Damages assessed at £2,040. A scheme of investment to be submitted.

Cases referred to in judgment

(1) *Mwaura Kamau v. Gatoto Mwangi*, [1962] E.A. 528 (K).

Judgment

Rudd J: This is a suit under the Fatal Accidents Act by a widow on behalf of herself and four minor children by her deceased husband who was killed in a motor accident when he was a passenger in another vehicle driven by a Kikuyus who was a passenger in another vehicle driven by a Kikuyu who was himself killed in the same accident. The plaintiff and her four children are all Kikuyus as was her deceased husband. The suit is brought against the Public Trustee as administrator of the deceased driver of the motor vehicle in which the plaintiff's husband was a passenger.

Negligence on the part of the deceased driver is admitted, so is the cause of death and the dependency of the plaintiff and her children. The plaintiff's husband had an aged father who gave evidence in the suit and does not claim to have been dependent on the plaintiff's husband, whom I will refer to as the deceased henceforth in this judgment.

At the time of his death the deceased was in steady employment as a salesman earning Shs. 300/- a month net all in, and was about 34 years of age. The plaintiff is comparatively young and is stated in the plaint to have been 24 years of age on April 29, 1964. Her children are as follows:

A son called Macharia born in November, 1958;

a son called Muraya born in October, 1960;

a son called Mbuthia born in February, 1962; and

a posthumous daughter of the deceased Wangari born in July, 1963.

There was no evidence as to the deceased's prospects of advancement and increased earnings in the course of time if he had not been killed. It was admitted that he had been in his employment for 3 years at the time of his death. One would expect that in the normal course of things he might get increases of salary or earnings but in the absence of evidence on the matter I do not think it would be right to rate this possibility as being very great. However, it is I think probable that in course of time his earnings would be more likely to increase than to decrease.

The deceased used to pay his wife Shs. 200/- a month to run the household but sometimes he paid her only Shs. 175/- a month. He also paid from the balance of his earnings for the house rent if any. At one time this was Shs. 52/- a month and he bought clothes for the family. Naturally a proportion of the allowance paid to his wife would be used to maintain the deceased. The evidence does not clearly show how much of the deceased's earnings was normally devoted to the needs of his family and how much was devoted to his own needs. I think it would not be unreasonable to assess this at one-third for the deceased himself and two-thirds of his family. This would make the amount of the dependency of his family on him at the time of his death about £10 a month or £120 a year. Possibly two-thirds of his earnings is somewhat more than what was spent on his dependants but as the children got older and their clothing got more expensive and school fees had to be paid the amount spent on his dependants would naturally increase. For the purpose of this judgment I think one-third and two-thirds are fair proportions.

Two matters both arising from Kikuyu law and custom have been raised by the defence in mitigation

of damages.

The first of these stems from the fact that the deceased left two brothers. The elder of these brothers has a wife and five children of his own. By Kikuyu

custom this brother became responsible for the welfare of the plaintiff and her children on the death of his brother, the deceased. He is bound under the custom to maintain them so far as he can and to the extent that his resources allow. He accepts this as a legal obligation upon him. Since he has a wife and five children of his own to provide for it is unlikely that he can spend very much on the plaintiff and her children. Further the amount which he does spend appears to be left at his discretion. There is no fund or proportion of a fund to which the plaintiff and her children are entitled. It was argued that the damages should be reduced by reason of the support to which they are entitled from the deceased's brother.

In my view the brother's obligation is not an absolute obligation to support the plaintiff and her children from his own resources. It is not an obligation to spend any particular amount. It is merely an obligation to protect and if necessary to give what support he can according to the necessities of their circumstances. I have no idea what value should be put on this obligation in terms of money. The plaintiff and her children have lost the right to support from her husband and their father. Their damages in this respect have been assessed as at least £10 a month and *prima facie* they are entitled to damages on that basis. Their right to this is part of their property in the widest sense. As I understand the effect of the Kikuyu custom the deceased's brother's obligation is not an obligation to spend money on the deceased's dependants unless their resources are found to be inadequate. It is conditional on necessity and does not affect their independent rights to property or damages. In fact I think that the brother is entitled to demand that they get their full damages in order that the burden on him may be eased. His obligation, if any, as regards support is to supplement their own resources and not an obligation in substitution of all or part of their damages.

The second matter that was raised in mitigation arises from the fact that under Kikuyu law and custom the deceased's relatives are entitled to compensation on a fixed scale. In this case the amount would come to Shs. 1,800/-. If such compensation is claimed it would when paid or decreed completely wipe out and eliminate any claim under the Fatal Accidents Act. See *Mwaura Kamau v. Gatoto Mwangi* (1).

But such a claim differs from a claim under the Fatal Accidents Act in as much as it could arise by reason of a blameless and purely accidental killing whereas a claim under the Act depends upon the killing being wrongful. It is fair to say, however, that such a customary claim could apply in the case of a wrongful killing without intent to kill. If there were an intentional killing the scale of compensation is raised to Shs. 2,850/-.

These claims also differ from claims under the Act in as much as the amount of compensation does not in any way depend on the actual damages occasioned to the deceased's dependants by reason of his death.

The Act gives a right to damages assessed in accordance with the injury resulting from the death. This right applies to Africans as well as to people of other races. The existence of an alternative right under tribal customary law cannot affect the rights given by the Act beyond the fact that the law forbids the injured parties from getting relief under the customary law and also relief under the Act. The customary right can be waived and I think the institution of this suit for relief under the Act is a waiver. No claim has been made for customary relief in this case. The deceased's defendants are entitled to elect as between the two forms of relief which were open to them and they have elected for relief under and in accordance with the Act. This is a proper and valid election. I hold that in the circumstances the fact that an alternative relief could have been claimed from the same party is not good ground for mitigation of damages.

On the assessment of damages, having regard to the age of the deceased and the possibility, indeed probability, that if he had lived his earnings would have increased in time, I think it right to multiply the amount of the annual value of his contribution towards his dependants by 17. I therefore assess the total damages at £2,040.

The wife is young and able bodied. She is not likely to remarry because that would involve repayment of her bride price and probably giving up her children to her husband's family.

The fact that she has four young children to look after may make it difficult for her to work and earn money independently. On the other hand, she can work and earn her keep from her husband's family. I assess her proportion of the damages at £300. I assess the proportion of damages for each of the three male children at £500 each, and the proportion of damages for the female child at £240. There will be decree and orders accordingly with costs and interest at court rates as prayed. Counsel for plaintiff should submit an investment scheme in chambers on a date to be arranged for orders respecting the investment of the children's damages.

Judgment for the plaintiff. Damages at £2,040. *A scheme of investment to be submitted.*

For the plaintiff:
GS Vohra
GS Vohra, Nairobi

For the defendant:
DF Shaylor
Kaplan & Stratton, Nairobi

National Union of Clerical, Commercial & Technical Employees v Uganda Bookshop

[1965] 1 EA 533 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	22 June 1965
Case Number:	62/1965
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Arbitration – Award in the alternative – Profit-sharing scheme not part of terms of reference – Whether award ultra vires – Whether the phrase "to make such award as may seem appropriate" entitles arbitrator to look beyond terms of reference – Whether alternative awards severable – Trade Disputes (*Arbitration and Settlement*) *Ordinance* (*Cap.* 90), *s.* 3(2) (*U.*).

Editor's Summary

As a result of the failure by the Labour Commissioner and the parties to settle a trade dispute concerning salaries and wages, the matter was referred to a sole arbitrator under s. 3(2) of the Trades Disputes (Arbitration and Settlement) Ordinance. Under the terms of reference the arbitrator's duty was to arbitrate the plaintiff's claim that employees of the defendant should be paid salaries according to the schedule and "to make such award as may seem appropriate". In due course, the arbitrator made his award and offered the defendant a choice between alternatives referred to as (*a*) and (*b*) in the award. Alternative (*a*) provided that the management should grant the minimum pay scales as set out in the terms of reference for arbitration whereas under alternative (*b*) the defendants had the choice of reverting to the profit-sharing scheme they had suggested in September 1963 and discussing with the plaintiff forthwith the basis of distribution. The defendant accepted alternative (*b*). The plaintiff thereupon sued for a declaration that (i) the alternative (*b*) award was ultra vires his terms of reference and invalid, and (ii) it was also invalid by reason of ambiguity and lack of finality. It was submitted on behalf of the plaintiff

that by awarding alternative (*b*), the arbitrator acted in excess of his powers, and that it was severable from alternative (*a*), and should be set aside. It was contended for the defendant that it was competent for the arbitrator to have made such an award as to him would seem appropriate in the circumstances of the dispute. It was further submitted that alternative (*b*) was not indeterminate nor ambiguous, as the share to which the plaintiff union was entitled under the scheme was well known as one-third of the net profits of the bookshop business and that it was for the plaintiff union to decide how the share was to be distributed amongst the employees of the defendant. It was also argued that alternative (*b*) was inseparable from the award as a whole and that grave injustice would result if alternative (*b*) alone were set aside.

Held –

(i) the arbitrator was not authorised to compare the scale of salaries demanded by the plaintiff union for its members with a profit sharing scheme outside the terms of reference;

(ii) it would be unjustified and unreasonable for an arbitrator, instead of deciding the question submitted to him to direct what to him may seem an equitable arrangement between the parties;

(iii) the phrase "and to make such award as may seem appropriate" was referable to the claims of salaries as set out in the schedule to the terms of reference; it could not operate to give the arbitrator a wide power to make the award under alternative (*b*);

(iv) in making the alternative (*b*) award the arbitrator acted in excess of his powers;

(v) alternative (*b*) of the award was on its fact invalid for uncertainty and lack of finality;

(vi) alternative (*b*) of the award was severable from alternative (*a*) and vice versa without any injury to either part.

Alternative (*b*) of the award set aside. Declaration as prayed.

Cases referred to in judgment

(1) *Williams Brothers v. Ed. T. Agius, Ltd*., [1914] A.C. 510.

(2) *Winter v. White* (1819), 1 B. & B. 350; 129 E.R. 758.

(3) *Ross v. Boards*, [1838] Ad. & El. 290; 112 E.R. 847.

(4) *Re Stone and Hastie*, [1903] 2 K.B. 463.

(5) *Duke of Buccleuch v. Metropolitan Board of Works* (1871), L.R. 5 App. Cas. 418.

(6) *Selby v. Whitbread & Co*. [1917] 1 K.B. 736.

(7) *Re Tidswell*, 33 Beau 213; 55 E.R. 349.

Judgment

Sir Udo Udoma CJ: In this suit the plaintiff's claim against the defendant is for:–

(*a*) a declaration that the alternative award (*b*) made by the arbitrator is ultra vires his terms of reference and invalid;

(*b*) a declaration that the said alternative award (*b*) is invalid for ambiguity and lack of finality; and

(*c*) an injunction to restrain the defendant from implementing the said alternative (*b*) of the award, etc.

The defendant has resisted the claim and denied that the alternative (*b*) of the award was indeterminate. Further the defendant has pleaded that it is

incompetent for the court to set aside the alternative (*b*) of the award; and that any order declaring the award or any part thereof void would be a nullity as the arbitrator and the Minister of Housing and Labour are not parties to these proceedings.

At the hearing, para. 6 of the statement of defence and para. 8 of the plaint were, by leave of court, withdrawn. They were both struck off.

The plaintiff, the National Union of Clerical, Commercial & Technical Employees, is a trade union registered under the Trade Unions Ordinance. The defendant, Uganda Bookshop, is a public company duly incorporated under the Companies Ordinance.

It appears that between August and October 1963 there arose a trade dispute between the plaintiff and the defendant concerning the salaries and wages to be paid to certain members of the plaintiff union employed by the defendant. An attempted settlement by the Labour Commissioner proved abortive.

In accordance with the provisions of s. 3(2) of the Trades Disputes (Arbitration and Settlement) Ordinance (Cap. 90), the matter was reported to the Minister of Housing and Labour, who, in exercise of the powers conferred upon him and by consent of the plaintiff and the defendant, referred the dispute to a sole arbitrator, a Mr. Ali Mazrui of the Department of Political Science, Makerere University College, appointed by him with certain terms of reference.

The appointment of the arbitrator was accordingly communicated to the plaintiff and the defendant under cover of a letter dated June 16, 1964 (Ex. A.3 in these proceedings) to which was attached the document (Ex. A.4) containing the arbitrator's terms of reference.

The sole arbitrator duly made his award, the terms whereof were duly communicated to the plaintiff and the defendant in a letter dated September 7, 1964 (Ex. A.5).

By the terms of the award, the defendant was offered a choice between two alternatives numbered (*a*) and (*b*) in the award. By its letter of September 29, 1964, the defendant notified the Permanent Secretary, Ministry of Housing and Labour, of its decision to accept alternative (*b*) of the award, and offered to open negotiations with the plaintiff as to the method of distribution of its one third share of the net profits of the bookshop business. It accordingly invited the plaintiff for a discussion of the basis of distribution of the said profit. Thereupon this action ensured.

The award, the subject-matter of this dispute, is contained in the letter (Ex. A.5) and is in the following terms:

> "Sir,
>
> Trade Dispute
>
> I am directed to publish the following award in accordance with s. 6(1) of the Trades Disputes (Arbitration and Settlement) Ordinance – Cap. 90 – awarded by the arbitrator in the trade dispute between the National Union of Clerical, Commercial and Technical Employees and Messrs. Uganda Bookshop concerning the Union's claim that employees of Uganda Bookshop concerning the Union's claim that employees of Uganda Bookshop should be paid salaries according to the following schedule:
>
> Schedule

Grade	*Salary*
	Shs. per month
1 Messengers	175/-

	Cleaners	
2	Packers	200/-
	Tea-Room waiters	

3	Shop assistants	250/- for 6 months 375/- after 6 months
	Order recorders	
	Searchers	
	Invoicers	
	Filing clerks (in other depts.)	
	Stock-Cards/storekeepers	
	Clerks	
	Receiving clerks	
	Drivers	
4	Magazine/newspapers clerk	475/-
	Filing clerks (despatch department)	
	Typist (orders)	
	Ledger clerks junior	
	Telephonist/despatch/typist	
	Deputy cashier	
5	Chief invoicing clerk	500/-
	Ledger clerks	
	Packing clerk	
	Toys dept. assistant to supervisor	
6	Wage/costing clerk	550/- for 6 months 600/- after 6 months
	Branch accounts clerk and controller	
	Storekeeper-duty free	
	Chief cashier	
	Chief receiving clerk	
7	Typewriter mechanic	500/- for 5 years training 600/- after 5 years training
8	Chief accounts clerk	
	Senior salesman	750/-
	Godown storekeeper	

Award

"The arbitrator presents the management of the Uganda Bookshop with a choice. The management should

Either (*a*) grant the minimum pay scales as set out in the terms of reference for arbitration; or (*b*) revert to the profit-sharing scheme they offered in September 1963 and discuss with the union forthwith the basis of distribution. The Uganda Bookshop must reach a decision as between these two schemes within a month of the date of the Ministry's letter informing them of the award. Should the second scheme marked (*b*) turn out to be impractical or undesirable from the bookshop's point of view, I direct that the first scheme marked (*a*) should be implemented.

In either case, the award is to take effect from April 1, 1964.

Dated at Kampala, this 19th day of August, 1964."

Ali A. Mazrui, Arbitrator.

It has been contended by counsel for the plaintiff that the award as contained in alternative (*b*) was not within the terms of reference (Ex. A.4), to which the plaintiff had consented and upon which the arbitrator was appointed and subject to which he was bound to act, and that there was nothing in the terms of reference entitling the arbitrator to consider at all any profit sharing scheme. By awarding the alternative (*b*), it was submitted, the arbitrator acted in excess of his powers and therefore the award of alternative (*b*) was bad in law and should be so declared, it being severable from the alternative (*a*) of the award.

In the alternative, counsel submitted that the alternative (*b*) of the award was not an award within the meaning of the Trades Disputes (Arbitration and Settlement) Ordinance in that it is indeterminate and leaves important matters of substance in dispute between the plaintiff and the defendant still unresolved as no basis for the distribution of the third share of the profits among the employees of the defendant was indicated.

For the defendant, his counsel submitted that it was competent for the arbitrator to have made the award in alternative (*b*), it being his duty to make such an award as to him would seem appropriate in the circumstances of the dispute between the plaintiff and the defendant.

Counsel further contended that alternative (*b*) of the award was not indeterminate, nor ambiguous, as the share to which the plaintiff was entitled under the scheme was well-known as one third of the net profits of the bookshop business. It was for the plaintiff to decide how the share was to be distributed amongst its members, employees of the defendant bookshop entitled to such share. As alternative (*b*) was inseparable from the award as a whole, grave injustice would result if alternative (*b*), part of the award, alone were set aside.

It should be observed that before the arbitrator was appointed at all the consent of both the plaintiff and the defendant was sought and obtained. The terms of reference were also agreed to and accepted by both the plaintiff and the defendant, and thus became the basis of the arbitration and the agreement of reference.

It is also to be noted that the terms of reference (Ex. A.4), hereunder set forth were concerned specifically with the claim of salaries to be paid to the employees of the defendant bookshop. According to the terms of reference the arbitrator was expressly enjoined to decide upon the claims of the Union, which claims were clearly set out in great detail in the schedule to the terms of reference, which were as follows:–

> “Terms of Reference for Arbitration Tribunal
>
> To decide upon the Union’s claim that employees of Uganda Bookshop should be paid salaries according to the following schedule and to make such award as may seem appropriate.
>
> Schedule

	Grade	*Salary*
		Shs. per month
1	Messengers	175/-
	Cleaners	
2	Packers	200/-
	Tea-Room waiters	

3	Shop assistants	250/- for 6 months 375/- after 6 months
	Order recorders	
	Searchers	
	Invoicers	
	Filing clerks (in other depts.)	
	Stock-Cards/storekeepers	
	Clerks	
	Receiving clerks	
	Drivers	
4	Magazine/newspapers clerk	475/-
	Filing clerks (despatch dept.)	
	Typist (orders)	
	Ledger clerks junior	
	Telephonist/despatch/typist	
	Deputy cashier	
5	Chief invoicing clerk	500/-
	Ledger clerks	
	Packing clerk	
	Toys dept. assistant to supervisor	
6	Wage/costing clerk	550/- for 6 months 600/- after 6 months
	Branch accounts clerk and controller	
	Storekeeper-duty free	
	Chief cashier	
	Chief receiving clerk	
7	Typewriter mechanic	500/- for 5 years training 600/- after 5 years training
8	Chief accounts clerk	
	Senior salesman	750/-
	Godown storekeeper	

Those terms of reference were communicated to both the plaintiff and the defendant under cover of a letter dated June 16, 1964 (Ex. A.3), the terms of which were as follows:–

"Sir,

Trade Dispute

Further to my letter No. TD. 8/54/8 dated May 6, 1964 I am directed to inform you that Mr. Ali Mazrui of the Department of Political Science, Makerere University College, has been appointed arbitrator in the trade dispute between you with terms of reference as stated in the attachment.

2. I will inform you in due course of the place, date and time proposed by the arbitrator for the sitting of the tribunal."

The wording of the above terms of reference is most significant. Under the terms the arbitrator was assigned the specific duty of "deciding upon the Union's claim that employees of Uganda Bookshop should be paid salaries according to the following schedule and to make such award as may seem appropriate."

It is also not without significance that in the terms of reference there is no

mention at all of any scheme for the sharing of profits between the employees of the defendant bookshop and the defendant. The arbitrator was not in any way authorised to compare the scale of salaries demanded by the Union for its members with a profit sharing scheme, which would have entitled him to make a choice between the two, after weighing carefully the advantages of one with the other.

It is not therefore clear how the arbitrator came by "the profit sharing scheme offered in September, 1963 by the defendant". On the face of the award, no evidence appears to have been taken of the profit sharing scheme, nor is there any evidence that the profit sharing scheme was examined by the arbitrator in the course of his enquiry. All indications on the other hand point in the opposite direction. It seems that if the scheme had been examined by the arbitrator it would have been unreasonable for him to refer to it as a profit sharing scheme offered in September 1963 and also for him to ask the defendant to discuss the scheme with the plaintiff.

It is trite law that it is the duty of an arbitrator to decide neither more nor less than the dispute submitted to him and to comply strictly with his terms of reference.

In *Williams Brothers v. Ed. T. Agius, Ltd*. (1), it was held by the House of Lords in effect that an arbitrator has no jurisdiction to deal with matters outside the contract, and that the court has jurisdiction under the Common Law to set aside an award which purports to determine matters not comprised in the agreement of reference.

On appointment, it is always the duty of an arbitrator to examine carefully his own terms of reference, which is the source of his powers, in order to ascertain the nature of the dispute referred to him and his power and authority within the said terms. It is also the duty of an arbitrator to make certain on making his award that he does not go outside the dispute referred to him and does not exceed his powers as expressed in his terms of reference. An arbitrator is bound by law to adhere strictly to and observe most scrupulously his own terms of reference. See *Winter v. White* (2).

It is an accepted proposition of law that one of the cardinal duties of an arbitrator is to decide, in the absence of any expressed provision in his terms of reference or expressed submission to the contrary, the question submitted to him according to legal rights of the parties concerned and not according to what he may consider fair and reasonable or appropriate in the circumstances. It would be unjustified and unreasonable, in my view, for an arbitrator, in lieu of deciding the question submitted to him, to direct what to him may seem an equitable arrangement between the parties.

In *Ross v. Boards* (3), on a reference of questions relating to an agreement for the sale of land the sufficiency of the vendor's title being disputed, an award that the purchaser should take conveyance of the title with all its defects and receive indemnity for such defects was held invalid as not finally settling the dispute between the parties concerning the title to the land.

The questions then to be considered in the instant case must be – Was it competent for the arbitrator to have made the alternative (*b*) award, having regard to his terms of reference? – and – Could the alternative (*b*) award, consisting as it does of a scheme for the sharing of one third net profits of the bookshop business, be said to form part of the arbitrator's terms of reference?

I think the answers to both these questions must be in the negative. I do not think that counsel for the defendant's submission that since it was the duty of the arbitrator to make such an award as seemed to him appropriate, it was competent for the arbitrator to have presented the defendant with a choice of the alternative (*b*) award, is sound.

Having regard to the terms of Ex. A.4, it was the duty of the arbitrator to decide neither more nor less upon the claims of the plaintiff that the employees of the defendant bookshop be paid the salaries set out in the schedule to the said terms of reference.

It cannot be disputed that the phrase "and to make such award as may seem appropriate" is referable only and can only reasonably be understood as referring to the claims of salaries as set out in the schedule to the terms of reference. It is governed and restricted by the said claims in its meaning and effect. It cannot operate to give the arbitrator such a wide power as was claimed by counsel for the defendant as to entitle the arbitrator to make the award under alternative (*b*).

In my judgment, the arbitrator in making the alternative (*b*) award acted in excess of his powers, which excess of powers cannot be justified in the circumstances of this case. The alternative (*b*) award, in my view, purports to determine matters which were not comprised in the terms of reference from which the arbitrator had derived his powers.

I hold that the terms of reference were the basis of the agreement between the plaintiff and the defendant that their dispute over the claims of the plaintiff to certain salaries be referred to the arbitrator for decision; and that the decision required of the arbitrator was as to whether or not the plaintiff was justified in its claim; and, if not, to decide what was appropriate in reference to the claims to certain rates of salary by the plaintiff and no more. The arbitrator having, after due enquiry, decided, I find, that the plaintiff was justified in its claim to certain rates of salaries shown in the schedule to the terms of reference, which is the effect of alternative (*a*) of the award, it was wrong in law for him to have made the alternative (*b*) award. The subject-matter of the alternative (*b*) award was not properly before him, and therefore the award cannot be conclusive. For on the authority of *Re Stone and Hastie* (4), an award is in no way conclusive if it is in excess of the jurisdiction of an arbitration.

On a careful consideration of the submissions addressed to this court, I am satisfied that on the grounds of law this court has jurisdiction to declare that the alternative (*b*) award is bad and invalid as an award made by the arbitrator in excess of his powers. There was no justification for the award as the consent of the parties thereto was never obtained.

It was contended by counsel for the defendant that grave injustice would result if the alternative (*b*) of the award were set aside as the same was not severable from the alternative (*a*) award, and that the best course for the court in the circumstances would be, if it came to the conclusion that the arbitrator acted in excess of his powers, to set aside the whole of the award.

There is a great deal to be said for this submission. For it may be, as was suggested, that the profit sharing scheme did operate in the mind of the arbitrator in making the alternative (*a*) award. I think, however, that although it is the duty of this court to approach the whole of the award with a desire rather to support than destroy it, it must also be realised in the language of Blackburn, J. in *Duke of Buccleuch v. Metropolitan Board of Works* (1871), 5 L.R. App. Cas. at p. 448), that where "an umpire has one thing submitted to him and gives an award on that and also on something not submitted to him, that award, so far as regards the latter, is not binding."

It is true that under the old rule an award void in part was void in toto. That doctrine, however, has since been modified and the present rule is that provided the part which is bad can be separated with reasonable clearness from the part which is good, an award, although void as to part, may be good as to the remainder (per McHardie, J. in *Selby v. Whitbread & Co*., (6), [1917]

1 K.B. at p. 748). If, however, the void part is inextricably connected with the other part then the award will be void in toto.

In the instant case, the award comprised two separate parts. The first part (*a*) granted the minimum pay scales as set out in the schedule to the terms of reference (Ex. A.4), and as an alternative to that the second part (*b*), which is the subject-matter of complaint by the plaintiff, gives the defendant an option of reverting to the profit sharing scheme which they had offered to the plaintiff in September, 1963. The award then calls upon the defendant to reach a decision within one month as to which of the two schemes it chooses to adopt.

There is no question that alternative (*b*) of the award is most uncertain. It has made no attempt to indicate how the one third share of the profits shall be distributed amongst the various grades of employees of the defendant as shown in the schedule to the terms of reference. Rather the scheme leaves it to the plaintiff and the defendant to discuss afresh and agree on the basis of distribution with the possibility of a further and fresh dispute between the plaintiff and the defendant. I agree with counsel for the plaintiff that the scheme would be impossible of implementation.

It is a general rule of law that if an award directs one of two things to be done and one of them is uncertain or impossible, the award is nevertheless sufficiently certain and final if the other alternative is certain and possible. It will therefore be incumbent on the parties concerned to perform the possible alternative. So it ought to be in the instant case that if the court holds that alternative (*b*) of the scheme is invalid and unenforceable, it would be incumbent on the defendant to give effect to part (*a*) of the award.

In my opinion, the alternative (*b*) of the award is on its face invalid for uncertainty and lack of finality in that it has failed to decide the matters referred to the arbitrator, namely, to decide upon the Union's claim that employees of the Uganda Bookshop should be paid salaries according to the scales shown in the schedule to the terms of reference.

In *Re Tidswell* (7), where an arbitrator who had to award and to apportion a trust estate among persons entitled, after finding a certain sum due from a party, instructed him to pay or account for it to the trust estate, the award was held to be uncertain on the ground that it ought to have specified to whom and in what proportion the money ought to be paid.

There an arbitrator's award was:

> "I find and award that including interest on the excess of value in the property apportioned to and taken by Benjamin Tidswell, the sum of £446. 10. 4. is due from him to the trust estate, to equalise his share in the trust property with the shares of his brothers and sisters; and I award and direct that this sum be forthwith paid or accounted for by him, and brought into trust account."

The objection that the award was neither certain nor final on the face of it by reason of the statement – "that the £446. 10. 4. should be forthwith paid or accounted for by him and brought into the trust account" was upheld.

In upholding the objection on the grounds of uncertainty, Sir John Romilly, M.R., in language which applies with equal force to the alternative (*b*) award in the instant case, said:

> "I think the last objection, with respect to the uncertainty appearing on the face of the award, is also fatal. The award finds that certain sums are due from various persons, but it does not express with sufficient distinctness how they are to be dealt with. I will take one illustration. A sum of £446. 10. 4. is found to be due from Benjamin Tidswell to the trust estate, to equalise his share in the trust property with the shares of his brothers and sisters; thereupon

> the arbitrator says, 'And I award and direct that this sum be forthwith paid'. Well, supposing it had stopped there, he does not say to whom it is to be paid, how or in what manner paid. But the award is even more indistinct, for it proceeds to state that it is to be 'paid or accounted for by him, and brought into the trust account'. What the arbitrator ought to have done is, to have specified how the same was to be divided, to whom it was to be paid, and when and in what shares and proportions as he had done with respect to the rest. Then how is this award to be enforced? How can it be determined whether this sum had been accounted for without taking the trust account? It is probable that this would merely give rise to fresh litigation. This is, in my opinion, a substantial uncertainty in the award, which the court cannot carry into effect; and concurring as I do in the observations made by Wightman, J. in the case which has been cited, and in which it appears to me, the uncertainty was not so great as in the present case, I am of opinion that this also is a fatal objection to the award and that it must be simply set aside."

As already stated, the award in the instant case consists of two distinct and separate parts (*a*) and (*b*). Either part is clearly independent of the other. It cannot rightly be said that part (*b*) of the award is inextricably connected with part (*a*) of the award. Holding as I do that part (*a*) of the award is competent being within the ambit of the terms of reference, and that part (*b*) of the award is invalid and therefore not conclusive and binding on the parties, I am of the opinion that part (*b*) of the award is severable from part (*a*) and vice versa without any injury to either part. That being so, I have reached the conclusion that alternative (*b*) of the award must be set aside.

The last submission made to the court by counsel for the defendant was that, as the arbitrator and the Minister of Housing and Labour are not parties to these proceedings, any order of this court declaring the award or any part thereof void would be a nullity.

I think that objection is sufficiently covered by O. 1 r. 9 of the Rules of this court, to which the attention of the court was drawn by counsel for the plaintiff. The provisions of O. 1 r. 9 are as follows:

> "9. No suit shall be defeated by reason of the misjoinder or nonjoinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

By the authority of the above provisions, this court is empowered to deal with the instant case so far as regards the rights and interests of the plaintiff and the defendant actually before it.

In the circumstances this action succeeds. The declaration and injunction asked for are granted in the terms hereunder set forth:

(*a*) a declaration that the alternative (*b*) of the arbitrator's award as contained in the letter dated September 7, 1964 (Ex. A.5), addressed to the plaintiff and the defendant by the Permanent Secretary, Ministry of Housing and Labour, Labour Department, is ultra vires, invalid and bad, the same having been made in excess of the power of the arbitrator as contained in his terms of reference (Ex. A.4), and is uncertain and lacks finality.

(*b*) an injunction restraining the defendant from implementing the said alternative (*b*) of the award.

The plaintiff is also awarded costs of this action.

Alternative (*b*) *of the award set aside. Declaration as prayed.*

For the plaintiff:
A Mayanja
Mayanja Clerk & Co, Kampala

For the defendant:
OJ Keeble
Hunter & Greig, Kampala

Verjee Brothers (Kenya) Ltd v Hassanali Hussein Suleman Verjee and others

[1965] 1 EA 543 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	26 April 1965
Case Number:	173/1965
Before:	Harris J
Sourced by:	LawAfrica

[1] Practice – Summary procedure – Application for judgment – Action based on guarantee – Defence of departure releasing the guarantors – Civil Procedure (*Revised*) *Rules*, 1948, *O.* 35 (*K*).

Editor's Summary

The plaintiff had filed a suit for Shs. 272,202/45 together with interest and costs based upon certain guarantees on the part of the defendants contained in written agreements and now applied for judgment under O. 35 of the Civil Procedure (Revised) Rules, 1948, against all the four defendants jointly and severally on the ground that there was no defence to the suit. The application was filed after appearances had been entered for the second, third and fourth defendants but before an appearance had been entered for the first defendant or the time therefor had expired and also before any of the defendants had filed their defences. It was explained by counsel for the plaintiff that the reason for filing the application so early in the proceedings was to prevent these defendants from filing defences. The first defendant filed an affidavit on behalf of himself and his co-defendants and stated that there had been a breach of contract which had the effect of releasing not only himself but his co-defendants from liability. No affidavit in reply was filed but counsel for the plaintiff submitted that there was no such breach as alleged and that in any event the defendants were estopped from raising a defence of this nature by virtue of the terms of the two agreements.

Held –

(i) the court could not find as a fact that there was no breach nor could it see anything in the agreements which must necessarily preclude the possibility of the defendants being released from their guarantees if they could show that such a breach did occur;

(ii) the court was not in a position to know whether a plea of estoppel would be raised at a later stage or with what likelihood of success;

(iii) by reason of O. 35, r. 2, the application as against the first defendant could not be entertained;

therefore, it would be manifestly unjust to grant the application against the other defendants alone, since none of them was the principal defendant;

(iv) the mere filing of an application under O. 35, r. 2, did not have the effect of preventing the exercise by a defendant of his right under the Rules to file his defence; nothing short of an order of the court can interfere with that right.

Application dismissed. Defendants granted leave to defend conditionally upon their filing their defence within 14 days.

Cases referred to in judgment

(1) *Jones v. Stone*, [1894] A.C. 122.

Judgment

Harris J: This is an application by the plaintiff under O. 35 of the Civil Procedure (Revised) Rules, 1948, for judgment for the amount claimed in the plaint, namely, Shs. 272,202/45, together with interest and costs.

The action is based upon certain guarantees on the part of the defendants contained in two agreements dated May 19, 1961 and November 7, 1961, and judgment is now sought against all four defendants jointly and severally on the ground that there is no defence to the suit.

The defendants have shown cause against the application by an affidavit of the 1st defendant filed on behalf of himself and his co-defendants in which he states that there has been a departure by the plaintiff from the terms of its contract and that this breach has had the effect not only of releasing him from his liability as guarantor but also of releasing the 2nd, 3rd, and 4th defendants from their liability.

No affidavit in reply has been filed but counsel for the plaintiff has submitted that there was no such breach as is alleged and that in any event the defendants are estopped from raising a defence of this nature by virtue of the terms of the two agreements themselves. On the affidavits now before me I cannot find as a fact that there was no breach nor can I see anything in the agreements which must necessarily preclude the possibility of the defendants being released from their guarantees if they can show that such a breach did occur. Furthermore I am not in a position to know whether a plea of estoppel will be raised at a later stage or with what likelihood of success.

Applications for summary judgment under O. 35 require to be treated with caution. In *Jones v. Stone* (1), Lord Halsbury, in delivering the advice of the Privy Council in a case concerning an Order in the Rules of the Supreme Court of Western Australia, the material provisions of which correspond exactly to those of our O. 35 and of O. 14 of the Rules of the Supreme Court in England, said that “the proceeding established by that order is a peculiar proceeding, intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay”. In the present case, for the reasons which I have stated, I am of the opinion that the defendants have produced evidence by affidavit sufficient to render it impossible for the court to say at this stage that the plaintiff is, without reasonable doubt, entitled to judgment.

The application fails also for another reason. Counsel for the plaintiff has submitted that the 1st defendant is the principal defendant and has obtained some support for this submission from the terms of that defendant’s affidavit. The application, however, was filed on March 22, 1965, after appearances had been entered for the 2nd, 3rd and 4th defendants but before an appearance had been entered for the 1st defendant or the time therefor had expired and also before any of the defendants had filed their defences, which, indeed, they have not done yet. It is clear, therefore, that by reason of r. 2 of the Order the application as against the 1st defendant cannot be entertained and must be dismissed, thereby creating the position that the application can proceed only as against the remaining defendants. It seems to me that it would be manifestly unjust in such circumstances, even if I were satisfied that every other requirement on the plaintiff’s part had been satisfied, to grant this application as against the 2nd, 3rd and 4th defendants alone, none of whom, according to the plaintiff, is the principal defendant but each of whom might well have rights over against the 1st defendant.

During the course of the argument, counsel for the plaintiff explained that the reason why he had filed the present application before the expiration of the time allowed for the filing by the 2nd, 3rd and 4th defendants of their defences and before any of them had in fact filed a defence was in order to prevent these defendants from filing defences. There may have been a misunderstanding here for the mere filing of an application under r. 2 of O. 35 does not have

the effect of preventing the exercise by a defendant of his right under the Rules to file in court a statement of his defence to the claim made against him. Nothing short of an order of the court can interfere with that right.

For the foregoing reasons this application for judgment fails and I shall give leave to the defendants to defend the proceedings conditionally upon their filing their defence or defences within fourteen days from this date.

Subject to the order for costs made by this court on April 6, 1965 the plaintiff shall bear its own costs of the application and the defendants' costs shall be costs in the cause save that if the 1st defendant defends separately from each of the other defendants he shall have his costs of the application as against the plaintiff in any event.

Application dismissed. Defendants granted leave to defend conditionally upon their filing their defence within 14 *days.*

For the plaintiff:
Anil Ishani
Ishani & Ishani, Nairobi

For the defendants:
SM Akram
Akram & Esmail, Nairobi

Credit Finance Corporation Ltd v Mahendi Abdulla Karmali
[1965] 1 EA 545 (SCK)

Division:	Supreme Court of Kenya at Kisumu
Date of judgment:	1 April 1965
Case Number:	1736/1958
Before:	Chanan Singh J
Sourced by:	LawAfrica

[1] Procedure – Suit against minor – No guardian ad litem appointed – Whether decree a nullity.

[2] Limitation – Setting aside judgment – Application made six years after decree – Limitation period thirty days from date of executing process for enforcing decree – Several applications for execution made but not actually executed – Limitation period does not begin to run until attachment of judgment debtor's property or person actually executed – Indian Limitation Act, 1877, *art.* 164.

Editor's Summary

In 1959, the plaintiff sued the defendant on a hire purchase agreement when he was a minor and obtained judgment in default of his filing a defence. Since obtaining judgment several execution applications were made for enforcing the judgment but no process for attachment of the defendant's property or person was actually executed. In 1965 the defendant applied for setting aside the judgment on the ground that the defendant was a minor when the suit was filed and that no guardian ad litem had been appointed as required by O. 31 r. 3 of the Civil Procedure (Revised) Rules, 1948. For the respondent it was submitted that under art. 164 of the Indian Limitation Act, 1877, a decree cannot be set aside unless the debtor applies for it to be set aside within 30 days of the execution of the decree.

Held –

(i) without a qualified guardian ad litem a minor cannot become a party to a suit and any decree obtained *ex parte* without such an appointment is a nullity;

(ii) the contract to lend money on which the case was based was void and unenforceable as the defendant was a minor and any judgment or decree obtained on it could not be enforced;

(iii) under art. 164 of the Indian Limitation Act the time does not begin to run until attachment of judgment debtor's property or person is actually executed and accordingly the application for setting aside judgment was not time barred.

Application allowed.

Cases referred to in judgment

(1) *Mohoni Bibee v. Dhurmodas Ghose*, [1903] I.A. 114.

(2) *Poorno v. Prosonno* (1877), 2 Cal. 123.

Judgment

Chanan Singh J: This is an application for setting aside a judgment and decree obtained by the respondent on the ground that the applicant had failed to file a written statement of defence within the time allowed by rules. The grounds raised by counsel for the applicant are two. First, he says that his client was a minor when the suit was filed and that no guardian ad litem was appointed under the rules. He has produced the birth certificate No. 1067 issued to his client by H.H. The Aga Khan's Ismailia Provincial Council, Kisumu, on February 7, 1950. This shows the applicant's birth date as February 20, 1941. The suit was filed on November 15, 1958, on which date the applicant was less than 18 years of age which is the majority age for Asians under s. 4 of the Age of Majority Act.

Under r. 3 of O. 31 of our Civil Procedure Rules, the court has to appoint a guardian ad litem of a minor defendant. The provision is mandatory – see p. 2905, (5th Edn.) Vol. III of A.I.R. Commentary by Chitaley on the Civil Procedure Code of India. If a decree is obtained without the appointment of a guardian, it is a nullity. Without a qualified guardian, a minor cannot become a party to a suit (ibid. p. 2907). The view of this matter in the United Kingdom is also the same. See 1965 Annual Practice, Part I, p. 176–180.

Another point that falls for consideration is that while it is true that the appellant was a minor at the date the suit was filed, he was of full age when the plaint was served on him and again when the judgment was entered by default. Counsel for the applicant wanted to argue that the service of the plaint was not effective and that he was entitled to ask for the setting aside of the judgment on this ground also. I did not allow him to argue this point because he had not included it as one of the grounds in either the notice of motion or the accompanying affidavit. But I am of the opinion that the appellant was not a proper party at the date of institution of the suit and no guardian ad litem having been appointed, he could not be regarded a party to the same suit later when he came of age.

The second point argued by counsel for the applicant is that the contract on which this suit is based was void because the applicant was a minor at the time he entered into it. He relies for this proposition (which as a proposition of law is indisputable) on s. 11 of the Indian Contract Act, 1872 which was in force in Kenya up to the end of 1960. This makes every person a competent party to a contract unless he is "disqualified from contracting by any law to which he is subject." In the case of *Mohoni Bibee v. Dhurmodas Ghose* (1), the Privy Council decided that this section meant that the contracts of minors were void and of no effect. See Pollock and Mulla, Indian Contract and Specific Relief Act, (8th Edn.) pp. 70 and 72.

A copy of the contract has not been produced in this case. The respondent company obtained judgment without producing the original agreement or a copy of it. The plaint states, however, that it was a “Hire Purchase Agreement.”

The affidavit of the applicant states that the vehicle which he had purchased was seized by the respondent. The only part of the contract that remains to be performed is thus the obligation which the applicant undertook to pay instalments. In the 1903 case (*supra*) the Privy Council decided that a mortgage made by a minor was void and that a money-lender who had advanced money could not recover it.

I think it is clear that the contract on which this case is based was similarly void and unenforceable and any judgment or decree obtained on it cannot be enforced. There is also authority for the proposition that a person cannot ratify contracts which he made during his minority. Whatever he has done or allowed to be done in his name since the filing of the suit cannot be regarded as ratification.

Counsel for the respondent has raised another point. He states that under art. 164 of the Indian Limitation Act, a decree cannot be set aside unless the debtor applies for it to be set aside within 30 days of the execution of the decree. The decree in this case is dated May 4, 1959, and this cannot, counsel for the respondent argues, be challenged by an application made in 1965. Even the latest application for execution was made more than 30 days ago. Counsel for the applicant in answer to this objection refers to the case of *Poorno v. Prosonno* (2), quoted at p. 394 of the Indian Limitation Act by Broomfield (6th Edn.). The relevant sentence reads: “Under the repealed Act” (which is the Act applicable to Kenya) “the date of executing any process for enforcing the judgment was the date on which any process for attachment of the judgment debtor’s property or person was actually executed; not the date on which notice was issued calling upon him to show cause why the decree should not be executed.” It does not appear that the several applications for execution in this case went beyond the “show cause” stage.

I think this satisfactorily meets counsel for the respondent’s objection on the ground of limitation, although counsel for the applicant has also given a technical answer to this objection. He says that, under s. 40 of one Limitation Act (Cap. 11) limitation ought to have been pleaded. Counsel for the respondent could have done this by filing an affidavit in reply.

In my opinion, counsel for the applicant has put forward an unanswerable case. I allow the application and set aside the judgment and decree passed against the applicant. The applicant will have the costs of the notice of motion and these proceedings.

In conclusion I must place on record my appreciation of the thorough and competent manner in which counsel for the applicant has prepared and argued his case. Counsel for the respondent has also been of great assistance to me. His faults, however, are the faults of his case.

Application allowed.

For the respondent:
RK Sood
RK Sood, Kisumu

For the defendant:
PV Raichura
Kohli, Patel and Raichura, Kisumu

Republic v Wamboi Kamau

[1965] 1 EA 548 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	11 August 1965
Case Number:	62/1965
Before:	Harris J
Sourced by:	LawAfrica

[1] Criminal law – Age of accused in capital case – Nature of inquiry into age when child below the age of criminal responsibility.

Editor's Summary

The accused, aged about 9, was charged with murdering a male infant temporarily in her care on March 3, 1965. Before entering into the general issue of guilt the court satisfied itself as to whether or not the accused was under the age of criminal responsibility.

Held –

(i) the court has a duty in cases of doubt to satisfy itself judicially as to the age of the accused when that affects criminal responsibility and this is best dealt with at the commencement of the proceedings without waiting for evidence relating to the general issues;

(ii) the necessary inquiry affecting the criminal responsibility of an accused aged about 8 years under s. 14(1) of the Penal Code is analogous to the inquiry affecting the capital sentence after conviction of an accused aged about 18 years under s. 25(2) ibid. where the court has a residual responsibility to satisfy itself as to the accused's age apart from the prosecution which must furnish such evidence as it can;

(iii) the court was still in doubt after considering the medical evidence whether the accused was over 8 at the time of the offence and therefore the accused must be treated as not being criminally responsible.

Accused acquitted.

Cases referred to in judgment

(1) *Mwangi Kamweru v. R.* (1953), 20 E.A.C.A. 251.

(2) *R. v. Mvula Irove* (1944), 11 E.A.C.A. 112.

Judgment

Harris J: The accused is charged with the murder of a male infant, Anthony Kanyi Muchoki, on March 3, 1965, contrary to the provisions of s. 204 of the Penal Code. The depositions taken before the magistrate suggest that the death of the infant occurred while he was being cared for by the accused at the instance of the infant's mother who was engaged elsewhere.

The depositions also disclosed that on March 8, 1965, a medical officer attached to the Fort Hall District Hospital had examined the accused at the request of the police and had found her apparent age to be nine years. This remarkable circumstance was rendered immediately and vitally relevant to the charge by the provisions of sub-ss. (1) and (2) of s. 14 of the Code, which are as follows:

> "14. (1) A person under the age of eight years is not criminally responsible for any act or omission.
>
> (2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission."

A distinction between these subsections is that, generally speaking, the applicability to any particular case of the provisions of sub-s. (2) would fall to be determined as part of the general issues in the case, while the applicability of sub-s. (1) might sometimes more suitably be dealt with at the commencement of the proceedings without awaiting the production of evidence relating to the general issues. In the present case it appeared both to counsel and to the court that the question raised by sub-s. (1) could conveniently be disposed of at the earlier stage. The question is whether the accused was under the age of eight years on March 3, 1965. This question is one of fact but regard must be had to the statutory provisions by reference to which it is to be determined. Section 14 may be compared and contrasted with sub-s. (2) of s. 25 which provides that sentence of death shall not be pronounced or recorded against any person convicted of an offence if it appears to the court that at the time the offence was committed he was under the age of eighteen years. The effect of this is to place the responsibility of determining the age of the accused upon the court.

The duty of the court and of the prosecution under sub-s. (2) of s. 25 was considered by the Court of Appeal in *Mwangi Kamweru v. R.* (1) and stated to be as follows ((1953) 20 E.A.C.A. at p. 253):

> "The first thing to note about this section is that the responsibility is placed on the court and that it is a matter of opinion. In many cases the youthfulness of the person before him will be so obvious to the trial judge that he will need no evidence to assist him in coming to an opinion. There may also be cases where the judge, from his own observation, may be able to decide that the young person before him is manifestly over eighteen, but these cases will be more rare. Certainly it is the judge's duty in any case where he feels the least doubt to call for evidence. We go further and say that in clearly doubtful cases it is the duty of the prosecution to have such evidence and not merely to await an application by the defence . . ."

Dealing further with the extent of the onus placed upon the prosecution under the same subsection the Court of Appeal in the same case said (ibid. at p. 254):

> "In our opinion it is an overstatement to say that an onus lies always on the prosecution to prove beyond any reasonable doubt that a person charged with an offence involving the capital penalty was over eighteen on the date the offence was committed. To apply this literally, especially where in these territories exact proof of age is a matter of extreme difficulty, would be to impose an intolerable burden on the Crown, not warranted in our opinion by the wording of the section. As we have said the section places the responsibility on the court, and it is for the court to be satisfied judicially in any case of doubt. If doubt remains in the mind of the court then sentence of death cannot be lawfully passed."

Similarly in *R. v. Mvula Irove* (2) where the only relevant evidence of age was that of a medical practitioner who stated that "the accused is about eighteen years of age. He is over seventeen" and where the learned trial judge in his report to the Court of Appeal said that the accused from his appearance "might have been anything from seventeen to twenty", the Court of Appeal, feeling a measure of doubt as to whether the accused was not under eighteen years, held that the accused must have the benefit of that doubt.

The duty resting on the court and on the prosecution under sub-s. (1) of s. 14 is certainly no lighter than that under sub-s. (2) of s. 25 in view of the fact that the issue raised is not merely as to the appropriate punishment to be imposed upon a convicted person for a proven or admitted offence but is as to whether the person accused before the court was legally capable at the relevant time of being guilty of any offence whatever against the criminal law of this country.

Accordingly, in the present case, counsel for the prosecution very properly gave to the court what assistance he could by calling as his first (and, as events turned out, his only) witness, Dr. C. S. Dave, the medical practitioner to whose deposition before the magistrate I have already referred. In his evidence Dr. Dave stated that he had examined the accused's body and teeth, that an X-ray photograph, if taken, could not have been reliable and that none in fact had been taken, that little research had been carried out on members of the African races in regard to the ascertainment of age so that apart from written records or other contemporary evidence it is not feasible to determine the age of a member of those races with any degree of accuracy, and that it was quite possible that the accused is at present aged not more than 8 years and 3 months. No other evidence of age was produced and in reply to questions put by me to the accused through the court interpreter she stated that she did not know how old she was. She appeared to be a truthful child and I saw no reason to disbelieve her.

It is not entirely clear from the language of s. 14 of the Code whether questions concerning the age of an accused person fall to be determined by the judge alone without reference to the assessors, but in this particular case it appeared to me to be desirable that I should have the benefit of the opinion of the assessors and each of them expressed the view that in March last the accused was under the age of eight years.

In the light of the evidence given and of the assessors' opinion and of the impression which I myself formed from her appearance and demeanour in court, I am not satisfied that the accused had attained the age of 8 years on March 3, 1965, and accordingly I hold that it has not been shown that she could have been criminally responsible for anything that may have happened on that day. I therefore acquit her of the offence charged.

Accused acquitted.

For the Republic:
James Karugu (State Attorney, Kenya)
The Attorney General, Kenya

For the accused:
Bali-Sharma
Bali-Sharma & Co, Nairobi

Rahemtulla Jethalal Ismail v Sherbanu N Jivraj
[1965] 1 EA 550 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	8 July 1965
Case Number:	4/1965
Before:	Newbold V-P, Crabbe and Law JJA
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Appeal from: High Court of Uganda – Sheridan, J

[1] Bills of exchange – Promissory note – Requirements of form – Document acknowledging receipt of money and stating term of repayment – Whether document promissory note – Stamp Ordinance (*Cap.* 193) *s.* 2 *and s.* 38 (*U*).

Editor's Summary

The appellant sued the respondent as administratrix of the borrower to recover a sum of money lent to the deceased, and the plaint alleged that the deceased had acknowledged the loan in writing in the following terms: "Received from Rahemtulla Jethalal Ismail cash Shs. 5,000/- five thousand only, which (sum) is to be paid within 30 days of the presentation of this chit". The respondent's defence was that the document was not an acknowledgment but a bill of exchange or promissory note, void for lack of affixing the necessary

stamp duty. By consent a preliminary issue was taken as to whether the document was in law to be regarded as a bill of exchange or promissory note. The judge decided that it was a promissory note, and that being unstamped it was inadmissible in evidence by virtue of the provisions of s. 38 of the Stamp Ordinance, and he dismissed the suit. On appeal on the grounds that the judge erred in holding that the document was a promissory note and erred in dismissing the appellant's case without hearing evidence,

Held –

(i) the judge erred in dismissing the suit because his finding that the document was a promissory note meant no more than that it was inadmissible in evidence as proof of the appellant's claim but it did not preclude the appellant from seeking to establish his claim by such other evidence as might be available to him;

(ii) the words "to be paid within 30 days of presentation" did not constitute a "condition or contingency" within the meaning of the expression "promissory note" for the purposes of the Stamp Ordinance;

(iii) the document was primarily a receipt for a loan containing the terms of repayment in a private transaction and it should not be taken as a promissory note without evidence of the intention of the parties to make the document negotiable.

Appeal allowed. Order that the suit be restored for hearing.

Cases referred to in judgment

(1) *Nawab Major Sir Mohammad Akbar Khan v. Attar Singh*, [1936] 2 All E.R. 545.

(2) *Lala Karam Chand v. Firm Mian Mir Ahmad Aziz Ahmad*, [1938] A.I.R. P.C. 121.

(3) *Lombard Banking* (*U*), *Ltd. v. V. Gordhandas*, [1960] E.A. 345 (U).

July 8. The following judgments were read:

Judgment

Law JA: This is an appeal from a decision of the High Court of Uganda (Sheridan, J.) dismissing a suit brought by the appellant in which he sought to recover from the respondent as administratrix of the estate of one Merali Jivraj, a sum of money allegedly lent to the deceased. In his plaint the appellant alleged that Merali Jivraj acknowledged the loan in writing in the following terms:

> "Received from Rahemtulla Jethalal Ismail cash Shs. 5,000/- five thousand only, which (sum) is to be paid within 30 days of the presentation of this chit.
>
> (Sd.) Merali Jivraj
>
> Mbarara 6. 8. 1955"

By her written statement of defence the respondent pleaded *inter alia* that this document was not an acknowledgment but "a bill of exchange and/or promissory note void for lack of affixing the necessary stamp duty thereon".

By consent of the parties, the issue whether the document was in law to be regarded as a bill of exchange or promissory note was tried as a preliminary issue. The judge decided that it was a promissory

note, and that being unstamped it was inadmissible in evidence by virtue of the provisions of section 38 of the Stamps Ordinance (Cap. 193), (U.), and he proceeded to dismiss the suit with costs.

The appellant now appeals against this decision on the following two grounds:

> "1. The learned trial judge erred in holding that annexure 'A' to the plaint . . . was a promissory note.
>
> 2. Assuming that the learned trial judge was right in holding that the said document was a promissory note, he erred in dismissing the appellant's case without hearing evidence of it, as he was merely delivering by consent a ruling on a preliminary point of law."

In my opinion, the second ground of appeal must in any event succeed. The suit the subject of this appeal was for the recovery of a sum of money allegedly lent; it was not a suit under the summary procedure (O. 33) upon a negotiable instrument. It was the respondent who alleged that the document relied upon by the appellant as an acknowledgment of the debt was in fact a negotiable instrument void for want of stamping. This issue was tried as a preliminary issue, and the judge's finding that the document was a promissory note meant no more than that it was inadmissible in evidence as proof of the appellant's claim. It did not preclude the appellant from seeking to establish his claim by such other evidence as might be available to him.

The first ground of appeal raises a question of some difficulty. A promissory note is defined in s. 83(1) of the Bills of Exchange Ordinance (Cap. 217), (U.), as follows:

> "a promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer."

The definition for the purposes of the Stamps Ordinance is contained in s. 2 of that Ordinance, and reads as follows:

> " 'Promissory note' means a promissory note as defined by s. 83 of the Bills of Exchange Ordinance;
>
> it also includes a note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen."

As the trial judge rightly remarked, the definition of a promissory note for the purposes of the Stamps Ordinance is wider than that for the purposes of the Bills of Exchange Ordinance, but in my opinion nothing turns on the difference between the two definitions in this appeal, as no "particular fund" or "condition or contingency" is referred to in the document the subject of this appeal, other than the contingency of presentation, which was no more than the method of determining the time when the debt was to be repaid. The words used in this case, "to be paid within 30 days of presentation", represent a normal method of determining the date of payment of bills of exchange and promissory notes, and do not in my opinion constitute a "condition or contingency" within the meaning of the expression "promissory note" for the purposes of the Stamps Ordinance. It is therefore only necessary to determine whether or not the document the subject of this appeal is a promissory note as defined in the Bills of Exchange Ordinance (Cap. 217). The trial judge held that it was, because of "its bare terms and undertaking or promise to pay within 30 days of presentation". The appellant claims that on a true construction it is a receipt for money incorporating a note of the agreed terms on which it was to be repaid.

In deciding whether any particular document is or is not a promissory note, the form of words used is immaterial. It must, however, consist substantially of a promise to pay, and nothing else. Counsel for the appellant referred to two Privy Council decisions on appeals from courts in India.

By s. 4 of the Indian Negotiable Instruments Act, 1881, a promissory note is defined as an instrument in writing (not being a bank note or currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument. The same definition was adopted for the purposes of the Indian Stamps Act, 1899, by s. 2(22) of that Act, with the addition of the same words which appear in the corresponding definition in the Uganda Stamps Ordinance, that is to say:

> "it also includes a note promising payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen."

The relevant legislation in India and Uganda was thus to the same effect, although the wording used to define a promissory note is not identical. It would seem, however, from the judgments in the two Privy Council reports to which reference is made hereunder, that the addition referred to above in the Indian Stamps Act no longer exists. As I have already pointed out, this addition is immaterial for the purposes of this appeal. In the first case relied upon by the appellant, *Nawab Major Sir Mohammad Akbar Khan v. Attar Singh* (1), the Privy Council had to decide whether a document in the following terms was or was not a promissory note:

> "This receipt is hereby executed by A for Rs. 43,900 . . . received from the firm of B for and on behalf of C. This amount to be payable after 2 years. Interest at the rate of Rs. 5–4–0 per cent per year to be charged."

This instrument was signed by the maker and stamped as a receipt. The Board held that the document was primarily a receipt, and even if coupled with a promise to pay it was not a promissory note. The following is an extract from the Board's advice:

> "Their Lordships prefer to decide this point on the broad ground that such a document as this is not and could not be intended to be brought within a definition relating to documents which are intended to be negotiable instruments. Such documents must come into existence for the purpose only of recording an agreement to pay money and nothing more, though of course they may state the consideration. Receipts and agreements generally are not intended to be negotiable, and serious embarrassment would be caused if the negotiable net were cast too wide. This document plainly is a receipt for money containing the terms on which it is to be repaid."

In *Lala Karam Chand v. Firm Mian Mir Ahmad Aziz Ahmad* (2), the Privy Council considered the effect of two documents in the following form:

> "Received from you . . . a cheque for Rs. 10,000 . . . The amount would be repaid with interest thereon at the rate of Rs. 11–4–0 p.c. Time ten months. The principal amount will be paid with interest after ten months from this date."
>
> "Received from you . . . a cheque for Rs. 10,000 . . . The amount to be paid back with interest at the rate of Rs. 11–4–0 p.c. after ten months. This principal amount with interest thereon to be repaid after ten months from this date."

The Board held that both documents were clearly never intended to be negotiable instruments and were therefore not promissory notes inadmissible in evidence for want of a stamp.

The similarity of the documents considered in the two cases referred to above with the document the subject of this appeal is immediately apparent. All begin by recording the receipt of a sum of money, and end with a reference to the date when the money is to be repaid. In none of them is there a specific undertaking or promise to pay, although such an undertaking or promise can be inferred.

Counsel for the respondent relied on a number of cases culled from the English Reports in which documents of a similar nature were held to be promissory notes. The latest of these cases was tried in 1848, many years before the enactment of the English Bills of Exchange Act, 1882, and I consider them to be of less assistance than the two Privy Council decisions referred to above. The intention of the parties is a factor in deciding whether a particular document is or is not a promissory note. I cannot believe that the document, the subject of this appeal, was intended to be a promissory note. The maker and the payee were both Asian traders, a class of person to whom promissory notes are well known; yet the document does not contain the words "I promise to pay", or words to the like effect, which are normally used in documents intended to be negotiable. The document is not stamped as a promissory note. It does not appear to have been negotiated, or intended to be negotiated. It is primarily a receipt for a loan. Admittedly an undertaking to repay the loan can be inferred from the words "which sum is to be repaid", but this is not sufficient to turn into a promissory note a document which was not intended to be a promissory note. There is no evidence as to the intention of the parties to the document the subject of this appeal. It is capable of being a promissory note if that was the intention of the parties, but on the face of it, it is a receipt for a loan containing the terms on which the parties had agreed that the loan should be repaid. It is an ambiguous document, and in the absence of any evidence as to the intention of the parties to make a promissory note it should not, in my opinion, be declared to be a promissory note, and thus a negotiable instrument, when its apparent purpose was to record a private transaction between two individuals in a form unsuited to a negotiable instrument.

In my view, this appeal succeeds on both grounds set out in the memorandum, and should be allowed, with the costs to the appellant, including the costs of the preliminary issue in the High Court.

The judgment and decree dismissing the appellant's suit must be set aside, and the suit restored for hearing in the High Court on the basis that the document annexed to the plaint is not a promissory note.

Newbold V-P: I have had the advantage of reading in draft the judgment of Law, J.A., and I agree with it. The document in question is in my view primarily a receipt; it cannot, therefore, be said to consist substantially of a promise to pay and of nothing else. Such must be the position before a document can be said to be a promissory note for the purposes of the Stamps Ordinance. I prefer what I understand to be the principle behind the decision in *Lombard Banking* (*U.*), *Ltd. v. Gordhandas* (3) to that which the same judge adopted in this case. There will be an order in the terms proposed by Law, J.A.

Crabbe JA: I agree.

Appeal allowed. Order that suit be restored for hearing.

For the appellant:
MV Jobanputra
Jobanputra & Pandya, Kampala

For the respondent:
JS Shah

Patel & Patel, Kampala

Okethi Okale and others v Republic
[1965] 1 EA 555 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 1 July 1965

Case Number: 179/1964

Before: Crabbe, Duffus and Spry JJA

Sourced by: LawAfrica

Appeal from: High Court of Kenya – Chanan Singh, J

[1] Criminal law – Judgment – Misdirection – Conviction based on theory put forward by judge rather than on evidence given.

[2] Criminal law – Evidence – Dying declaration – Caution required – Whether corroboration necessary.

[3] Criminal law – Burden of proof rests throughout on prosecution – Evidence to be looked at as a whole.

Editor's Summary

The four appellants were convicted of murder. In the court below the only issue was identification and the prosecution case consisted of evidence from the widow of the deceased and evidence of a dying declaration. The judge, after discounting the evidence of the widow, proceeded to put forward a theory of his own which was inconsistent with the widow's evidence and unsupported by the medical evidence; and he accepted the deceased's brother's evidence as to the dying declaration without giving any reasons. The judgment also contained a passage suggesting that the judge had accepted the prosecution case and then cast on the appellants the burden of disproving it or raising doubts about it.

Held –

(i) in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in counsels' speeches;

(ii) the trial judge had failed to approach the evidence of the dying declaration with the necessary circumspection;

(iii) (repeating the principles set out in *Ndege Maragwa v. Republic* (10)), the burden of proof in criminal proceedings is throughout on the prosecution, and it is the duty of the trial judge to look at the evidence as a whole.

Appeal allowed. Convictions quashed and sentences of death set aside.

Cases referred to in judgment

(1) *R. v. Isaac*, [1965] Crim. L.R. 174.

(2) *Jasunga Akumu v. R.* (1954), 21 E.A.C.A. 331.

(3) *Ramazani bin Mirandu* (1934), 1 E.A.C.A. 107.

(4) *R. v. Okulu Eloku* (1938), 5 E.A.C.A. 39.

(5) *R. v. Muyovya bin Msurya.*

(6) *R. v. Eligu Odel* (1943), 10 E.A.C.A. 90.

(7) *Re Guruswami*, [1940] Mad. 158.

(8) *R. v. Epongu Ewunyu* (1943), 10 E.A.C.A. 90.

(9) *Dala Mkwayi v. R.* (1956), 23 E.A.C.A. 612.

(10) *Ndege Maragwa v. Republic* (1965), E.A.C.A. Criminal Appeal No. 156 of 1964 (unreported).

Crabbe JA: read the following judgment of the court:

The case for the prosecution was that at about 8 p.m. on December 9, 1963 the deceased left his house at Kakola sub-location, East Kano Location, to see his brother, Barnabas Omolo, who lived in the same sub-location, about one quarter of a mile away. The deceased did not see his brother, and on his return journey home he was attacked by certain people and received a head injury. His wife, Joyce Awenda, who was attracted to the scene by shouts, took him home. Barnabas Omolo came to the house and the deceased mentioned to him the names of the appellants as his assailants. Nothing was done that evening about the injury until the following day when the deceased, accompanied by his wife and brother, walked to Ahero Health Centre for treatment. The dresser there found that the wound on the deceased was septic, and, therefore, after giving the deceased a penicillin injection, he advised that the deceased be taken to Kisumu Hospital. There the deceased was admitted and treated for some days by Dr. Chaudry (P.W. 1), but his condition showed no improvement, and ultimately he died on December 25. A post-mortem examination was performed by Dr. Tarlok Singh (P.W. 3) on December 26. Dr. Chaudry testified at the trial that when he first saw the deceased he noticed only one wound (2" × ¾") on the right side of his head; it was septic and pus was coming out of it. He said that on December 17 he made further and more thorough examination of the wound and found that the brain was sloughed or decayed, resulting from the single wound which he had earlier observed. In his opinion the wound could have been caused by a blunt instrument wielded with considerable force. Dr. Singh who also gave evidence confirmed that there was only one external wound about 2" round on the right side of deceased's head. He said that death was caused by a fracture of the skull.

The principal witness for the prosecution was the widow of the deceased, Joyce Awenda. She testified that she was with the deceased in the evening of December 11, 1963 when he left home on a visit to his brother. The crucial part of her evidence-in-chief was as follows:

> "He was with me up to 8.30 p.m. Then he went to see his brother Lala Okello. He left the house. I heard some shouts at about 9 p.m. I ran very fast because I believed that was my husband's voice. I ran in the direction from where shouting was coming from. I found people beating him. He was lying on the ground. The people who were beating him were those in the dock (witness points to 4 accused in turn from No. 1 to No. 4). All 4 were beating him. The first Accused had an axe. Nyambo had an axe. (witness points second accused). Mware (Accused 3) had a rungu. Sewe (Accused 4) also had a rungu. Okethi (Accused 1) had a rungu as well. When I arrived at the scene, all four accused ran away. I took my husband home."

The only other relevant evidence in support of the prosecution's case was what appeared to be the evidence of a dying declaration given by Omolo, the brother of the deceased.

The only issue at the trial was the identity of the appellants. The learned judge accepted the evidence for the prosecution, and in his judgment he said:

> "The evidence of the identity of the four accused persons and their connection with the crime has, in my opinion, been satisfactorily established by the prosecution."

The first ground of appeal argued by counsel for the appellants was in these terms:

> "The learned judge erred in finding that there was any or any sufficient evidence to establish that any of the appellants assaulted the deceased."

Counsel for the appellants first examined the evidence of Joyce Awenda and called attention to what, he contended, were inconsistencies in her evidence. He submitted that the evidence of Joyce Awenda contained sufficient contradictions such as would create a reasonable doubt, and he criticised the judgment of the learned trial judge which made no reference whatsoever to these contradictions. With respect to the learned trial judge, we think that the criticisms made by counsel for the appellants are well founded.

The events to which Joyce Awenda testified all took place in darkness, though she said it was not very dark. She said, however, that there was no moonlight, and that she knew all the appellants before that date. The material part of her examination-in-chief is already set out above, and under cross-examination she said that she saw the first appellant hit the deceased on the back and then on the waist, possibly with the rungu which he was holding. The second appellant cut the deceased on the head, presumably with an axe. There was no evidence that the second appellant held a rungu, and this piece of evidence is of some importance in view of what Joyce Awenda said at some later stage in her testimony. The third appellant according to Joyce, also beat the deceased, presumably with the rungu which he was holding. She did not, however, say whether or not the fourth appellant also assaulted the deceased.

The first contradiction in the evidence of Joyce is noticeable when she said in examination-in-chief: “When I arrived at the scene, all four accused ran away”. The crucial question is, how much opportunity did she have then in observing the assailants of the deceased? We think that a considerable light is thrown on this question by Joyce’s answers to questions by the trial judge. Firstly, she said that when she arrived at the scene of the crime the appellants had finished beating the deceased. She said: “he had been beaten already and was lying on the ground.” In these circumstances we entertain a grave doubt as to how she could then have observed the part which each appellant played in the assault on the deceased. Secondly, she said: “They beat him with rungus in my presence.” This statement is in direct conflict with her earlier statement. Besides, the statement implies that the fourth appellant also took part in the beating. But she admitted later in answer to a question that she had said at the preliminary enquiry that the fourth appellant was standing about 10 feet from the deceased. This admission clearly belies her evidence that she saw all the appellants beating the deceased with rungus. Thirdly, though Joyce had said positively that the second appellant had cut the deceased on the head, yet in answer to the trial judge she was not only unable to identify the assailant who had the axe, but also made this important statement: “I did not see him hit my husband with an axe.” It would appear that the learned judge ultimately rejected Joyce’s evidence implicating the second appellant as to the injury on the head of the deceased. Having discounted this apparently false evidence of Joyce the learned judge then put forward a theory of his own that it was possible that the head injury was caused by the rungu wielded by one of the other accused. The learned judge then proceeded to state:

> “This is a case in which reasoning has to play a greater part than actual evidence.”

With all due respect to the learned trial judge, we think that this is a novel proposition, for in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and not on any fanciful theories or attractive reasoning. We think it is dangerous and inadvisable for a trial judge to put forward a theory of the mode of death not canvassed during the evidence or in counsel’s speeches. (See *R. v. Isaac* (1)). This theory by the learned judge was inconsistent with the evidence of Joyce that the injury on the head was caused

by the second appellant with an axe, neither is it supported by the medical evidence.

Another piece of evidence which the learned trial judge said linked the appellants with the killing of the deceased was that of Barnabas Omolo, the brother of the deceased. Omolo testified that about 7 a.m. the next day after the assault on the deceased he had seen the deceased ill in his house, and that the deceased had mentioned the names of the appellants as his assailants. This witness stated further that after he had come to know the names of the four appellants he went to see the first appellant whom he asked: "Why did you beat Olale?" The reply was that he had not beaten the deceased, but that the second appellant had done so. The learned trial judge relied on this self-exculpatory statement by the first appellant as evidence against the second appellant. Clearly, this statement was inadmissible against the second appellant, and in this appeal counsel for the Republic quite properly conceded that the learned trial judge was wrong. It was therefore no longer necessary for counsel for the appellants to argue grounds 4 and 5 of his grounds of appeal.

But it was further contended by counsel for the appellants that the learned judge misdirected himself with regard to the evidence of Omolo by failing to show a proper appreciation that the statement by the deceased relating to the identity of his assailants was a dying declaration which was of negligible value, because in the circumstances of this case it was not made in contemplation of death. Counsel for the appellants further submitted that though a dying declaration is admissible yet it is the weakest of all evidence and requires corroboration. He argued that the judgment of the learned trial judge does not show an awareness that dying declarations have limited value and must be approached with caution. In this respect we would quote the following passage from the judgment of the court in *Jasunga Akumu v. R.* (2) ((1954), 21 E.A.C.A. at p. 334):

> "The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this Court in numerous cases, and a passage from Field on Evidence (7th Edn.) has repeatedly been cited with approval:
>
> > 'The caution with which this kind of testimony should be received has often been commented upon. The test of cross-examination may be wholly wanting; and . . . the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed The deceased may have stated his inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them.' (*Ramazani bin Mirandu* (3); *R. v. Okulu Eloku* (4); *R. v. Muyovya bin Msuma* (5)).
>
> Particular caution must be exercised when an attack takes place in darkness when identification of the assailant is, usually, more difficult than in daylight (*R. v. Ramazani bin Mirandu* (3); *R. v. Muyovya bin Msuma* (5)). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is no guarantee of accuracy (ibid.).
>
> It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration (*R. v. Eligu Odel* (6); *Re Guruswami* (7)), and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. (See, for instance the case of the second accused in *R. v. Eligu Odel* (6) and *R. v. Epongu Ewunyu* (8)). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of

> the accused and not subject to cross-examination, unless there is satisfactory corroboration."

(See also *Dala Mkwayi v. R.* (9) ((1956) 23 E.A.C.A. at p. 613)).

The learned trial judge appears to have accepted the statement by the deceased as testified by Omolo as true without giving any reasons, and in our view the evidence of Joyce is anything but satisfactory corroboration. The deceased was not obviously at the time of the declaration in immediate expectation of death and in these circumstances we think that the learned trial judge, with respect, failed to approach the evidence of Omolo with that circumspection that the law enjoins with regard to dying declarations.

Counsel for the appellants finally argued ground 6 of the grounds of appeal which alleged misdirection as to the onus of proof, and he referred to the following passage of the judgment:

> "I have given consideration to this unsworn evidence but I do not think it sufficient to displace the case built up by the prosecution or to produce a 'reasonable doubt'."

He submitted that the passage suggests that the learned judge first accepted the case for the prosecution and then cast upon the appellants the burden of disproving it or raising doubts about it. We think with respect that the learned judge's approach to the onus of proof was clearly wrong, and in *Ndege Maragwa v. Republic* (10), where the trial judge had used similar expressions this court said:

> ". . . we find it impossible to avoid the conclusion that the learned judge has, in effect, provisionally accepted the prosecution case and then cast on the defence an onus of rebutting or casting doubt on that case. We think that is an essentially wrong approach: apart from certain limited exceptions, the burden of proof in criminal proceedings is throughout on the prosecution.
>
> Moreover, we think the learned judge fell into error in looking separately at the case for the prosecution and the case for the defence. In our view, it is the duty of the trial judge, both when he sums up to the assessors and when he gives judgment, to look at the evidence as a whole. We think it is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it. Indeed, we think that no single piece of evidence should be weighed except in relation to all the rest of the evidence. (These remarks do not, of course, apply to the consideration whether or not there is a case to answer, when the attitude of the court is necessarily and essentially different.)"

We think that the observations of this court in that case apply with equal force to the present appeal.

Having considered all the misdirections and justifiable criticisms we were satisfied that it would be unsafe to allow the convictions to stand, and we accordingly quashed them, set aside the sentence of death and acquitted and discharged the appellants.

Appeal allowed. Convictions quashed and sentences of death set aside.

For the appellants:
AR Kapila
Pranlal Seth, Nairobi

For the respondent:
JB Karugu (State Attorney, Kenya)
The Attorney General, Kenya

P U Patel v L P Patel

[1965] 1 EA 560 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 27 August 1965

Case Number: 13/1965

Before: Newbold V-P, Duffus and Spry JJA

Sourced by: LawAfrica

Appeal from: High Court of Kenya – Sherrin Ag J

[1] Divorce – Desertion – Hindu Marriage and Divorce Act, s. 10(1)(*b*)(*k*) *– Respondent leaving home alleged ‘ just cause” – Alleged offer to return – Degree of misconduct necessary to justify party leaving – Whether mere unhappiness sufficient.*

[2] Divorce – Desertion – Burden and standard of proof – Whether burden shifts upon proof of fact of departure and animus deserendi.

[3] Divorce – Hindu Marriage and Divorce Act, s. 10(1)(*i*) *k.*

[4] Divorce – Costs – Practice – When wife may be condemned in costs.

Editor’s Summary

A husband petitioned for divorce on the ground of desertion under s. 10(1)(*b*) of the Hindu Marriage and Divorce Act. The wife admitted leaving the home, but alleged she had just cause for so doing (being neglect and cruelty) and also alleged bona fide efforts by her to return. The trial judge, in dismissing the petition, found that the husband had “behaved callously” and the wife “did not leave him without cause”. On appeal, counsel for the husband argued that the judge failed to appreciate that there was an onus on the wife, once desertion was established, to prove facts excusing it, which facts must be “grave and weighty”; and that the judge had misdirected himself when considering the effect of s. 10(1)(i) of the Act. Counsel for the wife argued that on the evidence the wife had not left without cause; and also that any desertion by the wife was ended by her making a bona fide offer to return.

Held –

(i) on the evidence, the husband had discharged the burden of proof on him to show that the wife left the home without his consent and with no intention of returning;

(ii) that thereafter, although the overall burden remained with the husband, the burden of proof passed to the wife to satisfy the court that there were reasons which absolved her, that while it is not necessary to prove any matrimonial offence to excuse desertion it is equally clear that desertion is not lightly to be excused, and that on the evidence the matters raised by the wife were not “grave and weighty”, mere unhappiness not being sufficient, and therefore she failed;

(iii) s. 10(1)(i) of the Act creates an extraordinary ground for divorce, but does not invalidate a previous second marriage and cannot be interpreted as changing in any way the marital obligations of the parties so long as both marriages subsist;

(iv) a bona fide offer to return made before the filing of the petition would determine desertion, but on the evidence the wife had failed to discharge the onus on her of proving such an offer;

(v) it is not the usual practice of the court to condemn a wife in costs in matrimonial proceedings, except where it is shown that she has sufficient separate estate, which had not been shown here; in the circumstances the husband should bear the wife's costs.

Appeal allowed. Order for decree nisi substituted.

Cases referred to in judgment

(1) *Mallinson v. Mallinson*, [1961] E.A. 185 (C.A.).

(2) *Beer v. Beer*, [1947] 2 All E.R. 711.

(3) *Dunn v. Dunn*, [1948] 2 All E.R. 822.

(4) *Edwards v. Edwards*, [1949] 2 All E.R. 145.

(5) *Pike v. Pike*, [1953] 1 All E.R. 232.

(6) *Williams v. Williams*, [1943] 2 All E.R. 746.

(7) *Saunders v. Saunders*, [1965] 2 W.L.R. 32; [1963] 1 All E.R. 838.

August 27. The following judgment was read:

Judgment

Spry JA: This is an appeal from a judgment and decree of the High Court of Kenya, dismissing a petition for divorce filed by the appellant (to whom I shall refer as "the husband").

The petition was filed under the provisions of the Hindu Marriage and Divorce Act (Cap. 157) and the Matrimonial Causes Act (Cap. 152) and contained an allegation that the respondent had deserted the husband without reasonable excuse for a period of three years and upwards, which is a ground for divorce under s. 10(1)(*b*) of the former Act. The respondent, in her answer to the petition denied that she had been guilty of desertion; she admitted that she had left the matrimonial home but alleged that she had just cause for so doing, in that the husband had been guilty of neglect and of physical and mental cruelty. She further alleged that even if she had been guilty of desertion, she had "put herself right" by making bona fide efforts to return. She also alleged undue delay in the bringing of the petition.

The learned trial judge, after reviewing the evidence, concluded–

> "I believe that the position of a Hindu wife whose husband has married again is intolerable unless he takes great care to be kind to her and to treat each of his wives fairly. I can find no trace of any kindness on his part in the evidence I have heard. He has behaved throughout callously towards her. I believe that he made no attempt to make her life at all happy and I consider she did not leave him without cause.
>
> I give judgment for the respondent with costs."

The main argument by counsel for the appellant was that the learned judge had failed to appreciate that there was an onus on the respondent, once desertion was established, to prove the facts she alleged as constituting the cause justifying or excusing her leaving her husband and had failed to appreciate that to constitute such a cause, the facts proved had to be grave and weighty. Counsel for the appellant submitted that most of the findings of fact by the learned judge favoured the husband's case and that such findings as were adverse to the husband were vitiated by an approach which suggested that the burden was on the husband of disproving the respondent's allegations. He submitted that those allegations were of a nature that called for a high standard of proof, that the only evidence in support of them was that of the respondent herself, whom the learned judge did not find to be a witness of truth, and that there was no corroboration which, though not essential, is desirable and usual. He argued also that there were two specific misdirections in the judgment, with which I shall deal later.

Counsel for the respondent submitted that there was sufficient evidence of a number of matters which, in the aggregate, justified the learned judge's conclusion that the respondent had not left the matrimonial home "without cause".

He was also given special leave, notwithstanding his failure to file a cross-appeal, to argue that even if it were held that the respondent had deserted her husband without cause, the desertion had come to an end when she made a bona fide offer to return, an issue which the learned judge did not consider in his judgment.

I think I should begin by considering where the burden of proof lies and the standard that is required. The basic rule was stated by Forbes, V.-P., in *Mallinson v. Mallinson* (1), when he said ([1961] E.A. at p. 198):

> "the burden of proof lies on the appellant [that was, the unsuccessful petitioner], and it is a heavier burden than that which lies on a party to an ordinary civil action."

Applying that principle to the present case, the husband would have had to establish, first, that the respondent left the matrimonial home; secondly, that she left without the husband's consent; thirdly, that she left with the intention permanently of ending co-habitation; and, fourthly, that she left without cause. Of these factors, the first is not in dispute. The second was not considered by the learned judge, except in so far as he rejected the respondent's evidence that she had been driven out. The husband said specifically that he "refused her permission to go to her parents' house" and this evidence was consistent with a letter sent to the respondent by the husband's advocate on January 17, 1956, that is, shortly after her departure. Although in the first instance she went to her brother's house, and subsequently to her father's, I think the only reasonable inference from the evidence, such as it is, is that the respondent left the matrimonial home without consent.

There was no evidence to prove whether or not, at the time when she left the matrimonial home, the respondent intended permanently to end her co-habitation with her husband. She herself gave no evidence on this subject. The only material from which an inference can be drawn is that when she left she took with her the child of the marriage, a trunk containing her clothes, her passport and her birth certificate. She did not take her jewellery because it was locked away and her sister-in-law had the key. It is not clear from the evidence whether she departed in her husband's absence; she said that she was driven out, but that evidence was rejected by the learned judge and the evidence of the husband is inconclusive, although I think it is to be inferred that he was not present. Certainly there is nothing to suggest that, at or about that time, she gave any indication that she would be willing to return on conditions.

In connection with both these issues, I should mention a letter dated February 2, 1956 (Ex. 2), written by an advocate and purporting to be written on the wife's instructions. That letter alleged departure with the consent of the husband and willingness to return. When she gave evidence, however, the wife expressly repudiated it and said that it was not written on her instructions. It has, therefore, no evidential value as to its contents.

Pausing at this point, I think it may be said that the evidence shows that the respondent left the matrimonial home without consent and with no intention of returning, that is to say that both the fact of departure and the animus deserendi had been sufficiently established, and although the learned judge made no express finding to that effect, I think it may reasonably be inferred from his judgment as a whole that he was of that view. It remains to consider whether the desertion was without cause.

It was submitted by counsel for the appellant that at this point the onus of proof shifts to the respondent, although he conceded an overall burden resting on his client. I think there is merit in this contention. There is authority for it in the case of *Beer v. Beer* (2), a case in which the facts were

different but which is authority for saying that where a *prima facie* case of desertion has been made

out, the burden of proof passes to the party alleged to be guilty of desertion to satisfy the court that there are reasons which absolve him, that is, of course, not the ultimate burden of proof, which remained on the husband throughout, but "a provisional burden raised by the state of the evidence" (to quote the words of Denning, L.J. (as he then was) in *Dunn v. Dunn* (3)).

The original allegations made by the wife in her answer to the petition included an assertion that the husband was physically cruel in that he beat both her and her child and this she maintained in her evidence. She also asserted in her evidence, and this was contrary to the contents of the answer, that it was not she who left her husband but he who turned her out of the house. This latter assertion was expressly rejected by the learned judge, who did not accept the respondent as a witness of truth. He did not deal in his judgment with the allegations of physical cruelty, but reading his judgment as a whole and in view of the fact that the allegations of cruelty and ejection were coupled in the respondent's evidence, I think it is clear that he rejected both and there was no cross-appeal on this issue.

The other conduct which was said to have made it impossible for the respondent to continue living with her husband was summarised by her counsel under nine heads. First, it was argued that the husband took a second wife and relegated the first to a subordinate position; secondly, having taken both wives and their luggage to the docks at Bombay in 1947, he sailed for Kenya with the second wife, leaving the first to follow later; thirdly, he failed to meet the respondent at the railway station on her arrival in Nairobi; fourthly, he failed to provide her with a room of her own or for herself and her child; fifthly, he failed to take her to the cinema; sixthly, he failed to buy her new clothes at the annual festival of Diwali; seventhly, he failed to go to fetch her home after her confinement at the house of her parents; eighthly, he caused her to be humiliated by permitting her to be excluded from the kitchen and, finally, although this could, of course, have no direct bearing on her departure from the matrimonial home, after she had left, he did not go in person to fetch her back but sent comparative strangers.

It may be noted that no evidence was given regarding Hindu customs, except for an admission by the husband in cross-examination that in a joint family it is a disgrace if a wife is not allowed in the kitchen. Generally, and even apart from the question of credibility, the evidence on both sides was unsatisfactory. I will deal briefly with each of the nine points made by counsel for the respondents'.

It is not disputed that the taking of a second wife by the husband was, at that time, permitted by law and by his religion. It is doubtful whether this second marriage had any substantial effect on the relations of the husband and wife. It may be noted that they had lived together for less than two years of the five and a half years they had been married and the respondent herself said that her relations with her husband were "very good" up to the birth of her child, apparently well over a year after the second marriage. There can be little doubt that relations deteriorated after the two wives had each given birth or that the husband's affections were with his second wife. This must, to some extent at least, have affected prejudicially the respondent's status but the evidence is extremely vague on this subject and it must be appreciated that there were five married women living in a comparatively small house, of whom the wife of the husband's elder brother was presumably the senior.

The husband's conduct on the docks at Bombay was at best discreditable and at worst disgraceful but this incident occurred more than eight years before the respondent left her husband. It cannot be regarded as a cause of her leaving, although it may well have left a permanent feeling of resentment, which contributed towards her ultimate decision.

I cannot attach any great significance to the failure of the husband to meet the respondent at the railway station on her arrival in Nairobi and, again, this was about eight years before she left the matrimonial home.

At first sight, the failure to provide the wife with a separate room might seem to afford a legitimate grievance but this must be viewed in the context of an extremely crowded household. There appear to have been at least nine adults and about ten children sharing ten sleeping rooms. Our attention was not drawn to any rule of Hindu law, nor am I aware of any, equivalent to the rule of Islamic law that a man with a plurality of wives must provide each with a separate home.

The alleged failure on the part of the husband to take the respondent to the cinema is, in my view, too trivial to warrant serious consideration. I would merely comment, and this illustrates the quality of much of the evidence, that there was no evidence that the respondent wished to go to the cinema or even asked her husband to take her.

Again, I would give little weight to the alleged failure to buy the respondent new clothes at Diwali. There was a conflict of evidence whether the husband bought her clothes at other times but he does appear to have provided her with money of which she was able to save a substantial amount.

I would not attach any importance to the fact that the husband did not go in person to bring the respondent home after her confinement. It may be, as the husband said, that to do so would have been contrary to custom, and there is some support for this in the evidence of the respondent's father. In any case, this happened about six years before the respondent left her husband.

There remains the alleged exclusion from the kitchen. On the husband's own admission, such exclusion would be a matter of disgrace. The evidence on this subject is, however, hopelessly inconclusive. The respondent's own evidence is that the other women excluded her. She said that she complained to her husband at the amount of work she was required to do but she never said that she complained to her husband about exclusion from the kitchen, while the husband expressly said that she had never complained of this. He also said that he took no interest in such matters. There was no reliable evidence to show whether the cooking was shared between the women of the household or done regularly by one or more of them. It was not even shown whether or not the husband's second wife took any part in the cooking. In these circumstances, it seems to me that nothing has been shown which could be regarded as a serious cause of complaint against the husband.

On these facts, the learned judge found that the husband had shown indifference to the respondent and that he had made no attempt to make her life happy. I think that conclusion was justified but it is for consideration whether the findings establish the degree of misconduct necessary to justify or excuse desertion. An appellate court will, of course, assume, in the absence of any indication to the contrary, that the trial judge applied the correct test and will only interfere if his decision was clearly wrong. That is particularly so where a case turns on the credibility of witnesses, but a peculiar feature of this case is that the learned judge found in favour of the respondent, although he expressed himself as not satisfied that she had given her evidence truthfully and virtually the only evidence in her favour consists of certain admissions made by the husband in cross-examination. This court is therefore in as good a position as the trial court to draw inferences from that evidence.

The answer to the petition contained an allegation of mental cruelty, based on the fact that the husband had taken a second wife and the allegation that he had relegated the respondent to the status of a menial in the household. This allegation

was not dealt with by the learned judge nor was it the subject of a cross-appeal but I think, for reasons that will appear, that I should deal briefly with it. Cruelty is always a matter of fact, but in matrimonial cases it has been held that to constitute cruelty, whether physical or mental, there must be injury or apprehended injury to health. Applying that test, there can be no doubt that the allegation of cruelty failed. There was no evidence, indeed not so much as a suggestion in the evidence, that the respondent's health suffered as a result of the husband's conduct, or that there was any fear that it might suffer.

I have dealt with this issue of mental cruelty, because the question how far conduct which falls short of cruelty may constitute a cause for desertion is not an easy one to answer. There are apparently conflicting decisions of the Court of Appeal in England (and English law is relevant, having regard to s. 3 of the Matrimonial Causes Ordinance) in the cases of *Edwards v. Edwards* (4) and *Pike v. Pike* (5). I do not, however, think it necessary to consider that question here, because I think the reference to mental cruelty in the answer to the petition was entirely misconceived, for the reasons I have given, and that it was therefore proper to consider all the evidence in relation to the main question, whether the husband's conduct excused the respondent's desertion.

It is quite clear that to excuse desertion, it is not necessary to prove any matrimonial offence. In *Williams v. Williams* (6), Du Parcq, L.J. said ([1943] 2 All E.R. at p. 752):

> "Counsel for the husband suggested, however, that as a general rule there could not be reasonable cause or excuse for desertion unless some matrimonial offence on the part of the deserted spouse were proved. This suggestion is wholly erroneous."

On the other hand, it is equally clear that desertion is not lightly to be excused. In *Saunders v. Saunders* (7), Sir Jocelyn Simon, P., said ([1965] 2 W.L.R. at p. 35):

> "The generally accepted test of what conduct amounts to constructive desertion is this: Has the defendant been guilty of such grave and weighty misconduct that the only sensible inference is that he knew that the complainant would in all probability withdraw permanently from cohabitation with him, if she acted like any reasonable person in her position."

That was a case where the wife was the petitioner, but I do not think the standard of evidence required is any different where the wife, as in the present case, is resisting an allegation of desertion by a counter-allegation of constructive desertion.

Saunders v. Saunders (7) was a case, like the present case, where the misconduct alleged consisted of a number of factors the aggregate effect of which was alleged to have made the wife's position intolerable. It is perhaps worthy of note that in that case the justices who dealt with the matter at first instance, and who found in favour of the wife, described the husband's conduct as showing "a considerable degree of callousness and lack of consideration for the wife's feelings", words remarkably close to those used by the learned judge in the present case, and that the appellate court felt that, not being satisfied that the decision was plainly wrong, they could not interfere.

In the present case, with some hesitation, I have reached the opposite conclusion. The earlier incidents to which counsel for the respondent referred cannot have made the wife's position intolerable, since, according to her own evidence, her subsequent relations with her husband were "very good" up to the time of the birth of her child. The remaining matters on which counsel for the respondent relied barely, in my view, for reasons I have already given, amount

to misconduct and certainly, as established by the evidence, cannot be regarded as such as to drive the wife out of the house. I do not, with respect, think it possible to describe them as “grave and weighty”. One may feel sympathy with the respondent in an unhappy situation but that is not enough: mere unhappiness has never been held sufficient to justify the repudiation of the obligations of marriage.

I have not previously referred to one piece of evidence, an undated letter written by the husband to the respondent. This appears to indicate that while the husband was prepared to recall his wife, he did not desire her return. The significance of this letter depends, in my view, on the date when it was written. No attempt was made by either counsel at the trial to bring out this fact, although it would appear to have been a fact which, both from the nature of the letter and references it contains, could easily have been established. We were asked by counsel to draw inferences as to the date of this letter. In my view, it would be wrong, except in the clearest circumstances, for this court to infer evidence which could have been, but was not, proved. I think, therefore, that the letter must be regarded as of no probative value.

Of the two specific misdirections that were alleged on the part of the learned judge, the first was that it was submitted that he had misdirected himself in looking to s. 10(1)(i) of the Hindu Marriage and Divorce Act for an indication of the way the husband should have treated the respondent. I think there is merit in this ground of appeal, although I would not accept counsel for the husband’s submission that the respondent was precluded from invoking s. 10(1)(i) because she had not chosen to base a petition on it. I think the correct view is that s. 10(1)(i) is irrelevant, since all it did was to create an extraordinary ground of divorce; it did not invalidate a previous second marriage and cannot, in my view, be interpreted as changing in any way the marital obligations of the parties so long as both marriages subsist.

Secondly, it was submitted by counsel for the husband that the learned judge had misdirected himself in holding against the husband the fact that he had failed to call other members of the household as to the status and treatment of the respondent but had relied on the evidence of servants. On this, I will merely say that I see no ground for criticising the learned judge. I think a trial court is always entitled to draw an inference from the failure to call a witness who was apparently in a position to give relevant evidence, except, of course, where the matter has already adequately been covered by equally good testimony.

Finally, I pass to the cross-appeal which counsel for the respondent was given special leave to argue, that if the respondent had been guilty of desertion without cause, the desertion had been determined by a bona fide offer to return on the part of the respondent, which had been rejected by the husband. This had been alleged in the answer to the petition but was not considered by the learned judge, presumably because, having found in the respondent’s favour on the issue of good cause, he did not consider it necessary.

The law as I understand it is, that if there was in fact desertion without cause, it would be determined by a bona fide offer to return, made before the filing of the petition. A wish to return is not enough, it must be conveyed to the deserted party and there is no obligation on the deserted party to make any overture. The onus of proof of an offer to return was clearly on the respondent. After considering all the evidence, I am not satisfied that it has been shown that any offer to return was made before the filing of the petition. I have already said that the advocate’s letter of February 2, 1956, has, in my view, no evidential value. Counsel for the respondent also sought to rely on the undated letter, to which I have already referred, as indicating that an offer had been made. That argument would only be valid, in my opinion, if it were clearly shown that the

letter was written after the date of the desertion. So far as the oral testimony is concerned, I can find nothing to indicate any approach by or on behalf of the respondent, while there is evidence of approaches by the husband which produced no response. I think this cross-appeal must therefore fail.

To sum up, I think that the husband has succeeded in proving desertion without cause and that the respondent failed to prove any allegations weighty enough to excuse that desertion. I think further that the respondent failed to prove any bona fide offer to return. I have not found this an easy case and I am not without sympathy for the respondent but I think that on the evidence and the findings of fact of the learned trial judge the husband was entitled to succeed. I would therefore allow the appeal, set aside the judgment and decree of the High Court and substitute an order for a decree nisi of divorce.

It is not the usual practice of the court to condemn a wife in costs in matrimonial proceedings, except where it is shown that she has sufficient separate estate, which has not been shown in the present case. After considering the circumstances, I would order that the wife's costs in the lower court and in this court be borne by the husband.

Newbold V-P: I have had the advantage of reading in draft the judgment of Spry, J.A. and I agree with it. There will be an order in the terms proposed by him.

Duffus JA: I also agree.

Appeal allowed. Order for decree nisi substituted.

For the appellant:
JM Nazareth, QC and JK Winayak
JK Winayak & Co, Nairobi

For the respondent:
EP Nowrojee
EP Nowrojee, Nairobi

Republic v Dunn
[1965] 1 EA 567 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	11 August 1965
Case Number:	95/1965
Before:	Sir John Ainley CJ and Miller J
Sourced by:	LawAfrica

[1] Criminal law – Practice – Order for payment of costs and compensation against Commissioner of Police – Whether charge frivolous or vexatious – Accused acquitted – Appeal by way of case stated –

Whether right to appeal against order for costs and compensation by way of case stated – Criminal Procedure Code (*Cap.* 75) *s.* 173 *and s.* 368(*K*).

Editor's Summary

The respondent was charged with unlawfully causing grievous harm and acquitted. The magistrate made an order under s. 173 of the Criminal Procedure Code that the Commissioner of Police should pay costs and compensation on the grounds that the charge was vexatious. The State appealed against the order for costs and compensation by way of case stated under s. 368 ibid, and the point for decision was whether the State had a right to appeal. It was contended for the State that the order for costs and compensation was a part and parcel of the "dismissal of a case" referred to in s. 173.

Held –

(i) the State has no right of appeal by way of case stated under s. 368 against an order for compensation made under s. 173;

(ii) there was nothing frivolous or vexatious in bringing a charge against the appellant and the magistrate should not have made the order for costs and compensation;

(iii) for a charge to be frivolous it must be shown that there was a blameworthy failure to devote any serious thought or any thought at all to the situation; there must be stupid or mischievous harassment of the accused before the charge is vexatious;

(iv) by virtue of the powers of revision given under s. 362 and s. 363 of the Criminal Procedure Code to the High Court, the court would set aside the order for costs and compensation.

Order accordingly.

No cases referred to in judgment

Judgment

Sir John Ainley CJ: read the following judgment of the court:

In this case the State has appealed by way of case stated from an order by a Resident Magistrate sitting at Nairobi, that the Commissioner of Police should pay costs and compensation amounting to Shs. 500/- to one Desmond Dunn, who was acquitted by the magistrate of a charge of unlawfully causing grievous harm to one Abdula Gaffer, upon the grounds that the said charge was vexatious.

The order was made under s. 173 of the Criminal Procedure Code. The appeal by way of case stated has been made under s. 368 of the same Code.

We quote the relevant provisions of s. 368:

> "After the hearing and determination by any subordinate court of any summons, charge, information or complaint, either party to the proceedings before the said subordinate court may, if dissatisfied with the said determination as being erroneous in point of law or as being in excess of jurisdiction, apply in writing . . . to the said subordinate court to state and sign a case. . ."

The question arises whether an order for costs or compensation under s. 173 of the Code is a determination, or an integral part of a determination, of a summons, charge, information or complaint. It is the contention of the State that the award of costs or compensation is part and parcel of the "dismissal of a case" referred to in s. 173 of the Code. We have not had the advantage of hearing argument against this contention, but clearly the argument can be advanced that the legislature has given a very limited right of complaint to the prosecutor. In the event of "the dismissal of a case" or of an acquittal of an accused they have beyond doubt given the prosecutor the right to challenge the dismissal or acquittal on a point of law. That it can be argued is the "determination" of which they can complain, given an acquittal, but they can complain, by way of case stated, of nothing else. Another way of attacking the State's argument is to say this, that the acquittal of a man of the charge made against him is a final, complete and comprehensive determination of the charge. The question whether the charge is or is not frivolous or vexatious, the question whether the prosecutor should pay compensation for his wrongful or mistaken preferment of the charge which has been disposed of by the acquittal is a question separate from, though it does arise from, the acquittal. These arguments have been raised by this court. We not infrequently set up ninepins and knock them down again ourselves. But in this case we think that our arguments are valid. Appeal is the creation of statute. No party, even the State, has a right of appeal unless such right is

clearly given. It would be to strain the words of this particular

statute to say that a right of appeal from an order of compensation made under s. 173 is provided by s. 368 of the Code. Had the legislature intended that an appeal from such an order should lie they would no doubt have said so in that fasciculus of sections headed “Costs and Compensation”. There an appeal from costs awarded under s. 171 of the Code is provided. The legislature has thought fit to enact a separate section, s. 172, making such provision. With deliberation, as it seems, they have made no provision for an appeal from an order made under s. 173. We suggest a radical revision of this part of the Criminal Procedure Code. If orders of the nature made in the present case are to be met by the tax payer, and not by the individual police officer who makes the “complaint”, as seems proper, then some right of appeal should be provided. If these orders are to be met by a constable or other police officer, that officer should surely be entitled to contest what may be a crippling order, in a court higher than that of a magistrate. At the moment no right, we stress the word right, is afforded to the State, or to an officer of the Police to contest such an order.

Fortunately this court is entitled, under ss. 362 and 363 of the Criminal Procedure Code, to alter or reverse any order made by a subordinate court in criminal proceedings. In the present case we decide to exercise our powers under that part of the Code headed “Revision”.

In the early hours of Sunday, October 20, 1963, Desmond Dunn hit Abdula Gaffer in the mouth, the two being present in the “Delicious Bar”, Nairobi. Abdula resented this treatment and complained to the police. There followed a charge of grievous bodily harm against Desmond Dunn. In fact the injury to Abdula did not amount to grievous harm, and there was therefore what might be called an “over-charge”. We do not think, however, that there was anything frivolous or vexatious in making a charge of unlawful violence against Mr. Dunn.

What was really said in the lower court about this matter was that had a less serious charge been preferred, Mr. Dunn would not have gone to the expense he did when arranging for his defence. This may possibly be true, but to say that the prosecution have made an incorrect estimate of the gravity of a man’s misconduct is not to say that the prosecution have behaved either frivolously or vexatiously. These are strong words. Given that the police have information that a man has struck and injured another unlawfully, a charge of unlawful violence is not, we think, frivolous unless the information rests upon such a shaky basis that the action of the police officer in preferring the charge has demonstrably arisen from a blameworthy failure to devote any serious thought or any thought at all to the situation. The word vexatious imports, we think, something more than lack of serious thought. A vexatious prosecution is one instituted with an intention wrongly to harass the accused, or so we think.

At the least, quite thoughtless, stupid or mischievous harassment of the subject must be made out against the prosecutor before an order under s. 173 of the Criminal Procedure Code is made.

In the present case we do not think that such a case was made out against the prosecutor. It is true that the charge was not eventually proceeded with, but though this may well have indicated that the prosecutor saw little hope of success, or after consideration, considered the charge to have been mistakenly made, those matters in themselves are not grounds for saying that the police originally behaved mischievously or in one or other of the ways we have sought to describe.

We consider that in this case the order should not have been made, and we set it aside.

Order accordingly.

For the appellant:

KC Brookes (Deputy Public Prosecutor, Kenya)
The Attorney General, Kenya

The respondent did not appear and was not represented.

G R Mandavia v Rattan Singh
[1965] 1 EA 570 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 9 September 1965

Case Number: 57/1963

Before: Crabbe, Duffus and Law JJA

Sourced by: LawAfrica

[1] Costs – Appeal – Appeal dismissed as incompetent – Application to review and reverse decision dismissing appeal – Application dismissed for want of appearance – Costs of application granted on basis of "instructions to oppose an appeal".

Editor's Summary

The appellant's appeal was dismissed on a preliminary objection as incompetent and the appellant applied for a review and reversal of the court's decision. When the application came on for hearing the appellant failed to appear by himself or an advocate and the application was dismissed. For the respondent it was submitted that the costs of the application should be assessed under r. 15 and Item 6, "Instructions to appeal or oppose appeal" of the 3rd Schedule to the Eastern African Court of Appeal Rules, 1954.

Held – having regard to the definition of appeal in r. 2 of the Eastern African Court of Appeal Rules, 1954, an application for review of a judgment of the Court of Appeal comes within the ambit of Item 6 and the respondent was entitled to costs under that Item.

Order accordingly.

No cases referred to in judgment

Judgment

Duffus JA: read the following ruling of the court:

This is an application by the appellant asking this court to review and reverse its decision of March 29, 1965, in which this court, after hearing submissions from both parties upheld a preliminary objection that the appeal was incompetent and in considered judgments, dismissed the appeal. On this application coming on for hearing on August 31, 1965, the appellant failed to appear by himself or by an advocate

and the court accordingly dismissed the application for want of appearance and after hearing counsel for the respondent, reserved the question of costs for further consideration.

Counsel for the respondent asked the court to assess the costs under the provisions of r. 15 of the Eastern African Court of Appeal Rules, as he submitted that if the costs were ordered to be taxed then the Taxing Officer would not be able, under the scale as set out in the 3rd Schedule to these rules, to allow such costs as would be justifiable in an application of this nature. He submitted that this court, in assessing costs, would not be bound by the scale as set out in the Rules, but could allow such amount as would appear just in the circumstances.

The relevant portion of r. 15 reads:

> "15(1) The cost of any proceedings in the court, unless assessed by the court, shall be taxed in accordance with the rules and scales set out in the third Schedule hereto."

Rule 75 would also be relevant. This states:

> "75. The court may make such order as to the whole or any part of the costs of appeal or in the court below as may be just, and may assess the same or direct taxation thereof."

Counsel for the respondent submitted that in a taxation under the 3rd Schedule, the Taxing Officer would only be able to allow costs under Scale (*a*) Item 5: "Instructions to appear for the respondent to any application – 100/-" and under Item 25 "For appearing in court on the hearing of any application or appeal for the first half hour – 100/-", and that no allowance could be made under Item 6 for instructions to oppose this application. Item 6 in the Schedule reads as follows:

> "6. Instructions to appeal or to oppose an appeal . . .
>
> Such sum as the taxing officer may allow as reasonable, having regard to the question whether the taxation is as between party and party or as between solicitor and client, the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances. The sum allowed under this item shall include all work necessarily and properly done in connection with the appeal and not otherwise chargeable under this scale, such as attendances on client or counsel, correspondence, perusals, consulting authorities, etc."

We agree that if no amount could be allowed under Item 6 then the costs otherwise taxable under the 3rd Schedule would not be sufficient to reimburse the respondent, having regard to the nature and difficulty of this application and the amount of research that would be necessary in the consulting of authorities and the preparation of this case.

It appears to us, however, that this application for review of our judgment does come within the ambit of Item 6 and that the respondent would be entitled to be allowed costs under this sub-head. Under the interpretation clause, r. 2 of these Rules, the word "appeal" is defined as:

> " 'Appeal' includes revision, review, reference, case stated and point of law reserved."

This is an application to review. It is not an interlocutory application, but what is before the court is the substantive question as to whether or not the court should review and reverse its previous judgment in this appeal. We are therefore of the view that the words "instructions to oppose an appeal", include instructions to oppose this application to review and that the Taxing Officer could properly allow the respondent costs under this Item.

The assessment of cost is, however, in this case, a relatively simple matter, and in order to save further delay and expenses, we are of the view that this is a proper case in which we should do so: accordingly, we assess the respondent's costs on this application at Shs. 700/-.

Order accordingly.

The appellant did not appear and was not represented.

For the respondent:
JM Nazareth, QC and JK Winayak
JK Winayak & Co, Nairobi

Wandera Reuben Kubanisi v Republic

[1965] 1 EA 572 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 30 July 1965

Case Number: 239/1965 (Nakuru)

Before: Rudd and Harris JJ

Sourced by: LawAfrica

[1] Criminal law – Charge – Attempt – No particulars of felonious act – Irregularity – Bad for uncertainty.

[2] Criminal law – Procedure – Irregularity – Accused's character not in issue – Previous convictions disclosed to magistrate before judgment – Accused convicted – Irregularity fatal to conviction.

Editor's Summary

The appellant was charged under s. 389 of the Penal Code, the particulars stating that the appellant "attempted to commit felony cont. sec. 389 P.C." The court disapproved of these abbreviations. The appellant did not put his character in issue yet the magistrate after hearing evidence and taking an unsworn statement from the appellant proceeded to adjourn the case for enquiry as to the previous convictions of the appellant. It turned out that the appellant had no less than five previous convictions and this was disclosed to the magistrate before he delivered judgment. On appeal,

Held –

(i) the charge was bad for uncertainty because it did not state the felonious act that was alleged to have been attempted;

(ii) since the accused had not put his character in issue the magistrate should not have enquired into or allowed any evidence to be given as to the appellant's previous convictions until after he had been convicted and the course adopted by the magistrate vitiated the conviction.

Appeal allowed.

No cases referred to in judgment

Judgment

Rudd J: read the following judgment of the court:

The appellant was brought before the lower court on a charge which read as follows:

"Attempted to commit an offence C/Sec. 389 Penal Code".

Particulars: "Wandera Ruben Kubanisi on 29th January, 1965 at 8 p.m. at Bungoma railway station in Bungoma district of the Western Province attempted to commit felony cont. sec. 389 P.C."

This charge is bad for uncertainty because it does not state the felony that was alleged to have been

attempted. We would add that contractions such as “cont.”, “sec”, and “P.C.” should not be used in framing the particulars of a charge.

The charge was not at any stage amended to state the nature of the offence alleged though the evidence of the first witness for the prosecution showed that the offence in fact attempted was theft from the person. We have not considered as to whether this fact could cure the failure properly to specify the offence charged because there was yet another defect in the trial.

The appellant did not put his character in issue yet the magistrate after hearing the evidence and taking an unsworn statement from the appellant in which he denied that he had attempted to commit an offence, then proceeded to adjourn the case for enquiry as to the previous convictions of the appellant.

It turned out that the appellant had no less than five previous convictions and this was disclosed to the magistrate before he delivered judgment since the magistrate referred to them in his judgment when convicting the appellant.

This was quite improper. The magistrate should not have enquired into, or allowed any evidence to be given as to, the appellant's previous convictions until after he had convicted the appellant.

The course adopted vitiates the conviction which is set aside. The sentence is also set aside and the appellant acquitted.

We regret having to adopt this course since there was clear evidence of an attempt to commit theft from the person. However, the conviction must be upset because it is not enough that justice is in fact done. Justice must be seen to be done and the enquiry as to previous convictions before judgment in a case in which the accused did not himself put his character in issue infringed that principle.

Appeal allowed.

The appellant did not appear and was not represented.

For the respondent:
IE Omolo (Deputy Public Prosecutor (S) Kenya)
The Attorney General, Kenya

Gioko Kimotho v R
[1965] 1 EA 573 (SCK)

Division:	Supreme Court of Kenya at Nakuru
Date of judgment:	22 December 1964
Case Number:	478/1964
Before:	Trevelyan J
Sourced by:	LawAfrica

[1] Dairy industry – Exposing milk for sale without licence – Meaning of "exposes it for sale" – Definitions of "retailer", "producer", "distributor" and "consumer" – Dairy Industry Act (*Cap.* 336) *s.* 3(*K*).

Editor's Summary

The appellant was convicted of exposing milk for sale without a licence contrary to reg. 13 of the Dairy Industry (Licensing of Retailers) Regulations, 1961. The evidence against the appellant was that an inspector had seen a woman coming out of the appellant's house with some milk which she claimed to have purchased from the appellant; that the inspector took the woman into the house where another woman poured the milk back into an eight gallon churn in which there was an estimated four and a half gallons of milk; that the appellant admitted that there were three gallons of milk for his own use.

Held –

(i) the words "exposes it (licensed produce) for sale" in reg. 13 of the Dairy Industry (Licensing of Retailers) Regulations, 1961 mean exposing licensed produce in order to attract offers for purchase from the public and accordingly the milk was not exposed for sale;

(ii) the definition of "retailer" in s. 3 of the Dairy Industry Act is a person who sells dairy produce directly to consumers or a person who purchases dairy produce from a distributor for resale to consumers and the appellant had not been shown to be such a person, nor was he a "distributor".

Appeal allowed.

Cases referred to in judgment

(1) *Clark v. Strachan*, 1940 S.C. (J) 29.

Judgment

Trevelyan J: The appellant was charged with "obstructing and hindering an Inspector of Kenya Dairy Board whilst on his duty contrary to r. 4(*a*) of the Dairy Industry Act (Inspectors Regulations, cap. 336), it being alleged that he "obstructed and hindered Inspector Patrick Gatuguta whilst on his duty". The charge should simply have been laid under reg. 4(*a*) of the Dairy Industry (Inspectors) Regulations, 1964 (Legal Notice No. 215 of 1964). Regulation 4(*a*) provides that "any person who obstructs or hinders any inspector in making entry or inspection of any land, premises, or place or in stopping any vehicle, bicycle, pack animal or person which he is authorised by these Regulations to enter or stop and inspect, as the case may be," shall be guilty of an offence and liable to penalties provided. It is referable, therefore, only to an "inspector." Regulation 2 of the Regulations provides that the Dairy Board may by notice in the *Gazette* appoint any person to be an inspector to exercise the powers and perform the duties of an inspector under the Regulations and that all police officers shall be inspectors for the purposes of them. In this case, Mr. Gatuguta who was stated to be such an inspector, was with another such inspector, a Mr. Gatharia, and these two were accompanied by two Municipal Health Inspectors, one of them being a Mr. Maloba. There is no evidence that Mr. Maloba was also an inspector under reg. 2 aforesaid. It would appear that the four persons met the appellant on a path. On his bicycle was a churn in which it was suspected that there was milk. Mr. Maloba told the appellant that he wished to take a sample of it and that he would pay for the same. The appellant refused to allow this to be done. There is no evidence that Mr. Gatuguta wished to take a sample. The evidence, therefore, cannot support the charge for it has not been shown that Mr. Maloba is an inspector as defined. Nor for that matter is he the complainant named in the charge. That person was Mr. Gatuguta.

The appellant was also charged with exposing for sale licenced produce contrary to reg. 14 of the Dairy Industry Act (Licensing of Retailers) Regulations (Legal Notice 158 of 1961) as read with s. 19 of the same Act (Cap. 336, Laws of Kenya). The charge should simply have been laid under regulation 13 of the Dairy Industry (Licensing of Retailers) Regulations, 1961 (Legal Notice 158 of 1961). It is reg. 13 and not reg. 14 because, by the Dairy Industry (Licensing of Retailers) (Amendment) Regulations, 1963 (Legal Notice No. 130 of 1963), Legal Notice No. 158 of 1961 was amended by deleting reg. 9 therefrom and by renumbering regs. 10, 11, 12, 13, 14, 15 and 16 as 9, 10, 11, 12, 13, 14 and 15 respectively. Regulation 13 provides that "any retailer who sells licensed produce or offers or exposes it for sale except under and in accordance with, and on such premises as may be specified in, a licence shall be guilty of an offence" for which maximum punishments are provided depending as to whether the accused is or is not a first offender.

Mr. Gatharia saw people going in and out of the appellant's house. One of them, a woman, had some milk (to the extent of about one pint) with her which she claimed to have purchased from him. The Inspectors took her into the house wherein was the appellant. There another woman poured the milk back into an eight gallon churn, in which there was an estimated four and a half gallons of milk, standing in a drum which was half filled with water, and repaid her its cost. The appellant admitted that he had milk in his house on the occasion concerned but claimed that there were only three gallons of it which were for

his

own use. The milk was not exhibited and it would be unfair to accept that there was more than he said. We do not know how many members of his family there are so we cannot determine whether he would need such an amount for them or not.

Before considering whether any other of the ingredients of the offence have been established it must be shown that (*a*) an accused is a retailer and (*b*) that he was exposing milk for sale.

"Retailer" is defined in reg. 2 of the Regulations as including "any person who purchases dairy producer or from a licensee for resale to consumers". "Producer" is not defined. "Licensee" is defined as meaning the holder of a valid licence. I confess that I find this definition none too easy to understand. I take it that it includes any person who purchases produce – in this case milk – either from a producer or a licensee for resale to consumers though why the word "includes" has been used is not immediately clear. On the other hand, it is assumed that it was intended to limit the ordinary understanding of the word, i.e. to sell in small quantities or parcels directly to consumers, otherwise the definition would not be in the form that it is in. However, the definition of "retailer" in the Act itself (contained in s. 3 thereof) means a producer who sells dairy produce directly to consumers or a person who purchases diary produce from a distributor for resale to consumers. "Producer" means a person who produces, processes, manufactures, prepares or treats dairy produce for sale. "Dairy produce" includes milk. "Consumer" means a person who buys dairy produce for his own use and not for resale. "Distributor" means any person who buys dairy produce for the purpose of resale. It has not been shown that the appellant purchased the produce from anyone nor has it been shown that he is a producer, for he can only be such if he sells dairy produce directly to "consumers", and in the circumstances of this case there has only been a sale to one person. I venture to say that there can be no doubt about this because it is the word "consumer" and not "consumers" which is defined in s. 3. "Retailer" in the Act is not exhaustive. It does not, for instance, cover a person who buys dairy produce not for the purpose of resale but who in fact resells it. Moreover, it has not been shown, and the onus was upon the prosecution to show it, that the milk, which was not exhibited in court, was "milk" for the purpose of the Act because "milk" is defined as meaning "milk from a cow". For all we know it may have been milk from a goat.

Nor do I believe that the milk was exposed for sale. It was in a man's house. There was not, upon the evidence, any sign without proclaiming that within was a purveyor of milk, nor was there upon the churn any indication that its contents were for sale. A churn containing milk was in the appellant's house. One pint of it was sold by someone. It may or may not have been the appellant. The word "exposed" is not a term of art. It must be considered in relation to its context. In *Clark v. Strachan* (1) the primary meaning of "exposed for sale" was held to be exposed for the purposes of sale, i.e. exposed in order to attract offers for purchase from the public. In my view a similar meaning must be attributed to the words in reg. 13.

The appellant is not a very truthful person. He not only said that the milk was for his own use (which it was not if he intended to convey that it was entirely for the personal use of his family and himself) but he also claimed that he had never before been in trouble, whereas he has two previous convictions. Nonetheless, the prosecution saw fit to charge him with offences under two regulations and have established neither of them. I am told that the fine was not paid. The convictions on both counts must be quashed and the sentences imposed set aside.

Appeal allowed.

The appellant did not appear and was not represented.

For the respondent:
VS Dhir (State Attorney, Kenya)
The Attorney General, Kenya

E C Boucher v Income Tax Commissioner
[1965] 1 EA 576 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	16 June 1965
Case Number:	8/1965
Before:	Newbold V-P, Sir Clement de Lestang and Law JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Miles, J

[1] Income Tax – Settlement formed in United Kingdom – Income paid to or for the benefit of settlor's children – Whether derived from the settlement or from shares in Kenya – East African Income Tax (*Management*) *Act,* 1958, *ss.* 3, 11 *and* 24.

[2] Income Tax – Double taxation – A trustee is not an "individual" – The Double Taxation Relief (*Kenya – United Kingdom*) *Arrangements Notice,* 1952 *para.* 6(2) *– East African Income Tax* (*Management*) *Act,* 1958, *s.* 72(8).

[3] Income Tax – Assessment of Trustees and settlor – Interaction of East African Income Tax (*Management*) *Act,* 1958, *ss.* 11, 24 *and* 75.

Editor's Summary

In 1953 and 1955 the appellant settled shares in a Kenya company on discretionary trusts in favour of his infant children by deeds executed in the United Kingdom. The settlor, the trustees and the beneficiaries were at all relevant times resident in the United Kingdom. The dividends accruing to the trust from these shares from 1957 to 1960 were deemed by the respondent to be the income of the appellant, as settlor, under s. 24 of both the East African Income Tax (Management) Acts of 1952 and 1958, and he was assessed accordingly. On appeal, the Supreme Court upheld the assessments. On further appeal the appellant contended firstly, that there was such irreconcilable conflict between ss. 11, 24 and 75 of the 1958 Act as to nullify any charge to tax; secondly that the trustees of the settlement were "individuals" within para. 6(2) of the Double Taxation Relief (Kenya – United Kingdom) Arrangements Notice, 1952, so that the income the appellant was deemed to have received under s. 24 qualified for double taxation relief, and thirdly, that the income caught by s. 24 was the income of the beneficiaries under the United Kingdom settlement and not the income of the trustees from the Kenya shares, with the result that it was not chargeable to tax not having accrued in the Territories.

Held –

(i) the interaction of ss. 11, 24 and 75 produces no uncertainty as to who should be taxed and at what rate. Section 11 amplifies s. 3 and provides that generally in the case of trusts the income thereof is first deemed to be the income of the trustee which is liable to tax at the standard rate; when part of the trust income so chargeable to tax is paid to or for the benefit of a beneficiary, then as a result of para. (2) such income, grossed up in the way specified, is assessed on the beneficiary at his individual rate. Section 75 merely provides machinery for an infant beneficiary to be assessed at the individual rate in the name of the trustee;

(ii) there is no conflict between s. 11 para. (1) which deals with the assessability of a trustee for income received in trust and s. 24 which deals with the assessability of a settlor for income paid to or for the benefit of a beneficiary;

(iii) paragraph (2) of s. 11 is a general provision that yields to the special provisions of s. 24; this is an expedient to prevent tax avoidance and is an exception to the general rule that the income of a person should be assessed on that person;

(iv) "individual" in its normal sense and as used in the Act and in para. 6(2) of the Double Taxation Relief (Kenya – United Kingdom) Arrangements Notice, 1952, does not include the holder of an office such as a trustee;

(v) the dividends on the Kenya shares accrued as income of the settlement on which the trustees could be assessed at the standard rate; to the extent that it was thereafter paid to or for the benefit of the children and was deemed under s. 24 to be income of the settlor, such income was not chargeable to tax under s. 3 because it derived from the settlement whose locus was outside the Territories.

Appeal allowed.

Cases referred to in judgment

(1) *Archer-Shee v. Baker*, 11 T.C. 749.

(2) *C.I.R. v. Kenmare*, 37 T.C. 383.

June 16. The following judgments were read:

Judgment

Newbold V-P: By settlements made in 1953 and 1955 the appellant vested property in trustees on discretionary trusts in favour, *inter alia*, of his infant children. It is not in dispute that the settlor, the beneficiaries and the trustees of these settlements are all resident in the United Kingdom and non-resident in the Territories. It is also not in dispute that the trust property includes shares in a Kenya company and that the dividends from such shares are income derived from Kenya. Nor is it in dispute that the trust deeds were executed in the United Kingdom and are governed by United Kingdom law and that in the circumstances the locus of the trusts is the United Kingdom. The income of the trust from the dividends on such shares for each of the years of income 1957 to 1960 was assessed on the appellant as settlor. No point has been made of it, so I assume that the whole of such dividends for each year of income was paid to or for the benefit of the children of the settlor. The assessment in respect of the year of income 1957 was made under s. 24 of the East African Income Tax (Management) Act, 1952 (the 1952 Act) and those in respect of the years of income 1958 to 1960 were made under s. 24 of the East African Tax (Management) Act, 1958 (the 1958 Act). Save in respect of the first ground of appeal, the position under the 1958 Act is, for all practical purposes, the same as that under the 1952 Act and I propose to refer only to sections of the 1958 Act in relation to the appeals in respect of each year of income. The appellant appealed to the Supreme Court against each of such assessments and the appeals were heard together. In each case the appeal was dismissed and the assessment confirmed. From these decisions the appellant appeals to this court on three grounds.

The first ground of appeal relates only to the years of income 1958 to 1960. For these years the 1958 Act applied. Counsel for the appellant submitted that the provisions of ss. 11, 24 and 75 of the 1958 Act are in such irreconcilable conflict as to nullify any charge to tax created by any of those sections. The same submissions were made to the trial judge who rejected them. The trial judge held that there was no conflict as section 11 was a general provision dealing with trusts generally, while ss. 24 and 75 were special provisions dealing with settlements and incapacitated persons respectively.

Section 3 of the 1958 Act is the main charging section and by sub-s. (1)(*f*) thereof tax is charged upon

the income of a person derived from the Territories in respect of “any amount deemed to be his income under this Act”. I shall refer to the words “derived from” as if they included “accrued in”. Counsel for

the appellant submitted that as para. (1) of s. 11 states that income received by a trustee "shall be deemed to be income of such trustee", and as s. 24(1) states that (what he submitted was) the same income may in certain circumstances "be deemed to be the income of the settlor", and as s. 75 states that (what he submitted was) the same income may be assessed on an infant beneficiary "in the name of his trustee" it is not clear who should be charged; and as liability to tax should only exist where the charge is clear therefore, if I understood him correctly, no-one should be charged to tax under the provisions of s. 24 of the 1958 Act. I am unable to agree. Section 11, in common with ss. 4 to 10, is an amplification of the basic charge contained in s. 3; and it provides generally that in the case of trusts the income thereof is first deemed to be that of the trustee (which is in fact the position at law) and liable to tax at the standard rate and thereafter any trust money received as income by a beneficiary or paid out of income on his behalf shall be deemed to be income of the beneficiary of the specified gross amount. Section 11 is a completely general section and para. (1) enables, though it does not require, the income of any trust which is chargeable to tax to be charged first on the trustee at the standard rate. If the income of the trust has already borne tax at the standard rate there might well be no point in assessing the income on the trustee. When, however, any part of the trust income so chargeable to tax becomes income of a beneficiary, then, as a result of para. (2), such income as grossed up would be assessed on the beneficiary at his individual rate. Section 75 merely provides machinery enabling, *inter alia*, the income of an infant to be assessed on the infant in the name of his trustee without in any way altering the incidence of tax. Under a normal trust in which an infant is a beneficiary, it might well happen that the income of the trust would first be assessed on the trustee at the standard rate and thereafter any part of the trust income which becomes income of the infant beneficiary might then be assessed at the individual rate on the infant in the name of the trustee. I see absolutely no conflict between ss. 11 and 75 and in neither case is any income treated in a fictional manner.

Turning now to s. 24, this is a special section designed to treat what is at law or in equity the income of one person as the income of another in respect of its assessability to tax. As I shall show when dealing with the third ground of appeal, what it deems to be the income of the settlor is the income of the beneficiary under the trust and not the income of the trustee, with the result that there is absolutely no conflict between para. (1) of s. 11 and s. 24. It might well happen that the income of the trust would first be assessed on the trustee and so much thereof as is paid to or for the benefit of a child of the settlor might then, under s. 24, be assessed on the settlor. Insofar as para. (2) of s. 11 is concerned, it is true that when s. 24 is applied, what is at law, in equity and under para. (2) of s. 11 the income of one person is deemed to be the income of another person. This is an expedient to which income tax legislation frequently resorts in order to nullify what is considered to be a transaction in avoidance of tax. Section 24 is a special provision and creates an exception to the general rule that the income of a person should be assessed on that person. In the circumstances in which s. 24 applies then the provisions of para. (2) of s. 11 cease to apply, with the result that there is no real conflict as the general yields to the special. I am quite satisfied that no uncertainty arises in the interaction of ss. 11, 24 and 75 in any given set of circumstances as to who is to be taxed or at what rate. In my view, consequently, there is no merit in the first ground of appeal.

The second ground of appeal relates to the years of income 1957 to 1960. Counsel for the appellant submitted that the word "individual" in para. 6(2) of the Double Taxation Relief (Kenya – United Kingdom) Arrangements Notice, 1952, should be construed as including a trustee. The relevance of that submission is that under that paragraph a dividend paid to an individual who,

inter alia, is resident in the United Kingdom is exempt from Kenya surtax; and as s. 72(8) of the 1958 Act states that as from the year of income 1958 a reference to surtax is to be construed as a reference to such part of any rate as is in excess of the standard rate, the result, it was submitted, would be that the dividends when deemed the income of the appellant could not be liable to any tax in excess of that which they would already have borne. The same submission was made to the trial judge who rejected it and held that the word "individual" did not include a trustee. I agree. The whole scheme of the Act is to distinguish on the one hand an individual human being from, on the other hand, a group of persons, whether associated or not and whether incorporated or not, or the holder or holders of an office such as that of trustee. The normal meaning of the word "individual" would not embrace the title of an office, the holders of which might well be a corporation alone or a corporation together with an association or an individual. In any event there is a clear intention from the paragraph itself that the word "individual" should not be construed so as to embrace anything beyond its normal meaning. In the first place the exemption only arises if, *inter alia*, the individual is resident in the United Kingdom, a provision which could give rise to considerable difficulty if the trustee were anything other than a single individual. Secondly, and in my view conclusively, a trustee was not liable under the 1952 Act to surtax and thus there would be no point in exempting a trustee therefrom. This may result in there being a difference between the appeal relating to the year of income 1957 and the appeals relating to the subsequent years of income, but I disregard this possible difference. As from the year of income, 1958, surtax has been abolished but, as mentioned earlier, under s. 72(8) of the 1958 Act that word, for the purposes of any double taxation relief arrangements, means the part of any rate in excess of the standard rate. Under the 1958 Act a trustee is only liable to tax at the standard rate, with the result that, insofar as the 1952 Arrangements continue to have effect under the 1958 Act, there is equally no point in construing para. 6(2) so as to exempt a trustee from a tax to which he is not liable. Accordingly, in my view, there is no merit in the second ground of appeal. I might mention that in any event this ground of appeal is irrelevant for the reason, as I shall show when dealing with the third ground of appeal, that it is not the income of the trustee which is deemed the income of the settlor.

The third ground of appeal relates to the years of income 1957 to 1960 and I have found some difficulty in arriving at a decision. Counsel for the appellant submitted that the income deemed to be that of the appellant was income derived from the settlements and as the locus of each of the settlements was in the United Kingdom therefore the income was not derived from the Territories, which, under s. 3, it must be before it is liable to tax in the hands of the appellant. Counsel for the Commissioner accepted that only income derived from the Territories could be assessed on the appellant and that the income of the beneficiaries under the settlements would not be income derived from the Territories; but, he submitted, what was deemed the income of the appellant under s. 24 was the income of the trustees, that is, the dividends from the shares, which dividends were clearly derived from the Territories, and that any income received by the trustees was received for the benefit of the children. The trial judge, if I understand his judgment correctly, considered that the income of the beneficiaries under the trust was derived from the assets of the trust and not from the trust and he cited in support of that view the cases of *Archer-Shee v. Baker* (1) and *C.I.R. v. Kenmare* (2).

Whatever may be the position in the United Kingdom and whatever may have been the position in East Africa prior to the 1958 Act, I am satisfied that the result of para. (1) of s. 11 of the 1958 Act is to make the income of a trust in the first place that of the trustee and assessable on him. This is the position whether

the beneficiary is or is not an infant. I cannot escape the conclusion that the necessary consequence of this is that when a beneficiary receives income from a trustee that income is derived from the trust. In other words the position is that set out in the dissenting speech of Viscount Sumner in *Archer-Shee's* case (1) (11 T.C. at p. 771), when he said the beneficiary "is not entitled to any of the stocks, shares, securities or real property that form part of the New York trust estate. These belong to the trustee company, to whom also the annual payments made in respect of them by way of rent, interest or dividends 'arise', 'accrue' and 'belong'". If the dividends are the income of the trustee and assessable on him it must follow that when any part of those dividends is paid to a beneficiary as income that income can be derived from nowhere other than the trust. This is in accord with the principle behind the decision of this court in Case No. 16 1 E.A.T.C. 131, in which Worley, V.-P., said (ibid at p. 165) that he could not accept the "proposition that the court is entitled to go behind the contract and to look at the ultimate source of the company's profits". As I have said, I do not understand counsel for the respondent to dispute this as far as the beneficiary is concerned. That such is the correct position is, I think, made clear by consideration of the position where the settlor, the beneficiary and the trustee are all resident in Kenya, and the trust is executed in Kenya and governed by Kenya law but some or all of the income of the trust fund is for the time being derived from the United Kingdom. Surely it could not be asserted that the income of the beneficiary is derived from the United Kingdom. Respondent's counsel's submission, however, was that where the assessment is made under s. 24 the interposition of the trust is to be disregarded. In support of this he urged a very powerful argument to this effect: it would be a wrong construction of s. 24 to create a position in which two transactions, each of which was a settlement for the purposes of s. 24, could have vastly different tax results. He pointed out that shares vested in a trustee under a trust in favour of a beneficiary were a settlement; but, he submitted, there would also be a settlement if the shares were transferred directly to the beneficiary, as the definition of settlement in sub-s. (8) of s. 24 included any transfer of assets. In the first case, he submitted, the dividends should not be regarded as derived from the trust for the purposes of s. 24 as in the second case they could only be derived from the shares themselves. I appreciate the force of this argument, but I find myself unable to accept it.

What s. 24(1) does is to deem as the income of a settlor any income paid to or for the benefit of a child of the settlor "under" the settlement. By s. 24(7) the section applies to a settlement wherever made, but, of course, by reason of s. 3 tax is only chargeable if the income is derived from the Territories. It is only income paid "under" a settlement, that is, under the provisions of the settlement (see s. 2(4) of the 1958 Act), that is deemed to be that of the settlor. Where the settlement is a trust it seems inescapable that what is deemed the income of the settlor is income derived from the trust and nothing else as it is only such income which is paid to or for the benefit of the child of the settlor. I cannot accept that it is the income of the trust which is deemed to be the income of the settlor. To come to that conclusion would not only be to come to a conclusion contrary to the clear words of the section, but also to create a position impossible of determination, and which could not be resolved by a simple allocation of the trust income, should the trust deed contain, as is quite common in a family settlement, discretionary trusts in favour of persons other than the minor children of the settlor. Nor can I accept counsel for the respondent's submissions that, subject to any equitable right to a specific amount on the part of any beneficiary other than a child of the settlor, by reason of sub-s. (2)(*a*) all the income of the trust is deemed to be paid to or for the benefit of the child of the settlor. The words "income which, under a settlement to which this section applies, is so dealt with that it . . . will or may become payable or

applicable to or for the benefit of a child" which appear in that subsection, show clearly that before income can be said to be paid to or for the benefit of a child of the settlor either the income must actually be paid to or for the benefit of the child or the trustee must deal with it in the required manner. This is a further indication that what is deemed to be the income of the settlor under sub-s. (1) of s. 24 is income derived from the trust and not the income of the trust. I come, therefore, to the conclusion, where the settlement consists of a trust, that what is deemed under s. 24 to be the income of the settlor is income which is derived from the trust and not from the assets of the trust. Even if a settlement for the purposes of s. 24 may also take a form in which what is deemed to be the income of the settlor is the income of the assets of the settlement this would not persuade me in the case of a trust to go contrary to the clear words of a section, the more especially when to do so would be to strain the meaning of a section in order to impose a liability to tax. It may be, though I accept it would be an undesirable position, that income paid to a child of the settlor which has its ultimate origin in dividends paid on shares may be derived from different places according to the form of the settlement under which the entitlement of the child arises. This court, however, is concerned at present with the position under a settlement in the form of a trust; should any question arise in the future as to the position under a settlement where the shares themselves are simply transferred to the child of the settlor it would then be for consideration whether the income of the child would be derived from the settlement or from the shares. I consider, therefore, that the appellant succeeds on his third ground of appeal as the income of the children under the settlement is not derived from the Territories and under s. 3 in the case of a non-resident it is only income derived from the Territories which is chargeable to tax.

For these reasons I would allow the appeal, set aside the judgment and decree of the Supreme Court and substitute therefor a judgment and decree allowing the appeals to the Supreme Court and ordering that the additional assessments in respect of each of the years of income 1957 to 1960 be annulled. As the question of the costs before the Supreme Court was the subject of special agreement I would not disturb the order of the Supreme Court in respect of costs. As far as the appeal to this court is concerned the appellant is entitled to his costs and I would give a certificate for two counsel. As the members of the court agree, it is so ordered.

Sir Clement De Lestang JA: Three questions arise on this appeal; (1) whether there is irreconcilable conflict between the provisions of ss. 11, 24 and 75 of the East African Tax (Management) Act, 1958; (2) whether the word "individual" in para. 6(2) of the Double Taxation Relief (Kenya – United Kingdom) Arrangements Notice, 1952, includes a trustee; and (3) whether the settlor was liable to tax under s. 24(1) of the Act.

As regards the first two questions, I agree entirely with the reasoning and conclusions of the learned Vice-President and cannot usefully add anything.

The third question I have found very difficult. At first sight the very wide provisions of s. 24 appeared to me to be specially designed to catch settlements like the present one, but when that section is read, as it must be, together with s. 3, the charging section, it becomes, I think, clear that what is deemed to be the income of the settlor is "income which is (*a*) derived from East Africa, (*b*) under any settlement wheresoever made, and (*c*) paid to or for the benefit of a child under 19 of the settlor". Requirements (*b*) and (*c*) are clearly satisfied, but for the reasons given by the learned Vice-President, requirement (*a*) is not because the income under consideration is the income of the beneficiaries under the settlement and such income derives from the settlement which has its locus outside East Africa. The place where the settlement was made is not conclusive

as to its locus, it being only one of the matters to be considered in determining this question.

I agree with the order proposed by the learned Vice-President.

Law JA: I have had the advantage of reading the judgment prepared by the learned Vice-President with which I agree.

Appeal allowed.

For the appellant:
K Bechgaard, QC and *WS Deverell*
Kaplan & Stratton, Nairobi

For the respondent:
B O'Donovan, QC and *SM Otieno* (Asst. Legal Secretary, E.A.C.S.O.)
The Legal Secretary, E.A.C.S.O.

Republic v Hamisi Mswagala
[1965] 1 EA 582 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	28 November 1964
Case Number:	214/1964
Before:	Reide J
Sourced by:	LawAfrica

[1] Criminal law – Process to compel appearance of accused – Failure to obey summons not a criminal offence under Criminal Procedure Code (*Cap.* 20), *s.* 101 (*T*).

[2] Criminal law – Statutory contempt – Failure by accused to obey summons to attend not an offence under Penal Code, s. 114 (*T*).

Editor's Summary

The accused was charged with possession of a radio apparatus without a licence, summoned for this offence, and the summons was duly served. On the day appointed for hearing he was not present and the court ordered a warrant of arrest to issue. When the accused appeared subsequently the magistrate heard his excuse for the previous absence and without specifying under which authority he made his order the magistrate ordered the accused to pay a fine of Shs. 30/- for the offence charged and Shs. 50/- for contempt or to go to prison in default. The accused paid the fines. On revision,

Held –

(i) failure to obey a summons to answer a charge is not per se a criminal offence under s. 101 of Criminal Procedure Code, nor does the section provide any punishment in respect of disobedience of the summons;

(ii) failure of a person to appear to answer a charge in obedience to a summons is not per se 'contempt' within the mischief of s. 114 of the Penal Code (aliter if the person is a witness).

Order for payment of fine of Shs. 50/- for accused's failure to appear set aside.

No cases referred to in judgment

Judgment

Reide J: This record was called for because the return showed that the accused, convicted of possession of a radio apparatus without a licence, was "fined Shs. 80/- or 2 months' and 6 weeks' imprisonment". Inspection of the record reveals that the accused was summoned for this offence and that the summons was duly served. On the day appointed for hearing he was not present and the court ordered a warrant of arrest to issue. When the accused appeared subsequently, the magistrate heard his excuse for his previous absence (which was indeed quite inadequate), and ordered him to pay a fine of Shs. 50/- or to go to prison for two months. The learned magistrate did not specifically say under which authority he made this order, but it was presumably intended as a fine for contempt of court. The accused then pleaded guilty to the charge and was fined Shs. 30/- or six weeks' imprisonment in default. Both fines have been paid.

Failure to obey a summons to answer a charge is not per se a criminal offence or contempt of court. The learned magistrate is referred first to s. 101 of the Criminal Procedure Code, which provides that if an accused person does not appear at the time and place appointed by the summons and his personal attendance has not been dispensed with the court may issue a warrant to apprehend him and cause him to be brought before it; but the section does not go on to provide for any punishment in respect of his disobedience. The learned magistrate is next referred to s. 114 of the Penal Code, which is concerned with contempt of court. He will see that failure of a person to appear to answer a charge in obedience to a summons is not per se within the mischief of the section (aliter, if the person is a witness).

The order for payment of the Shs. 50/- for the accused's failure to appear is accordingly set aside, and the Shs. 50/- is to be returned to the accused.

The front of the record has been left blank. The learned magistrate should ensure that case records are duly completed.

Order for payment of fine of Shs. 50/- *for accused's failure to appear set aside.*

Gathuri Njuguna v Republic
[1965] 1 EA 583 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	30 July 1965
Case Number:	526/1965
Before:	Rudd and Harris JJ
Sourced by:	LawAfrica

[1] Criminal law – Robbery with violence – Only violence used was to retain stolen property on arrest – Whether "immediately after" – Whether accused should have been convicted of burglary and theft – Penal Code, s. 295(*K*).

Editor's Summary

The appellant was convicted of robbery with violence under s. 295 of the Penal Code, and sentenced to five years imprisonment and 12 strokes. The complainant had left his dwelling house at 7 a.m. and was returning about 9 p.m. the same day when he saw the appellant proceeding from the direction of his house carrying a bundle. On discovering that it was his house that had been broken into, he alerted his neighbours and set out after the appellant whom they found about 500 yards away. The appellant resisted the complainant and hit him with a club before being overpowered. He was charged with robbery with violence and on an alternative count with burglary and theft. The trial magistrate convicted the appellant of the former charge because the appellant had used violence to resist arrest and to retain the stolen property soon after the theft. On appeal,

Held –

(i) the essence of the offence of robbery is an openly committed theft from or in the presence of someone or a theft where the offender is caught more or less in the act or immediately after the act; it did not extend to a case such as this where the offence was committed clandestinely without discovery or chase until after the offender had left the premises and had proceeded so far on his way without being discovered to be the thief;

(ii) the better and proper conviction in this case was for burglary and theft.

Appeal dismissed. Conviction altered to one for burglary and theft.

No cases referred to in judgment

Judgment

Rudd J: read the following judgment of the court:

The appellant appeals from a conviction of robbery with violence and from sentence of five years imprisonment and twelve strokes.

The evidence established that the complainant left his dwelling house at 7 a.m. and went to work having locked and secured his house before he left it. He returned about 9 p.m. the same day and saw the appellant proceeding from the direction of the complainant's house carrying a bundle. The complainant thought nothing of this at the time since he had not yet reached his house and discovered that it had been broken into and that things had been stolen from it.

When the complainant reached his house and saw what had happened he alerted his neighbours and set out after the appellant whom they found about 500 yards from the house. When they came up with him the appellant resisted the complainant and hit him with a club, before being overpowered by the complainant and his neighbours. The appellant was found in possession of the property that was stolen from the complainant's house. He was charged with robbery with violence and on an alternative count with burglary and theft.

The learned magistrate found that the appellant had broken into the complainant's house and stolen property therefrom but he convicted on the count of robbery with violence because the appellant used violence to resist arrest and to retain the stolen property soon after the theft.

Had this offence occurred in England we think that the offence could not have amounted to robbery because the theft was not committed in the presence of the complainant or from his person.

The definition of robbery in our Penal Code, however, differs from the definition under the law of England, and we think that in the circumstances proved in evidence the propriety of the conviction for robbery with violence depends upon whether or not the violence was used "immediately after" the articles were stolen.

This can be a very fine point, but we think that the essence of the offence of robbery is an openly committed theft from or in the presence of someone or a theft where the offender is caught more or less in the act or immediately after the act. We do not think it extends to a case such as this where the offence was committed clandestinely without discovery or chase until after the offender had left the premises and had proceeded so far on his way as he had in this case without being discovered to be the thief.

In our opinion the better and proper conviction in this case was for burglary and theft and we alter the conviction accordingly.

As regards sentence the appellant had a previous conviction for being armed by night with an offensive weapon in respect of which he served a sentence of 5 years imprisonment. He was again armed by night with an offensive weapon which he used to resist arrest soon after committing burglary while armed with such a weapon. The sentence imposed is within the powers provided for sentence for burglary and we see no reason to reduce it. The appeal against sentence is dismissed.

Appeal dismissed. Conviction altered to one of burglary and theft.

The appellant appeared in person.

For the respondent:
IE Omolo, Deputy Public Prosecutor (S), Kenya
The Attorney General, Kenya

Kimani Njoroge and Njuguna Mwaura v Republic
[1965] 1 EA 585 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	22 August 1965
Case Number:	495, 496/1965
Before:	Rudd Ag CJ and Madan J
Sourced by:	LawAfrica

[1] Criminal law – Conveying suspected stolen property – Accused flee from vehicle on seeing police – Accused chased and arrested – Criminal Procedure Code (*Cap.* 75) *s.* 26(*K*) *– Penal Code* (*Cap.* 63) *s.* 323(*K*).

Editor's Summary

The appellants were convicted of having in their possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained under s. 323 of the Penal Code. The facts were that on December 18 a sub-inspector of police, together with a police sergeant and a constable, went in a police car to the Royal Air Force Transmitting Station as a result of certain information received and on arrival there saw a Landrover standing on a side road near the transmitting station and four men standing behind it. The men ran away as soon as the police car arrived but the appellants were caught. The Landrover was found to contain a quantity of copper wire weighing 285 lbs. of the type used underground by the transmitting station and about which there had been many reports of theft. The 1st appellant was employed as driver of the Landrover but he claimed that he was hired by the 2nd appellant to carry beans. The 2nd appellant on the other hand claimed he was merely a person who had asked the 1st appellant and the other men for a lift. The trial magistrate rejected these explanations and convicted them. On appeal the issue, *inter alia*, was whether the appellants were stopped and detained has a result of the powers conferred by s. 26 of the Criminal Procedure Code.

Held –

(i) there was ample ground for suspicion that the wire was stolen in view of the action of the appellants and their companions in running away from the police;

(ii) the evidence was also sufficient to support the finding that the appellants and others were in

possession in the sense of conveying of the stolen wire, and that they were stopped and detained as a result of the powers conferred by s. 26 ibid.

Appeals dismissed.

No cases referred to in judgment

Judgment

Rudd Ag CJ: read the following judgment of the court:

These appeals were consolidated and were dismissed on August 19, 1965 when we stated that reasons would be given later. We now give our reasons:

The appellants were convicted of an offence under s. 323 of the Penal Code which reads as follows:

> "Any person who has been detained as a result of the exercise of the powers conferred by s. 26 of the Criminal Procedure Code and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who

> does not give an account to the satisfaction of the court how he came by the same, is guilty of a misdemeanour".

Section 26 of the Criminal Procedure Code, *inter alia*, authorises any police officer to stop, search and detain any person who may reasonably be suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.

The following facts were established – at about 4.30 p.m. on December 18 a sub inspector of police, together with a police sergeant and a constable, went in a police car to the Royal Air Force Transmitting Station as a result of certain information received. On arrival they saw a Landrover standing on a side road near to the transmitting station and four men standing behind it who all ran away as soon as the police car arrived. The appellants were two of the four men who ran away and they were chased and caught. The other two men made good their escape. The Landrover was found to contain a quantity of copper wire weighing 285 lbs. of the type used underground by the transmitting station. There had been many reports of theft of such wire. The 1st appellant was employed as the driver of the Landrover.

The 1st appellant claimed that he was hired by the 2nd appellant to carry beans but that the 2nd appellant loaded the wire on to the vehicle at the place where the police found it.

The 2nd appellant claimed that he was merely a person who had asked the 1st appellant and the men who escaped for a lift in the Landrover.

The magistrate rejected these explanations as he was entitled to do.

The only question is whether the facts proved fit the section. There was ample ground for suspicion that the wire was stolen in view of the action of the appellants and their companions in running away from the police. The evidence was also sufficient to support the finding that the appellants and the other two men were in possession in the sense of conveying, of the stolen wire. They were stopped, and detained as a result of the powers conferred by s. 26 of the Criminal Procedure Code. We could find no fault with the conviction.

The sentences of 18 months imprisonment on the 1st appellant and 2 years imprisonment on the 2nd appellant, who had a bad previous record, were not excessive.

For these reasons we dismissed the appeals.

Appeals dismissed.

The appellants did not appear and were not represented.

For the respondent:
KC Brookes, Deputy Public Prosecutor, Kenya
The Attorney General, Kenya

Gulbanu Rajabali Kassam v Kampala Aerated Water Co Ltd

[1965] 1 EA 587 (PC)

Division: Privy Council

Date of judgment:	24 March 1965
Case Number:	51/1961
Before:	Lord Guest, Lord Upjohn and Lord Wilberforce
Sourced by:	LawAfrica
Appeal from:	E.A.C.A. Civil Appeal No. 103 of 1960 on Appeal from the High Court of Uganda – Lyon, J

[1] Fatal accident – Damages – Assessment – Measure of damages – Dependant children – Calculation of dependency – Whether acceleration of benefit of deceased's estate be taken into account – Assessment of total dependency as lump sum.

[2] Damages – Assessment – Measure of damages – Dependant children – Calculation of dependency – Whether acceleration of benefit of deceased's estate be taken into account – Assessment of total dependency as lump sum.

Editor's Summary

The appellant's father and mother were killed in a motor accident when a car driven by the father collided with a vehicle driven by a servant of the respondent. The appellant claimed fatal accident damages on her own behalf and on behalf of seven other children of the deceased and for loss of expectation of life under the Law Reform (Miscellaneous Provisions) Ordinance, 1953. The trial judge held that the respondent's driver was negligent and wholly to blame for the accident. No question of liability arose on appeal. The children were aged between 3 and 23 when the accident happened. The deceased, who was aged between 40 and 45 years, was a shopkeeper with an average annual income of £744 out of which £558 or three quarters was spent on his family. The trial judge found that the deceased left estate the net value of which was Shs. 89,425/-, that his expectation of life was fifteen years and that he would have continued to pay out for the benefit of his children between £10 and £12 per week. The trial judge, in assessing the damages, estimated the total dependency as a lump sum and awarded the damages, including special damages at Shs. 120,000/-, applying a multiplier of fifteen to a dependency of £10 per week. The judge did not apportion the damages. On appeal, the Court of Appeal concluded that there were only four dependants, namely the youngest children, and after making detailed mathematical calculations and considering each dependant separately, reduced the award of general damages to Shs. 35,913/-, apportioning the general damages among the four dependants. The Court of Appeal made a deduction in respect of acceleration of the benefit of the deceased's estate to his children. On further appeal to the Judicial Committee of the Privy Council by the appellant, it was submitted for the respondent that the method of calculating the total dependency as a lump sum was inappropriate where the mother had died in the accident.

Held –

(i) the question of damages for the loss of support is essentially a jury question which must be dealt with on broad lines particularly where the number of imponderables makes mathematical calculations inapt;

(ii) having regard to the anticipated savings which might reasonably have been expected to have been

made by the deceased if he had lived, no deduction ought to have been made on the score of accelerated benefit, as these two items largely cancel out;

(iii) there was no reason why the support necessary for young children should, where the mother has been killed in the accident, be more sparingly estimated than if the mother had survived;

(iv) dependency is a question of fact and in view of the evidence and of the judge's finding that "the deceased would have continued to pay out for the benefit of his children something between £10 and £12 per week" had he not died, the Court of Appeal were wrong to take the view that there were only four dependants;

(v) the trial judge's basis of calculating a £10 per week dependency over a 15 year period was erroneous in view of the variation of ages of the eight children between twenty-three and three at the time of the accident and accordingly his award could not stand;

(vi) on the facts of the case a figure of Shs. 70,000/- would fairly represent the total loss of dependency among the eight dependants and this sum should be apportioned.

Appeal allowed.

Cases referred to in judgment

(1) *Davies v. Powell Duffryn Associated Collieries Ltd*., [1942] A.C. 601; [1942] 1 All E.R. 657.

(2) *Muirhead v. Railway Executive* (1951) unreported, see Kemp and Kemp, The Quantum of Damages (2nd Edn.) Vol. II, p. 226.

(3) *Daniels v. Jones*, [1961] 3 All E.R. 24; [1961] 1 W.L.R. 1103.

Judgment

Lord Guest: This is an appeal from a judgment of the Court of Appeal for Eastern Africa allowing in part an appeal by the respondent from a judgment of the High Court of Uganda.

The action arose out of a motor accident on August 31, 1959 when Rajabali Kassam, the father of the appellant was killed. The appellant brought the action on her own behalf and on behalf of the other dependants:–

(*a*) Sadrudin Rajabali Kassam aged 20 years, son.

(*b*) Badrudin Rajabali Kassam aged 19 years, son.

(*c*) Zarina Rajabali Kassam aged 17 years, daughter.

(*d*) Shah Sultan Rajabali Kassam aged 15 years, daughter.

(*e*) Amirali Rajabali Kassam aged 12 years, daughter.

(*f*) Roshanali Rajabali Kassam aged 10 years, son.

(*g*) Nazma Rajabali Kassam aged 3 years, daughter.

The plaint alleged that the death of the deceased was caused by the negligence of the respondent's servant, the driver of the respondent's motor lorry, and claimed damages for loss of expectation of life under section 13 of the Law Reform (Miscellaneous Provisions) Ordinance, 1953 (the equivalent of s. 1 of the Law Reform (Miscellaneous Provisions) Act, 1934) and under ss. 7 and 8 of the Law Reform (Miscellaneous Provisions) Ordinance, 1953 (the equivalent of ss. 1 and 2 of the Fatal Accidents Act, 1846). The issue of liability was first tried by the learned judge and he found for the appellant and

adjourned the hearing as to damages. After evidence had been led on the question of damages the learned judge awarded the appellant a round figure of £6,000 (Shs. 120,000) with interest at 6 per cent from September 30, 1960, which sum included special damages. He also awarded costs to the appellant. He made no apportionment of the sum as between the appellant and the various dependants. The respondent

appealed to the Court of Appeal for Eastern Africa when the court allowed the appeal in part by reducing the general damages to Shs. 35,913 which they apportioned among four dependants as follows:–

Shah	Shs	7,981
Amirali	Shs	7,183
Roshanali	Shs	8,778
Nazma	Shs	11,971

In addition to the general damages of Shs. 35,913 the court awarded agreed items of Shs. 1,000 general damages to the appellant personally, Shs. 600 special damages for funeral expenses and Shs. 320 for medical expenses, bringing the total to Shs. 37,833. In the final result the court reduced the award of damages from Shs. 120,000 to Shs. 37,833. The order for costs in the court below was not disturbed, but the appellant was ordered to pay three quarters of the respondent's costs of the appeal in that court.

The appellant complains that the award of the Court of Appeal is too low and asks for the trial judge's award of £6,000 to be restored. No question as to liability arises.

The facts upon which the award has to be based are not seriously in dispute. The deceased who was aged between 40 and 45 years was a shop-keeper. The family consisted, in addition to the dependants already mentioned, of the deceased's wife and daughter, Dolatkhanu, who were both killed in the same accident as the deceased. The deceased's average income from his business from 1955 to 1959 inclusive was £744 per annum. The trial judge concluded that out of that figure the deceased spent £558 or three-quarters of £744 upon his family. This figure was in effect accepted by the Court of Appeal when they took £572 as the annual dependancy, approximately £11 per week. The figure of 15 years as the remaining effective working life of the deceased taken by the trial judge was also accepted by the Court of Appeal. None of these figures were seriously challenged by the respondent and there was no cross-appeal against the Court of Appeal's award. The deceased left estate the net value of which was Shs. 89,425 and which, as he died intestate, would be divided according to the law of Uganda equally among his children.

The principles upon which an appellate court should act in reviewing an award of damages were clearly stated in *Davies v. Powell Duffryn Associated Collieries Ltd*. (1) by Lord Wright ([1942] A.C. at p. 617):

> "In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

Their Lordships therefore first address themselves to the question of whether the award of the Court of Appeal having regard to the considerations above mentioned can stand. It should be explained initially that the basis of the Court of Appeal's award differed from that of the trial judge in several respects. Gould, J.A. delivered the judgment of the Court of Appeal in an admirably clear opinion, making some

intricate calculations based upon a mathematical basis. He considered each dependant separately and arrived at the conclusion that there were only four dependants, namely the youngest children. He then took the average dependancy of these four children at 11¼ years. As there were according to his view only four dependants he took 4/9ths of the total dependancy of £572 which he multiplied by 11¼. This figure was then discounted to

represent the advantage to the dependants of obtaining the capital sum instead of the income over the years. This resulted in a figure of Shs. 43,218. From this figure was deducted a sum amounting to Shs. 7,305 representing the estimated value to the four dependants of the acceleration of their interest in the deceased's estate which was taken at Shs. 89,425 plus the prospective value of the claim for loss of expectation of life under s. 13 of the Law Reform (Miscellaneous Provisions) Ordinance, 1953, which claim had been abandoned by the appellant in the course of the hearing before the trial judge. This left a final figure of Shs. 35,913 or £1,795 which he apportioned among the four dependants.

As an arithmetical exercise the above calculation may be difficult to fault. But pure arithmetic does not always in such cases lead to a just result where there are so many imponderables. The aim in assessing damages in a case such as the present is to estimate the loss of reasonable expectation of pecuniary benefit. This must in most cases be a matter of speculation and may be conjecture. The more usual method of assessing damages is that adopted by the trial judge of estimating the total dependancy as a lump sum and thereafter apportioning it among the various dependants. Another method may be to assess each dependancy separately. This was the method adopted with the approval of the English Court of Appeal in *Muirhead v. Railway Executive* (2) where figures existed for the degree of support of each child. But if the method of assessing the support for each dependant separately leads to a result which is so out of line with what would be a reasonable estimate of the loss of each individual dependant this suggests that some step in the calculation must be erroneous. "In what is essentially a jury question, the overall picture is what matters. It is the wood that has to be looked at and not the individual trees" (*Daniels v. Jones* (3) per Willmer, L.J. [1961] 1 W.L.R. at p. 1113). Taking the Court of Appeal's apportionment of the figure of Shs. 35,913 and assuming as Gould, J.A. did, the dependancy of the girls to the age of 25 and of the boys to the age of 21, this represents a figure of £40 or 15/- per week for each child which appears to be very much on the low side.

The figure of £1,795 awarded by the Court of Appeal represents only about three years purchase on the annual dependancy of £572. This is an exceptionally low multiplier and counsel for the respondent conceded that upon the basis of a 15 year working life a multiplier of 10 would not be unreasonable if the widow and children had survived, which he said was the conventional figure. Counsel for the respondent, however, suggested that where no widow survived, she having been killed at the same time as the deceased, the lump sum method of calculation was inappropriate. In the case where the widow survived, he said, the widow's dependancy persisted at any rate during the remainder of the deceased's working life and her award went to provide for the younger children. Their Lordships see no reason in principle for this distinction and no reason why the support necessary for young children should in the absence of a mother be more sparingly estimated than if the mother had survived. It may be that the absence of a frugal mother may lead to a more expensive household budget.

The Court of Appeal reached the conclusion that there were only four dependants and scaled down the total dependancy accordingly. Their Lordships take the view that this scaling down very largely vitiated the whole calculation. At the death of the deceased there were not only four dependants, but eight. In addition to the four youngest children there were Sadrudin aged 20, Badrudin aged 19, Zarina aged 17, and the appellant aged 23. It is true that Zarina and the appellant were at the date of the hearing in September 1960 both engaged to be married, but at the date of the death of the deceased the eight children were all living in family with the deceased. "He kept us all", the appellant said in evidence. Entries in the books of the deceased produced by his accountant showed sums in name of wages for Sadrudin, Dolatkhanu and the appellant, but these

sums were clearly only book entries and never paid as appears from the account of the deceased's assets where the accumulation of salaries unpaid are credited to Dolatkhanu, Sadrudin Badrudin and the appellant. The Court of Appeal relied upon the deceased's books as justifying their conclusion that the two elder boys and the appellant were not in fact dependant on the deceased. The trial judge, however, declined to accept that these salaries were or would be paid to any of the children. He moreover found as a fact that had he not died the deceased would have "continued to pay out for the benefit of his children something between £10 to £12 per week". Dependancy is very largely a question of fact, and their Lordships take the view that in the state of the evidence and having regard to the trial judge's finding the Court of Appeal were not entitled to take the view that there were only four dependants. In their Lordships' view the trial judge was entitled to make the finding which he did.

The Court of Appeal have made a deduction in respect of the acceleration of the benefit of the deceased's estate to his children. Their Lordships' view is that this is a highly speculative matter, and having regard to the anticipated savings which might reasonably have been expected to have been made by the deceased if he had lived, no deduction ought to be made on the score of accelerated benefit, as these two figures very largely cancel out. Warnings against the propriety of this type of deduction were given in *Daniels v. Jones* (3). The deduction for loss of expectation of life Shs. 2,000 is of so little account that it can be ignored.

For these reasons their Lordships have reached the conclusion that the award of the Court of Appeal, carefully though it may have been calculated, represents an erroneous estimate of the loss suffered by the dependants of the deceased.

Their Lordships now turn to the learned judge's award of £6,000 in order to see whether this has been made upon correct principles. Although the judge mentions the figure of some Shs. 120,000 as the value of the estate left by the deceased, it is plain that he has made no allowance therefor in his calculation, but for the reasons already given their Lordships would not however consider that his failure to take into account this factor vitiated his award. A more serious criticism can however be made of the fact that he has taken for all the dependants, aged as they were from 23 to 3 years, the period of dependancy at 15 years, the estimated remainder of the deceased's working life. This is plainly wrong as the eight dependants would not all be equally dependant for the 15 year period. The elder boys would soon become self-supporting, the girls would probably get married or go into employment, and the younger children would in time grow up and earn their own living. In fact only the youngest Nazma would be dependant for the whole period of 15 years. This indicates to their Lordships that the learned judge's basis of calculating a £10 a week dependancy over a 15 year period is erroneous, and that his award for this reason cannot stand.

Their Lordships were invited by both parties in the event of neither the trial judge's award nor that of the Court of Appeal commending themselves to the Board themselves to assess the total damages.

The question of damages for the loss of support is essentially a jury question which must be dealt with on broad lines. Mathematical calculations can never lead to a precisely accurate estimate for the loss suffered. Dealing with the matter in this way their Lordships have reached the conclusion that a figure of £3,500 (Shs. 70,000) would fairly represent the total loss of dependancy among the eight dependants, namely the appellant, Sadrudin, Badrudin, Zarina, Shah, Amirali, Roshanali, and Nazma. This figure will have to be apportioned among these dependants, and their Lordships consider that as was suggested by the appellant it would be more appropriate that this should be done by the High

Court of Uganda. The agreed items of general damages to the appellant of Shs. 1,000 personally, Shs. 600 special damages for funeral expenses, and Shs. 320 for medical expenses awarded by the Court of Appeal were not challenged by the respondent. All these awards will carry interest at 6 per cent from 30th September, 1960.

The order as to costs in the High Court of Uganda will not be disturbed, the appellant will have to pay one-half of the respondent's costs in the Court of Appeal, and the respondent will have to pay three-quarters of the appellant's costs before the Board.

Appeal allowed.

For the appellant:
Desmond Ackner, QC and *TO Kellock*
Kingsford Dorman & Co, London

For the respondent:
EW Eveleigh, QC and *John D Stocker*
Gardiner & Co, London

Prem Lata v Peter Musa Mbiyu
[1965] 1 EA 592 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 September 1965
Case Number:	33/1965
Before:	Crabbe Duffus and Law JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya – Sir John Ainley, C.J

[1] Practice – Interest – Action for damages for personal injuries – Plaintiff not entitled to interest on general damages for period between date of filing suit and judgment – Interest on special damages if amount actually expended or incurred allowable.

Editor's Summary

The appellant, in a suit for damages for personal injuries, was awarded Shs. 24,000/- as general damages and Shs. 1,742/80 as special damages but the judge refused an application to award interest on these two sums from the date of filing suit until judgment. On appeal,

Held – In personal injury cases, interest on general damages should not be awarded for the period

between the date of filing suit and judgment but interest should normally be awarded on special damages, if the amount claimed has been actually expended or incurred at the date of filing the suit.

Order accordingly.

Cases referred to in judgment

(1) *Toprani v. Patel*, [1958] E.A. 346 (C.A.).

(2) *Eastern Radio Service v. R. J. Patel*, [1962] E.A. 818 (C.A.)

(3) *Y. F. Gulamhusein v. French Somaliland Shipping Co. Ltd*., [1959] E.A. 25 (C.A.).

Judgment

Law JA: read the following judgment of the court:

This is an appeal by an infant plaintiff and her next friend from the judgment of the Chief Justice in the High Court of Kenya awarding the infant plaintiff Shs. 24,000 as general damages for personal injuries and awarding the next friend Shs. 1,742/80 as special damages. In the course of the hearing we indicated that we could see no merit in the appeal against the quantum of general damages awarded and against the order that these damages be paid to the Public Trustee.

We also indicated that there was no merit in the sole ground relied on in support of the cross-appeal, that the Chief Justice should have held that the infant plaintiff was guilty of contributory negligence.

The only point remaining for decision is that contained in ground 2 of the appeal:

> "That the learned Chief Justice misdirected himself in failing to order interest in favour of the successful party at court rates from the date of filing of the action to the date of recovery of the amount due under the judgment or decree of the court".

It is agreed by both counsel for the appellants and counsel for the respondent that, immediately after judgment was pronounced, counsel for the appellants applied for an order that interest be awarded on the amounts awarded as general and special damages from the date of filing suit until judgment. It is also agreed that the Chief Justice rejected this application. Nothing appears on the record as to the reasons for which the application was rejected. The award of interest on a decree for the payment of money for the period from the date of the suit to the date of the decree is a matter entirely within the court's discretion, by s. 26 of the Civil Procedure Act. Such a discretion must of course be judicially exercised, and where as in this case no reasons are given for the exercise of a judicial discretion in a particular manner, it will be assumed that the discretion has been correctly exercised, unless the contrary be shown (*Toprani v. Patel* (1) [1958] E.A. at p. 349). In an attempt to satisfy us that the normal practice is to award interest on the amount of a money judgment from the date of filing suit counsel for the appellants referred us to *Eastern Radio Service v. R. J. Patel* (2) and *Y. F. Gulamhusein v. French Somaliland Shipping Co. Ltd.* (3). In both these cases the successful party was deprived of the use of goods or money by reason of a wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest. But suits for damages for personal injuries are in a different category. It cannot be said that, at the date of filing suit, the plaintiff is entitled to any particular amount. This depends on the decision of a number of factors, including liability, contributory negligence, and the assessment of the damages which may include, as in this case, a considerable element in respect of future disability. In these circumstances, we do not consider that the Chief Justice wrongly exercised his discretion in refusing to award interest from the date of filing suit in respect of the general damages, as the infant plaintiff cannot have been said to have been deprived of the money represented by these damages from any particular date before judgment. Counsel for the respondent does not, however, oppose an order for the payment of interest on the special damages awarded to the next friend, as these represent out of pocket expenses actually paid or incurred at the date of filing suit. We agree. In our opinion the Chief Justice was right in refusing to award interest on the general damages from the date of filing suit, but it is conceded, and rightly so in our opinion, that interest should have been given on the amount of Shs. 1,742/80 awarded to the next friend in respect of special damages. We allow ground 2 of the appeal to this limited extent, and order that paragraph 1 of the decree be amended by the addition of the words "together with interest at 8 per cent per annum from the date of filing suit until the date of judgment". Apart from this we dismiss the appeal and the cross-appeal, without any order as to costs. Each side will bear its own costs of the proceedings in this court.

Order accordingly.

For the appellants:
YP Vohra
Vohra & Vohra, Nairobi

For the respondent:
JJ Patel
JJ & VM Patel, Nairobi

John F Hogan and others v Homi D Adrianwalla
[1965] 1 EA 594 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	28 August 1965
Case Number:	28 of 1965
Before:	Sir Samuel Quashie-Idun P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – Saidi, J

[1] Practice – Appeal – Plea of "res judicata" argued as preliminary issue – Ruling delivered against plea of res judicata – Reasons for ruling delivered after twenty-one days – No right of appeal against ruling without leave – Notice of appeal filed against ruling – Leave to appeal obtained when reasons for ruling subsequently delivered after prescribed time – Whether order granting leave to appeal nullity – Eastern Africa Court of Appeal Rules 1954, *r.* 23(2) – *Appellate Jurisdiction Ordinance s.* 7(1) (*T*).

Editor's Summary

The appellant brought an action against the respondent to recover damages for negligence arising out of an accident between two motor vehicles. It was the appellant's contention that as a result of a judgment in a previous suit the issue of negligence on which the present action was based, was res judicata, and that accordingly the respondent was estopped from denying liability. The issue of res judicata was argued as a preliminary point and the trial judge on April 7, 1965, ruled against the plea of res judicata, and stated that reasons for the ruling would be delivered later. After 21 days, reasons for the ruling were delivered and the judge also on verbal application granted leave to appeal under r. 23(2) of the Eastern Africa Court of Appeal Rules, 1954. On the appeal coming on for hearing the respondent's counsel took a preliminary objection that the order granting leave to appeal was a nullity as the jurisdiction of the High Court of Tanzania to grant leave to appeal to the Court of Appeal under r. 23 ceased on the expiration of fourteen days after the decision of April 7 1965, and that accordingly, the High Court in purporting to grant leave on April 28 acted without jurisdiction and the order was therefore a nullity and of no effect. For the appellant it was submitted that the decision was the signed reasons for the ruling of April 28 and that the ruling of April 7 was only an intimation by the judge that he intended at some future date to deliver a written judgment in the terms that he was then stating,

Held –

(i) the ruling of April 7 was a definite decision of the court on the preliminary issue of res judicata and the written statement delivered on April 28 was only a statement setting out the reasons for the

decision of April 7 and was not in itself a decision or order of the court;

(ii) the reasons for the decision given on April 28 did not amount to a decree, order, judgment, decision or finding of the High Court within s. 7(1) of the Appellate Jurisdiction Ordinance which gives and governs the right of appeal from the High Court of Tanzania;

(iii) the application for leave to appeal should have been made within 14 days after the decision was given and the High Court, in purporting to grant leave to appeal after that period had expired, acted without jurisdiction and the order was a nullity.

Appeal struck out as not being properly before the court.

No cases referred to in judgment

August 28. The following judgments were read:

Judgment

Duffus JA: This is an appeal from an interlocutory order of a judge of the High Court of Tanzania. The appeal to this court is under the provisions of the Appellate Jurisdiction Ordinance of Tanganyika and it is agreed that an appeal from an order of this nature lies only with the leave of the High Court. On the matter coming on for hearing the respondent raised the preliminary objection that the appeal was not properly before the court as the leave to appeal granted by the High Court was a nullity in that the purported grant was made after the expiration of the time within which the High Court had jurisdiction to act.

This action was brought by the three appellants against Homi D. Adrianwalla, and three other respondents, one of whom, F. H. Cooper, is not a party to this appeal. The action sought to recover damages for negligence arising out of an accident between two motor vehicles. Pleadings were duly filed and in an additional reply the plaintiffs claimed that as the result of a judgment in a previous suit the issue of negligence on which this present action is based, was 'res judicata' and that accordingly the respondent was estopped from denying liability and that the action should now proceed against the respondent only for the purpose of determining the quantum of damages. The former suit on which the plea of 'res judicata' was raised was in Civil Case No. 40 of 1963 in which a Mr. Gaskill, a passenger in the plaintiff's car, had brought an action against the owners and drivers of both vehicles, that is against the first and second appellants, and the first and second respondents in this case, and had in the result recovered a judgment for substantial damages against the second respondent only.

The learned trial judge in the High Court heard the plea of 'res judicata' as a preliminary issue. This issue was fully argued by counsel on April 1 and 2, 1965 when the judge reserved his decision and delivered this on April 7, 1965, as follows:

> "Order
>
> This case is difficult. Mr. Beynon submitted on behalf of the plaintiff that the issue of negligence on which this suit is founded is res judicata as between the parties and then prayed that the suit should proceed against the 2nd defendant to determine the quantum of damages.
>
> The plea of res judicata was vehemently opposed by counsel for the defendants.
>
> I have considered with utmost care and pains the submissions of the learned counsels and the authorities they relied upon and my conclusions are that it would be unfair in the circumstances of the case to uphold the plea of res judicata against the defendants. I am satisfied that it would be in fairness to both parties that the suit should go to a full trial. I have decided to make this decision right now in order to enable the plaintiffs to have their case heard before they leave Tanzania early June 1965, as it was alleged by their counsel. My reasons will appear in a full ruling on this preliminary point. Question of costs reserved.
>
> *Sgd. A. Saidi*
>
> Judge
>
> 7.4.65."

It is to be observed that the judge has, in this ruling, given a definite decision on the preliminary issue and has ruled against the plea of 'res judicata' and

ordered that the trial should proceed. This order was in writing duly signed by the judge. He, however, followed the unusual course of stating that he would give his reasons for this ruling at a later date and in fact did so on April 28 when he set out in full his reasons for the decisions of April 7. I would quote here the following passage from these reasons which make it very clear that the decision had been given on April 7 and that these were only the reasons for his decision:

I quote:

> "This question of res judicata became a preliminary issue which was argued before me by counsel for the plaintiffs and counsel for the defendants on April 1 and 2, 1965.
>
> After the arguments counsel for the plaintiffs urged me to decide the issue as early as possible to enable him to fix hearing dates so that the plaintiffs might be able to give their evidence before they left East Africa in June, 1965, for the United States of America, where they live. On April 7, 1965 I over-ruled the plea of res judicata and ordered that the suit should go to a full trial. I will now outline my reasons for doing so."

In the meantime the appellants had filed notice of appeal against the decision of April 7, but took no steps to obtain leave to appeal against this decision until after the judge had stated his reasons on April 28, a matter of 21 days after the decision was given.

On April 28 after the reasons were delivered counsel for the appellant made verbal application for leave to appeal under r. 23(2) of the Eastern African Court of Appeal Rules. Counsel for the respondent opposed this application as not having been brought at the proper time, but the learned trial judge then granted leave to appeal to this court. In the formal order drawn up, the court purports to grant leave to appeal against the order or ruling of April 7 and the reasons for the ruling of April 28.

The preliminary objection now taken by the respondent is that the order is a nullity as the jurisdiction of the High Court of Tanzania to grant leave to appeal to this court under r. 23 ceased on the expiration of 14 days after the decision of April 7, 1965 and that accordingly, the High Court, in purporting to grant leave on April 28, acted without jurisdiction and the order was therefore a nullity and of no effect.

Rule 23 states:

> "(1) This rule shall apply to civil causes and matters only.
>
> (2) Leave to appeal to the court may be granted or refused by the Superior Court without formal application at the time when the decision is given, and in such event the decree or order shall record that leave has been granted or refused accordingly.
>
> (3) In all other cases application to the Superior Court for leave to appeal to the court shall be by motion or summons, which shall state the grounds of the application, and shall if necessary be supported by affidavit. Such application shall be made not more than 14 days after the judgment or decision complained of and shall be intituled and filed in the proceedings from which it is intended to appeal, and all necessary parties shall be served. If leave is granted, the order giving leave shall be included in the record of appeal. If leave is refused, the order refusing leave shall be produced on any application for leave to appeal made subsequently to the court".

Counsel for the appellant contended that the decision was the signed reasons for ruling of April 28 and that the ruling on April 7 was only an intimation by

the learned judge that he intended at some future date to deliver a written judgment in the terms that he was then stating. This submission is in my view, clearly wrong, as from the order of April 7 which I have already quoted in full, and also from the extract that I have set out from the ruling, it is perfectly plain that the ruling of April 7 was a definite decision of the court on the preliminary issue of 'res judicata'. The written statement delivered on April 28 was only a statement setting out the reasons for the decision on April 7 and was not in itself a decision or order of the court.

Counsel for the appellant, however, further relied on the definition of "judgment" in the Indian Civil Procedure Code of 1908 which still applies in Tanganyika, which states:

> "(*a*) 'judgment' means a statement given by the judge of the grounds of a decree or order".

He submits that the decision on April 7 was an order and that the reasons given on April 28 were the statement by the judge of the grounds of the order he made on April 7 and that these reasons were accordingly, a 'judgment' in Tanganyika.

There is, so far as I am aware, no statutory requirement that a judge shall give reasons for an order made on an interlocutory application (unlike a judgment, which, under O. 20, r. 5, must contain reasons), although it is obviously desirable except in the simplest cases. It is not unusual for a judge to reserve his reasons for making an interlocutory order until he delivers his judgment and for my part I can see no objection to that course. But I think, with respect, that the course followed by the learned judge in delivering a separate "Reasons for Ruling" is without authority and is undesirable. In this case the judge gave his definite decision on April 7 and in fact in doing so he then gave the main reason for his decision in stating that it would be unfair in the circumstances of the case to uphold the plea of 'res judicata'. I will also refer to s. 33 of the Code of Civil Procedure which states that the court shall pronounce judgment after the case has been heard, and also to the provisions of O. 20 of the First Schedule of the Code which deals with judgments and decrees, and which again refers to judgments being delivered after the case has been heard, and there sets out the rules governing the essential requirements of the judgment and of its delivery. It is to be noted that a judgment has to contain the decision of the court and the reasons for that decision and that no provision is made for the decision to be first given, and then for the reasons of the decision to follow at a later date. In fact r. 3 of O. 20 expressly provides that the judgment shall be dated and signed by the court in open court at the time of pronouncement and shall not afterwards be altered or added to except as provided under s. 152 which refers to accidental clerical or arithmetical mistakes or on review. I am therefore of the view that the reasons given on April 28 for the decision made on an interlocutory matter on April 7 were given without legal authority and cannot come within the meaning of a 'judgment' under the Civil Procedure Code.

In any event the Indian Civil Procedure Code does not give the respondent the right to appeal to this court, this is given by the Appellate Jurisdiction Ordinance, 1961 No. 55 of 1961 of the Tanganyika Laws. Section 7 of that Ordinance gives the right to appeal in Civil Cases and the relevant portion of this section reads:

> "7. (1) In civil proceedings, except where otherwise provided by any other Ordinance for the time being in force, an appeal shall lie to the Court of Appeal – . . ."
>
> (*c*) With the leave of the High Court, against every other decree, order, judgment, decision or finding of the High Court."

In s. 2 of the Ordinance 'judgment' is defined as follows:

> " 'judgment' includes decree, order, sentence or decision;"

"judgment" in this Ordinance is not therefore given the restricted meaning as in the Indian Civil Procedure Code, and while the definition is obviously not exclusive, I think, applying the "noscitur a sociis" principle of interpretation, that it can include only acts which determine an issue and certainly not mere reasons which only explain why a particular decision was given. I am of the view that the reasons for the decision given on April 28 are not a decree, order, judgment, decision or finding of the High Court as set out in s. 7(1) of the Appellate Jurisdiction Ordinance and it is this Ordinance which gives and governs the right of appeal from the High Court of Tanganyika in this court and not the Civil Procedure Code of India.

I am of the view, therefore, that the decision against which an appeal lies in this case is the decision of April 7. This was a definite finding of the court and comes within the purview of s. 7(*c*) of the Appellate Jurisdiction Ordinance, 1961. The further statement of April 28 was in fact only an explanation given by the learned judge to support and fully set out his reasons for the ruling that he gave on April 7, and no further legal significance can be attached to this statement. To hold otherwise would mean that the same decision was given on two different dates and that there would be different periods within which an appeal against the same decision would lie, and this period might be extended indefinitely if for instance the judge delayed giving his reasons or chose to file a further amplification of the reasons of his original, and, in fact the only decision on this matter.

Counsel for the appellant further submitted that this would be a mere irregularity and that the court in its discretion might allow the appeal to continue on terms under the provisions of r. 40 of the rules of this court.

The facts here, however, establish that the High Court in granting leave to appeal acted entirely without having any jurisdiction to so act. This court can under our r. 9 extend the time within which an application for leave to appeal has to be brought, but the High Court has no such power, and on April 28 when the purported leave was granted the High Court had no jurisdiction either to extend the time within which to appeal or to have granted the leave to appeal. It follows that the order granting leave was a complete nullity and that this appeal is not now properly or legally before this court. This is not an irregularity to which this court can apply the provisions of r. 40.

I would therefore uphold the preliminary objection and find that this appeal is not properly or legally before this court and should be struck out with costs to the respondent.

Sir Samuel Quashie-Idun P: I agree with the judgment of Duffus, J.A. and accordingly order that this appeal be struck out with costs to the respondent.

Spry JA: I also agree.

Appeal struck out as not being properly before the court:

For the appellant:
AC Beynon
AC Beynon, Dar-es-Salaam

For the respondent:

Bryan O'Donovan, QC and *Taher Ali*
Taher Ali & Co, Dar-es-Salaam

Tanganyika Shell Ltd v K Jafarbadwalla

[1965] 1 EA 599 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	12 June 1965
Case Number:	12/1965
Before:	Sir Samuel Quashie-Idun P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – Weston, J

[1] Rent restriction – Persons protected – Public company – Lease – Assignment – Landlord's consent – Withholding of consent – Application to Rent Restriction Board to consent to assignment – Application made before expiry of lease – Application decided after expiry of lease – Retrospective consent to assignment granted by Board with effect from date earlier than date of application – Order that intended assignee became statutory tenant under s. 26(1) *Rent Restriction Act* 1962 (*T*) *– Whether public company can become statutory tenant – Rent Restriction Act* 1962, *s*. 19(1) (*g*) *s*. 26(1) *and s*. 30(*T*).

Editor's Summary

The respondent had leased a private dwelling house to the appellant, which was a public company, for a term of four years from April 1, 1960. Under the lease the appellant was given an option to extend it for a further period of two years by giving a written notice three months prior to the expiration of the lease. The lease also contained provision against assignment without the consent of the respondent such consent, however, not to be "unreasonably withheld in the case of a responsible and respectable person, firm or company". On July 29, 1963 the advocates acting for the appellant wrote to the respondent requesting consent to assign the lease to its associate company which was refused by a letter written in December 1963. The appellant on March 21, 1964 applied to the Rent Restriction Board, Dar-es-Salaam, for consent to assign the tenancy and at the hearing of the application in May 1964 it was submitted that the application was made under s. 30 of the Rent Restriction Act, 1962 which provides: "Notwithstanding the absence of any covenant against the assigning or subletting of any premises, no tenant shall have the right to assign, sub-let or transfer the possession of such premises except with the consent of the landlord or, where such consent shall be unreasonably withheld, with the consent of the Board". For the respondent it was submitted that on the expiry of the lease on March 31, 1964 there was no tenancy which the appellant was in a position to assign as the option to renew had not been exercised. The Board gave consent to the assignment of the tenancy with effect from August 29, 1963 and further ordered that with effect from April 1, 1964 the associated company became the statutory tenant of the house under s. 26(1) of the Act. The respondent appealed successfully to the High Court where the judge held that the word "tenant" in s. 30 of the Rent Restriction Act, 1962 means a contractual tenant and the

context excludes a statutory tenant; that the Board erred in treating the respondent's application as one for consent to assign the last eight months of its lease as the Board was not vested with jurisdiction to grant consent having effect from a date prior to that of the application; that the word "tenant" in the context of s. 19 of the Rent Restriction Act, 1962 should be construed as restrictively as it had been done in England, that is to say, so as to extend the protection of the Rent Restriction Act, 1962 only to persons "personally in occupation"; and that a public limited company as opposed to a private company or a partnership is incapable of holding over as a statutory tenant under s. 19 of the Rent Restriction Act, 1962. On further appeal,

Held –

(i) when the Rent Restriction Board gave its consent the lease had

already expired and accordingly the Board should have dismissed the application;

(ii) the provisions of s. 19(1) (*g*) of the Rent Restriction Act, 1962 shows that the legislature of Tanganyika did not intend the word "tenant" in that section to have the restricted meaning it has in England but instead intended it to include corporations as well as natural persons;

(iii) in Tanganyika a limited liability company, whether public or private, may claim protection as a statutory tenant because it is implicit in s. 19(1) (*g*) ibid.

Appeal dismissed.

No cases referred to in judgment

June 12. The following judgments were read:

Judgment

Spry JA: The appellant company, which is incorporated in the United Kingdom, was the tenant of the respondent under a lease for four years from April 1, 1960, of certain premises to which, it is agreed, the Rent Restriction Act, 1962, (No. 42 of 1962) applies. The lease contained a covenant against assigning without consent, such consent not to be unreasonably withheld in the case of a responsible and respectable person, firm or company. It also contained an option for renewal, which was not exercised.

By a letter dated July 29, 1963, the advocates for the appellant company applied to the respondent for consent to assign the lease to a company of the same name but incorporated in Tanganyika (to which I shall refer as the assignee company). On December 11, 1963, the advocates for the respondent replied, refusing consent. On January 7, 1964, the advocates for the appellant company wrote enquiring the reason why consent was withheld. That letter was never answered, but on March 5, 1964, the advocates for the respondent wrote to the appellant company requiring it to give vacant possession of the premises on March 31, 1964. The appellant company then, on March 21, 1964, applied to the Rent Restriction Board of Dar-es-Salaam for consent to the assignment of the lease to the assignee company.

Mr. Grimble before the High Court appears to have said that an assignment of the lease had previously been executed and registered, but this was not part of the appellant company's case before the Board and it was neither proved nor admitted. Before us, counsel for the appellant said that he was not aware of any assignment and believed there had been none, and it is on that basis that we must proceed.

The Board allowed the application. They took the view that the respondent had deliberately procrastinated when asked for his consent; they noted that he had made no enquiry regarding the constitution or financial standing of the assignee company; and they considered that consent had been withheld unreasonably. They granted consent to assign with effect from August 29, 1963. They considered as a matter of law that a limited liability company is capable of being a statutory tenant in Tanganyika and that the assignee company, having retained possession of the premises after the expiration of the lease, was a statutory tenant. In this, they appear to have been making a declaratory order outside the scope of the application before them.

The respondent appealed successfully to the High Court. The learned judge began by expressing the opinion that the appellant company had been more at

fault in the matter of delay than the respondent. Be that as it might, he considered that the Board had erred in granting retrospective consent, remarking that in his opinion the Board had no jurisdiction to grant consent with effect from a date earlier than that of the application, observing in this connection that under s. 30 of the Act, a tenant's remedy in case of the unreasonable with-holding of consent by the landlord is to seek the consent of the Board, not to appeal against the refusal. He considered that s. 30 of the Act takes away the common law power for a tenant in such circumstances to assign his lease without thereby becoming liable to forfeiture for breach of covenant. He held that "a public limited company is incapable of holding over as a statutory tenant under s. 19 of the Act", although a private limited company may do so. He held therefore that all that had been in issue had been an application for consent to assign the last ten days of the lease, with no statutory tenancy to follow, adding that if there had been a statutory tenancy to follow, he would have regarded that as in itself a reason for refusing consent. He set aside the order of the Board in its entirety but declined to make any other order, other than to award the respondent costs in the High Court as well as before the Board.

I do not, with respect to learned counsel, propose to deal fully with their arguments or with the English cases on which, to a considerable extent, they both relied.

The problem with which the Board were faced appears to me to have been, quite simply, whether they could make any order capable of being implemented. The application was for consent to assign and the purpose of giving consent was to enable an assignment to be made: the giving of consent could not operate as an assignment. By the time the Board gave their decision, the lease had already expired and it appears to me that no assignment was then possible. It is true that deeds are sometimes expressed to take effect retrospectively; for example, leases are often expressed to take effect at the date when possession was given, although executed at a later date. In the same way, I see no reason why an assignment should not be expressed to take effect at a date earlier than the date of its execution, for the purpose of regulating the rights inter se of assignor and assignee, provided the assignment is made while the lease is in existence. Once, however, the lease has expired, there is, as I see it, nothing to assign and there can therefore be no assignment.

I think, with respect, that where the Board erred was in failing to appreciate the difference between assignment and consent to assign. That is where, too, this case is so different from most of the English cases that have been cited to us, cases where the tenant has in fact assigned without consent and the landlord has sought to forfeit the lease for breach of covenant.

If, as I think, the lease, being dead, was incapable of being assigned, it would follow that the Board should have dismissed the application for consent to assign it. I think, therefore, that this appeal must be dismissed, and that so far as the order of the Board went beyond the scope of the application, it cannot be sustained. The record is singularly lacking in facts, so that is it not possible, even if it would be proper, for us to comment on the present rights of the parties or the remedies available to any of them.

As I would uphold the decision of the learned judge for reasons other than those on which his judgment was based, I think I must comment on one of the main propositions of law on which he relied and with which I respectfully disagree.

The Board had held that "a limited company or corporation can become a statutory tenant under the provisions of s. 26(1) of the Rent Restriction Act, 1962". The learned judge, after referring to the English case law, remarked:

> "Parliament must be presumed to have been aware of the English decisions and that these would be followed in the absence of clear provision either express or by plain implication to the contrary effect. I can find no such provision in the Act. The proviso to s. 19(1) (*h*) of the Act plainly implies that the intention was to safeguard the possession of private limited companies and partnerships, but it is not difficult to distinguish between the essential nature of these legal entities and that of public limited companies, nor to understand why protection might well be extended to the former but not to the latter. In my view therefore a public limited company is incapable of holding over as a statutory tenant under s. 19 of the Act – this not because it is nowhere in the Act either in terms or by clear implication provided that public companies shall not be capable of doing so, but because it is nowhere in the Act in terms or by clear implication provided that they shall."

With respect, I think that was a misdirection. The second sub-paragraph of para. (*g*) of sub-s. (1) of s. 19 of the Act (to which the learned judge presumably referred when he spoke of "the proviso to s. 19(1) (*h*)") enlarges the meaning of "assign" by providing that:

> "For the purposes of this paragraph, if the tenant is a private limited company or partnership the transfer, without the consent of the landlord, of more than fifty per centum of the share capital of the company or the interest of the partners in the partnership shall be deemed to be an assignment of the premises;".

It seems to me that this provision clearly shows that the legislature of Tanganyika did not intend the word "tenant" in s. 19 to have the restricted meaning it has in England but instead intended it to include corporations as well as natural persons.

I think the reason why the sub-paragraph refers only to private companies and partnerships is easily explained. As counsel for the appellant submitted, private companies and partnerships have the power to control transfers of share capital and partnership interests. It is therefore not unreasonable to regard the giving of consent to transfers which change the controlling interest in the company or partnership as equivalent to the assignment of its property. Furthermore, it is practicable to require a private company or partnership to seek the consent of its landlord before giving its own consent to a transfer. On the other hand, a public company cannot normally refuse to register a transfer which is technically in order and it would therefore have been impracticable and unreasonable to extend the sub-paragraph to public companies.

The fact that s. 19(1) (*g*) applies even to a single class of corporation precludes the drawing, as in England, of an inference from the use of the words "so long as he retains possession" in s. 26(1) of the Act. Also, the fact that the second sub-paragraph of para. (*g*) is a provision extending the requirements of consent to assignments for the benefit of landlords means that it cannot logically be regarded as restrictive of the meaning of "tenant".

I think, therefore, that the Board were correct in saying that a limited liability company, whether public or private, may be a statutory tenant, although not for the reason they gave – that there is nothing in the Tanganyika legislation to prevent it – but for the more positive reason that it is implicit in para. (*g*).

In the course of the hearing, learned counsel made submissions on the question whether it is possible under the Act for a statutory tenant to obtain consent to assign. This is obviously a question of considerable importance but as it was not considered by the Board and only incidentally by the learned judge, and as it was not raised in the Memorandum of Appeal and its determination is not

necessary for the decision of this appeal, I think it better to express no opinion on it.

As I indicated earlier, I would dismiss this appeal with costs.

Duffus JA: This is an appeal arising from a decision of the Rent Restriction Board under the provisions of the Rent Restriction Act, 1962 of Tanganyika. The application was made by Tanganyika Shell, Ltd., a company incorporated in England, and sought the Board's consent to the proposed assignment of a lease. The proposed assignment was to be made to Tanganyika Shell, Ltd., a company incorporated in Tanganyika, and the application was made under s. 30 of the Act on the ground that the landlord, the respondent, had unreasonably withheld his consent to the proposed assignment. The lease was for a period of four years and expired, by reason of the effluxion of time, on March 31, 1964. The application to the Board was made on March 21, 1964. The hearing before the Board was completed on May 18, 1964, on which date the lease had already expired. The Board's decision was delivered on May 27, 1964.

The Board granted the consent sought for the tenancy to be assigned retrospectively from August 29, 1963, and then the Board went on further to make a declaration, which had not been asked for, to the effect that as from April 1, 1964, Tanganyika Shell, Ltd., incorporated in Tanganyika, became the statutory tenant of the premises under s. 26(1) of the Act.

The respondent appealed to the High Court of Tanzania. The appeal was heard by Weston, J. who allowed the appeal and set aside the Board's order in its entirety.

I have had the advantage of reading the judgment of Spry, J.A. and I agree with his decision and the order he proposes.

The facts have been carefully set out in his judgment but I must comment here on the apparent confusion existing in the presentation of the facts by the appellant company, Tanganyika Shell, Ltd. incorporated in England, not only to the Board but during the appeals to the High Court and to this court. It is essential that all the relevant facts should have been placed before the Board and the question as to whether or not an assignment of the premises had actually been executed before the hearing took place would be one of the most relevant and vital issues in the matter.

In the proceedings before the Board the appellants' case was based on the fact that no assignment had taken place and that they were seeking the Board's consent before assigning. This is clear from the application itself which was filed by the company incorporated in England and sought permission to assign to the company of the same name as incorporated in Tanganyika, and also to the reference in the application to the "proposed assignment". Nowhere in the proceedings before the Board was there any evidence of, or indeed any mention that an assignment had in fact been executed. In the course of the proceedings on March 26, 1964, it is to be noted that counsel for the appellant referred to the possibility of Tanganyika Shell, Ltd. incorporated in England, applying to the Board as statutory tenants asking for permission to assign the statutory tenancy to the proposed assignees, the company incorporated in Tanganyika. The application before the Board was asking for consent to assign the contractual tenancy created by the deed of lease, a copy of which was put in evidence before the Board.

When the matter came before the High Court on appeal, counsel for the appellants, who were the respondents in the appeal, said:

> "Informs court that lease in fact assigned and registered in Land Office before application heard – Not disclosed to Board. Will explain fully."

Then later on at the hearing of the appeal counsel further said:

> "Application for assignment made in July 1963. Refers to s. 30 and 19(1) of Rent Act. Transfer registered March 28, 1964."

The notes made by the learned judge do not show that any explanation was offered why this vital fact was not disclosed to the Board and whether this was done inadvertently or deliberately.

The position was no clearer before us as learned counsel for the appellant company stated that he had no instructions that there was a written assignment, and he based his argument supporting the fact that there had been an assignment because he said the landlord had accepted cheques for rent from the new company, incorporated in Tanganyika, but here again these cheques were not in evidence and there was no evidence on the record to support this fact. It is also to be noted that at no time was any application made to the High Court or to this court for further additional evidence to be adduced.

This court has to decide this appeal on the application and on the evidence adduced before the Board. The application was one asking for the Board's consent to a proposed assignment and the evidence before the Board supported the fact that no assignment had been made up to the time that the application was heard. We therefore have to accept as a fact that when the Board's decision was made in May, 1964, no assignment had yet been made and that on the date when the Board gave its consent to the assignment being made that the lease had then expired and accordingly a consent to the assignment of the term of years under the lease would be of no value as the term of years under the lease had expired and there was nothing left to assign. The Board appeared to have regarded consent to an assignment as an assignment! It is elementary that once the term of years has expired under a lease the tenant cannot assign an interest which he no longer holds and he cannot assign retrospectively. A gift or sale takes place when it is completed and a change of ownership cannot be dated as having occurred at a past date unless this actually took place. The position may be different if there was a subsequent deed of assignment to confirm a previous verbal assignment but there was no evidence before the Board to support this.

Different considerations would arise if the application had been made for consent to assign the statutory tenancy that may have arisen after the expiration of the lease on March 31, 1964. This was not, however, the application before the Board and as Weston, J. points out in his judgment, the application was for consent to the assignment of the contractual tenancy under the lease and that the application could have referred to no other tenancy as this contractual tenancy was all that the applicant had when its application was made on March 21, 1964.

I agree, therefore, with Spry, J.A. that the Board's order giving a retrospective consent for the assignment of the lease must be set aside.

The Board also made a declaratory judgment stating that the Tanganyika Shell company, incorporated in Tanganyika, were statutory tenants of the premises as from April 1, 1964. A declaratory order of this nature was never sought and on the evidence before the Board the statutory tenants would still apparently have been the applicants, the Tanganyika Shell company incorporated in England. I use the word "apparently" here, as even the two companies, the company incorporated in England, and the company incorporated in Tanganyika, seem themselves to be in considerable doubt as to which company should claim to be statutory tenants and to be now in possession of these premises.

I agree, therefore, that this appeal should be dismissed and the decision of the High Court of Tanzania quashing the Board's order should be confirmed although not for the reasons given by the learned judge of that court.

In his judgment Weston J., held that while a private limited liability company could become a statutory tenant under s. 26 of the Act a public company could not. A decision on this question is not now really material on this appeal but as it is a matter of considerable importance and as Weston, J. gave a definite opinion, I agree with Spry, J.A. that we should shortly deal with the matter.

It does appear that a tenant under the Rent Restriction Act would definitely include those tenants which are duly incorporated companies. I would in this respect refer to the definition of "tenant" in the Act which states:

> "'tenant' includes any person deemed to be a tenant under s. 3 and a sub-tenant and any person from time to time deriving title under the original tenant, . . ."

and then to the definition of "person" in the Interpretation Act, (Cap. 1), as including "any body of persons, corporate or unincorporate". This is also made very clear by a reference to the second paragraph of s. 19(1) (*g*) which refers to a private limited company. As Spry, J.A. points out, the purpose of this sub-paragraph was to enlarge the meaning of the word "assign" to include cases where the majority of the holders of the proprietary interest in a partnership or private limited company had been transferred, but the reference to a private limited company or to a partnership as being included in the definition of a tenant show that the legislature definitely intended that "tenants" should include "any body of persons, corporate or unincorporate", and I can see no reason why the meaning of tenant under s. 26 of the Act should be given a restricted meaning.

We have been referred to a number of English cases, to the effect that a limited liability company cannot become a statutory tenant under the English Rent Restriction Acts, and further that the protection afforded a tenant insofar as recovery of possession is concerned does not apply to a company. The English Acts are different from those in Tanganyika and the equivalent of s. 19 of the Tanganyika Act is s. 5 of the English Act of 1920 as substituted by s. 4 of the 1923 Act. The English section is different from the section in Tanganyika and does not contain the provision as to a private limited company or partnership as set out in the second paragraph of sub-s. (1) (*g*) of s. 19. This is the paragraph which, as I mentioned before, makes it abundantly clear that the Tanganyika legislature intended to and did in fact extend the protection of s. 19 to a limited liability company who are tenants of a dwellinghouse.

Section 26 extends the protection of s. 19 to tenants who retain possession after the original contract has ended and the legislature must have intended that the word "tenant" here should have the same meaning as it had in s. 19 and throughout the Act. I am, therefore, of the view that the meaning of "tenant" under s. 26 of the Act must be given its ordinary meaning and not a restricted one and that a limited liability company whether "public" or "private" can be a statutory tenant.

I should also like to refer to the opinion expressed by Weston, J. to the effect that s. 19(1) (*g*) of the Act permits a statutory tenant to assign with the consent of the landlord or with the consent or approval of the Board. In England it was necessary to pass special legislation to allow a restricted right of assignment of a statutory tenancy under their Acts but there has been no such special legislation in Tanganyika and the question as to whether a statutory tenant in Tanganyika has a right to assign whether under his original contract or under the Act is one of difficulty which will no doubt have to be fully gone into and considered by the courts in some case in the future.

I agree, therefore, with Spry, J.A. that this appeal should be dismissed with costs.

Sir Samuel Quashie-Idun P: I have read the judgments of my brothers Duffus and Spry, JJ.A. and I have nothing to add. I agree that the appeal should be dismissed with costs. It is accordingly dismissed.

Appeal dismissed.

For the appellant:
RN Donaldson
Donaldson & Wood, Dar-es-Salaam

For the respondent:
NRD Sayani and *AG Kinariwalla*
Sayani & Co, Dar-es-Salaam

H K Bwire v Uganda
[1965] 1 EA 606 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	6 August 1965
Case Number:	693/1964
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Criminal law – Judgment – Desirability of trial court dealing with explanation given by accused.

[2] Criminal law – Whether a fraudulent intention must exist when goods taken – Uganda Penal Code (*Cap.* 22), *s.* 245.

Editor's Summary

The appellant was the Government Agent in charge of a station. A contract for the repair of two Government houses was awarded to one Baguma, Baguma being responsible thereunder for providing all materials including paint and cement. After awarding this contract the appellant took a loan from Baguma. When Baguma later ran short of paint he was issued with some from the government stores for which the appellant awarded Baguma another Government contract, took another loan from him, and later issued him with some cement from the government store for use on this contract. No record was kept of the issue of the paint or cement. When the appellant handed over the station on transfer he failed to mention these dealings to his successor. Nevertheless he gave Baguma a promissory note for the balance of his loans after deducting the value of the government paint and cement. At the trial the appellant explained that he intended to replace the paint and cement and denied any intention to deprive the Government of the goods at the time he issued them to Baguma. The appellant was convicted of

stealing by a person in the public service. The main issue on appeal was that the trial magistrate had failed to deal specifically with this explanation; a point of law was also raised namely that if the original intention was to lend the cement and paint to Baguma then the subsequent intention to misappropriate the goods could not amount to stealing.

Held –

(i) in the circumstances of the case it was unnecessary (although desirable) for the magistrate to express an opinion on the appellant's explanation and on the evidence the magistrate's conclusion was correct;

(ii) obiter, theft under the Penal Code can occur where the animus furandi is formed after an innocent taking.

Appeal dismissed.

Cases referred to in judgment

(1) *R. v. Farrington* (1811), R. & R. 207.

(2) *R. v. Harvey* (1823), 2 B. & C. 257.

Judgment

Sir Udo Udoma CJ: This is an appeal against conviction and sentence. The appellant was charged with two counts of stealing by person in the public service contrary to s. 245 and punishable under s. 257 of the Penal Code. He was tried, found guilty, convicted and sentenced to consecutive fines of Shs. 500/- or three months imprisonment on each count in the District Court of Mubende.

The facts do not appear to be much in dispute and may be summarised as follows. At all times material to this case the appellant was the Government Agent at Mubende. As such Agent he was in charge of the Government Station. A contract for the repair of two Government houses was awarded to Celestino Baguma (P.W. 1). The contract was worth more than Shs. 4,000/-. Under the terms of the contract, Celestino Baguma (P.W. 1) was personally responsible for providing himself with all necessary materials including paint and cement for carrying out the work.

Shortly after the award of the contract, the appellant by his letter Ex. 1 (English translation whereof being Ex. 4), requested a loan of Shs. 600/- from Celestino Baguma (P.W. 1) promising to refund the sum to him by instalments, the first which instalment of Shs. 300/- to be refunded in October 1963.

In response to that letter (Ex. 1), Celestino Baguma (P.W. 1) visited the appellant and as a result and thereupon agreed to and did lend the sum of Shs. 600/- to the appellant, who there and then acknowledged receipt thereof at the foot of Ex. 1. The receipt was dated October 5, 1963.

In the course of carrying out the contract work, Celestino Baguma (P.W. 1) ran short of paint. On the instruction of the appellant he was issued with a tin of paint from the Government store of which the appellant was ultimately in charge as Government Agent. That was in or about December 1963.

At this juncture it should be noted that, although by the terms of the loan of Shs. 600/- as contained in Ex. 1 (English translation Ex. 4) the first instalment of Shs. 300/- was promised to be refunded in October, 1963, no such refund was in fact made either at the appointed time or at any other time thereafter.

The appellant subsequently again awarded to Celestino Baguma (P.W. 1) another contract worth about Shs. 3,000/- for the construction of an incinerator, the supervision of which was the responsibility of the appellant, whose duty it was also to see that the work was done satisfactorily. Soon thereafter the appellant requested for and obtained another loan of Shs. 1,500/- from Celestino Baguma (P.W. 1), and, in acknowledgment of that loan, the receipt Ex. 2 was issued by the appellant.

Then the appellant, realising that Celestino Baguma (P.W. 1) was short of cement for carrying out the work of constructing the incinerator, immediately issued from the Government stores ten bags of cement valued at about Shs. 17/- each, which were delivered to Celestino Baguma (P.W. 1) at the site of the work even without the latter's request. Celestino Baguma (P.W. 1) accepted both the paint and the ten bags of cement in the belief that they were supplied to him from the Government store on loan, which he would have to replace. No official record of these transactions appears to have been kept at the Government store or at the Government Agent's office.

At the time of the supply of the ten bags of cement to Celestino Baguma (P.W. 1), the appellant's debts to him amounted to the total sum of Shs. 2,100/-.

Then on December 23, 1963 the appellant was to leave Mubende on transfer to Tororo, another

Government Station, as an Assistant District Commissioner. On that day the appellant met Celestino Baguma (P.W. 1) for the purpose presumably of squaring his account with him. He then issued to Celestino Baguma (P.W. 1) the promissory note Ex. 3 acknowledging indebtedness to

him in the sum of Shs. 1,930/- only, thereby deducting from his total debt of Shs. 2,100/- the value of the ten bags of cement and one tin of paint, which had been issued to Celestino Baguma (P.W. 1) from Government store. There is of course no dispute that the cement and the paint were Government property.

On leaving Mubende for Tororo on transfer, the appellant did not mention the fact of the transaction about paint and cement to his successor either in his handing over notes or in conversation. There was no official record of the transaction kept in the Government Agent's office. The shortage of these items was only brought to light as a result of Government enquiries.

At the trial, the appellant admitted having deducted the value of the cement and paint from his debt to Celestino Baguma (P.W. 1), but explained that he had done so because he had himself intended to have them replaced personally, and that he had no intention at the time of giving out the cement and the paint to Celestino Baguma (P.W. 1) permanently to deprive the Government of the goods.

This explanation of the appellant forms the substance of the three grounds of appeal on the issue of law argued in his favour by his counsel. The grounds which will be considered together are as follows:

1. That the learned magistrate did not direct his mind sufficiently or at all on the question whether at the material time, that is to say at the time of giving cement and a tin of paint to Baguma (P.W. 1), he, the appellant had any fraudulent intent; in any case the learned magistrate misdirected himself when considering this point in as much as he has given no facts from which such inference (of fraudulent intent at the material time) could properly have been drawn; in the premises there was no evidence from which such inference could in fact have been drawn and any inference which must necessarily have resulted from proved facts would be to the contrary.
2. The learned magistrate erred in law in convicting the appellant, in as much as he failed to consider the applicability of s. 8 of the Penal Code on the facts in the instant case.
3. That the proved facts were more consistent with the innocence of the appellant than his guilt although he the appellant did not act in the interests of his employer, namely the Government (as the learned magistrate puts it).

It was submitted by counsel for the appellant that, in as much as the appellant acted within his powers in giving out the ten bags of cement and tin of paint ostensibly on loan to Celestino Baguma (P.W. 1), there was at the material time of the said giving no intention to defraud or permanently to deprive the Government of the said cement and paint. It was further submitted that on the evidence the appellant himself had undertaken to replace the ten bags of cement and one tin of paint and that was why he had deducted their value from his debts to Celestino Baguma (P.W. 1).

The decision of the learned trial magistrate was criticised, because it was contended that he did not appear directly to have expressed any opinion on the explanation offered by the appellant at the trial; and that the presumption must be that he had accepted that explanation, particularly as the learned trial magistrate had failed to make any specific finding as to the precise time when the theft had occurred.

Counsel further contended that if the original taking was innocent then any subsequent misappropriation would not amount to stealing within s. 245 of the Penal Code.

For the respondent, the State Attorney submitted that the fact that there was no official record of the transaction kept by the appellant; and that the

transaction itself was never mentioned to the appellant's successor on handing over, were circumstances sufficient to warrant the inference which had been drawn by the learned trial Magistrate that the appellant had at the time of the supply of the paint and the cement to Celestino Baguma (P.W. 1) intended all along to deprive the Government of the same.

From these arguments the most important matter for consideration, therefore, in this appeal is as to the intention of the appellant in dealing as he did with the paint and cement, admittedly Government property. That of course is a question of law.

I think it is a well-established principle of law that a man's intention in doing an act can seldom be capable of positive proof. Such an intention can only be implied from the overt acts of the person concerned; or to put it in another way: where an intent is an essential ingredient in the commission of an offence such an intent in most cases can only be inferred as a necessary conclusion from the acts done by the person concerned. As a general rule, however, a man is taken to intend the natural and probable consequences of his own act. See *R. v Farrington* (1) and *R. v. Harvey* (2) (2 B. & C. at p. 264).

The question then is, in the circumstances of the instant case, can it truly be said that the inference drawn and conclusion reached by the learned trial magistrate were justified by the evidence and therefore correct? Was there sufficient material from which a reasonable court could have drawn such an inference?

There is no doubt that the learned trial magistrate correctly directed himself on the law involved by stating, as he did, that the gist of the offence of theft is the fraudulent intention to appropriate permanently. A mere temporary deprivation is no theft.

In the concluding passage of his judgment the learned trial magistrate said:

> "I have considered the evidence as a whole. I am satisfied beyond reasonable doubt that between November 1, 1963 and December 21, 1963 one tin of paint and ten bags of cement (which were Government property) were issued to P.W. 1 on the verbal authority of the accused, who was acting as Government Agent at Mubende. The paint and the cement were not replaced by the accused. There was no official record kept by the accused that he had issued these goods as a loan to P.W. 1. The accused failed to inform his successor. The accused was under financial obligation to P.W. 1. The conduct of the accused was of such as tells against his innocence. I am of the opinion that the facts of this case are such as to warrant an inference of guilt on the part of the accused. I am satisfied beyond reasonable doubt that at the time the accused gave orders for the issue of the paint and the cement he had the fraudulent intention of depriving the Government permanently thereof."

Now it has been submitted by counsel that the above passage of the judgment constitutes a misdirection in law in that the learned trial magistrate failed to direct his mind to the explanation offered by the appellant, and, indeed, failed to express any specific opinion as to that explanation.

I do not think that this submission is a sound one. Although it might have been neater, and indeed, desirable that the learned trial magistrate should have expressed an opinion on the explanation offered by the appellant, I do not think that in the circumstances of this case it was necessary to do so. It seems to me that the fact that the learned trial magistrate did not believe the explanation offered by the appellant as to his intention to replace the paint and the cement is implicit in his finding that the appellant had intended all along to deprive the Government of the goods permanently. From that conclusion it follows that the explanation offered by the appellant was rejected by the court.

In addition to the facts found by the learned trial magistrate, in my opinion, the fact that shortly after awarding the second contract to Celestino Baguma (P.W. 1) and taking the second loan of Shs. 1,500/- from him, the appellant, of his own volition and without any request from Celestino Baguma (P.W. 1), caused to be delivered to Celestino Baguma (P.W. 1) at the site of the work ten bags of cement, is a most damaging piece of evidence from which the only reasonable inference to be drawn is that he was in fact selling the cement to Celestino Baguma (P.W. 1).

On a consideration of the whole of the circumstances of this case and on a reasonable view of the evidence, I am satisfied that the conclusion reached by the learned trial magistrate was irresistible. It was the correct one as there was abundance of evidence to support it.

Normally that conclusion should dispose of this appeal, which must, in any case, be dismissed.

There was, however, a point of law which was also argued, namely, that if the original intention of issuing the cement and paint to Celestino Baguma (P.W. 1) was as on loan, the appellant's subsequent intention to misappropriate the goods by deducting the price from his debts to Celestino Baguma (P.W. 1) could not amount to stealing.

On the finding of the learned trial magistrate and on the conclusion which I have reached, it is of course unnecessary to consider this point of law. But by way of an obiter dictum, I would like to point out that this submission is based on a misconception of the provisions of s. 245 of the Penal Code. Such a submission may probably be sound in English law in terms of the provisions of s. 1 of the English Larceny Act, 1916, under which where the original taking was innocent the subsequent misappropriation may not amount to stealing, depending, of course, upon the circumstances.

In my view, there is a clear difference between the wording of s. 1 of the Larceny Act and of s. 245 of the Penal Code. In s. 1 of the Larceny Act, the emphasis is on animus furandi at the time of the taking, that is to say, the offence is committed at the time of the taking and carrying away of the goods concerned whereas in the Penal Code the offence can be committed not necessarily at the time of taking and carrying away but even at any time subsequently thereafter depending again on the circumstances.

On the evidence in the instant case, I am of the view that it would have been possible to hold that the theft of the paint and cement occurred when the appellant decided to, and did deduct the price of the goods from his debts to Celestino Baguma (P.W. 1). For by making such a deduction at that particular time he had decided permanently to deprive the Government of the goods.

This appeal is therefore as already stated dismissed and the conviction and sentence confirmed.

Appeal dismissed.

For the appellant:
Z Haque
Haque & Gopal, Kampala

For the respondent:
S Treon (State Attorney, Uganda)
The Attorney General, Uganda

Mohamed Fikirini v Republic
[1965] 1 EA 611 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	30 July 1965
Case Number:	468/1965
Before:	Rudd and Harris JJ
Sourced by:	LawAfrica

[1] Criminal law – Rogue and vagabond – Accused alleged to have been convicted as an idle and disorderly person – Ordinary certificate of convictions produced – Whether conviction proved – How conviction to be proved – Procedure to be followed – Penal Code (*Cap.* 63) *s.* 182(*c*) *and s.* 183(*a*) (*K*).

Editor's Summary

The appellant was convicted in the resident magistrate's court of being a rogue and vagabond under s. 183(*a*) of the Penal Code and sentenced to six months imprisonment. The particulars of the charge stated that the accused "on the 12th day of April, 1965, at Nairobi in the Nairobi Area having been previously convicted as an idle and disorderly person under s. 182(*c*) of the Penal Code played a game of chance for money or moneys worth in a public place to wit Duke St.". Under s. 183(*a*) every person convicted of an offence under s. 182 after having been previously convicted as an idle and disorderly person is deemed to be a rogue and vagabond. At the trial the appellant pleaded not guilty whereupon the prosecution adduced evidence to show that the appellant had been playing cards for money in a public place on April 12, 1965 and thereafter produced the ordinary certificate of previous convictions issued by the Criminal Records Office in respect of one Mohamed Fikirini, but there was no proof that the certificate of previous convictions related to the appellant other than it was issued in respect of one Mohamed Fikirini; nor was there evidence to show that the appellant's finger prints were taken in connection with this charge and submitted to the Criminal Records Office for comparison. The appellant made an unsworn statement denying that he had been found playing cards and also denied the previous convictions though he did not cross-examine the Inspector of Police who produced the certificate. On appeal,

Held –

(i) the certificate of previous convictions was not properly proved, nevertheless, it was information of a very damaging nature and should not have been produced unless and until it had been properly proved since it contained other offences which were not relevant;

(ii) unless the accused had put his character in issue such a certificate, even if properly proved, could not be produced in evidence on a charge of this nature if the certificate stated other offences which were not relevant to the charge;

(iii) the interaction of s. 182(*c*) and s. 183(*a*) requires the prosecution, as a matter of practice when making charges under s. 183(*a*), to ask for a stay of sentence under s. 182 pending the result of

fresh proceedings under s. 183(*a*). If the fresh charge results in a conviction a sentence under s. 183(*a*) will replace the sentence previously stayed, if not, sentence can be passed under s. 182.

Appeal allowed. Conviction and sentence set aside.

No cases referred to in judgment

Judgment

Rudd J: read the following judgment of the court:

The appellant was convicted as a rogue and vagabond under s. 183(*a*) of the Penal Code and sentenced to 6 months imprisonment.

Section 183, in so far as it is material, reads as follows:

> "The following persons–
>
> (*a*) every person convicted of an offence under section 182 of this Code after having been previously convicted as an idle and disorderly person: . . . shall be deemed to be a rogue and vagabond and is guilty of a misdemeanour and is liable for the first offence to imprisonment for three months and for every subsequent offence to imprisonment for one year".

Section 182 of the Penal Code provides, *inter alia*, as follows–

> "The following persons–
>
> (*c*) every person playing at any game of chance for money or moneys worth in any public place: . . . shall be deemed idle and disorderly persons and shall be liable to imprisonment for one month or to a fine not exceeding one hundred shillings or to both such imprisonment and such fine."

The charge read as follows:

> "Being a rogue and vagabond contrary to s. 183(*a*) of the Penal Code.
>
> Particulars: Mohamed Fikirini: On the 12th day of April, 1965, at Nairobi in the Nairobi Area having been previously convicted as an idle and disorderly person under s. 182(*c*) of the Penal Code played a game of chance for money or moneys worth in a public place to wit Duke St."

After the appellant had pleaded not guilty the prosecution adduced evidence to show that the appellant was playing cards for money in a public place in Duke Street on April 12, 1965, followed by the production of the ordinary certificate of previous convictions issued by the Criminal Records Office (Police Form C.44), in respect of one Mohamed Fikirini. After this the appellant made an unsworn statement denying that he had been found playing cards. Then the magistrate convicted the appellant of the offence charged.

There was no proof that the certificate of previous convictions related to the appellant other than the intrinsic fact that it was issued in respect of one Mohamed Fikirini. The previous convictions were not at any time admitted by the appellant though he had an opportunity to cross examine the Inspector who produced the certificate but he did not avail himself of this opportunity. There was no evidence that the appellant's finger prints were taken in connection with this charge and submitted to the Criminal Records Office for comparison, though the certificate stated that some finger prints bearing the name Mohamed Fikirini had been taken and that they had been traced and the convictions stated in the certificate were on record.

It is clear that the certificate of previous convictions was not properly proved. It was nevertheless information of a very damaging nature and it should not have been allowed to be produced unless and until it had been properly proved. It contained statements of previous convictions as an idle and disorderly person and as a rogue and vagabond, but it also contained statements of other convictions for other offences which were not relevant. Unless the accused has put his character in issue such a

certificate even if properly proved cannot be produced in evidence on a charge of this nature if the certificate states other offences which are not relevant to the charge, such as, for instance, convictions for gambling under the Gambling Act, to say nothing of convictions for theft and convictions as a drunk and disorderly person.

The conviction and sentence must both be quashed and the appellant discharged. An order for retrial would not be appropriate. The appellant must therefore be acquitted.

Before leaving the case we wish to give some guidance to the police as to the procedure to be followed where it is intended to prosecute for an offence under s. 183(*a*). The proper procedure is not very obvious and the section is certainly peculiar. We think that the statement of the offence could well be amended in due course, but that is a matter for the legislature and the courts and prosecutors must take the law as it is unless and until it is amended. There may be a case for complete redrafting, but even if the words "every person who commits" were substituted for the words "every person convicted" the provision would be easier to apply.

However, as at present the wording is "every person convicted of an offence under s. 182". It follows from this that there should first be a charge under s. 182 and this charge should be proceeded with in the ordinary way to conviction. Then upon such conviction under s. 182 the prosecutor should submit a fresh charge on the basis of that conviction for an offence under s. 183(*a*). Sentence on the conviction under s. 182 should be stayed pending the result of the proceedings on the new charge. In these proceedings previous convictions as an idle and disorderly person are relevant, but other previous convictions are not relevant. After hearing evidence or after admission of previous convictions as an idle and disorderly person a conviction under s. 183(*a*) can be entered. Then any other previous convictions can be proved or admitted and sentence can be passed under s. 183. In such case a separate sentence under s. 182 should not be passed, but if the prosecution fails to establish previous convictions as an idle and disorderly person then the charge under s. 183(*a*) would fail and sentence can be passed in respect of the conviction under s. 182.

This procedure appears to us to be the proper procedure for conviction under s. 183(*a*) as the law now stands. We do not think it a wholly satisfactory procedure though it is not unfair. It is, however, undesirably complicated and we think that there is too much room for error. For these reasons we hope that in due course the legislature will decide to amend the law on this matter and make it simpler.

Appeal allowed. Conviction and sentence set aside.

The appellant did not appear and was not represented.

For the respondent:
IE Omolo, Deputy Public Prosecutor (S), Kenya
The Attorney General, Kenya

Uganda v Keneri Opidi
[1965] 1 EA 614 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	30 April 1965
Case Number:	5/1965
Before:	Sir Udo Udoma CJ

Sourced by: LawAfrica

[1] Criminal law – Charge citing non existent sub-section of Traffic Ordinance – Particulars of offence giving details of offence alleged – Defect not curable by Criminal Procedure Code s. 347 (*U*) *– Court not entitled to speculate on probable intention of framers of charge.*

[2] Criminal law – Charge – Misdescription of enactment under which charge laid – Particulars of offence giving details of offence laid – Impossible from record to ascertain whether charge laid under Traffic Ordinance or Traffic Regulations – Charge bad for contravening s. 136 *Criminal Procedure Code* (*U*).

Editor's Summary

The accused pleaded guilty firstly for failing to display an "L" plate and secondly for being a learner driver, driving while not being accompanied by a competent driver. The first count was laid under "s. 9 (*b*) 123 of the Traffic Ordinance" and the second under "s. 9(*a*) and 12 of the Traffic Ordinance 1951". It was contended in support of a revisional order against conviction and sentence that the counts were manifestly wrong in law in that the first should have been laid under s. 9 of the Traffic Regulations and that the second failed to indicate the law under which the charge was laid. On behalf of the Director of Public Prosecutions it was contended that the convictions on both counts should stand as the accused was in no way prejudiced by the counts being laid under the Traffic Ordinance instead of the Traffic Regulations and that it was probable that the framers of the charge meant s. 9(*b*) of the Traffic Regulations,

Held –

(i) in respect of the first count there being no s. 9(*b*) of the Traffic Ordinance only s. 9 (which however did not create an offence) the particulars set out as constituting an offence however clearly stated of themselves could not create an offence;

(ii) the error was a fundamental one of law in that the accused was charged with a non-existent offence and was not curable by s. 347 of the Criminal Procedure Code: *Abdul Rasul G. Sabur v. R.* (1) distinguished;

(iii) it was not competent for the court to speculate on the intention of the framers of the charge but must be guided in determining such intention by the expressions contained in the record of proceedings;

(iv) it being impossible to ascertain from the record whether the second count was laid under the Traffic Ordinance or Traffic Regulations, the charge was bad as it contravened s. 136 of the Criminal Procedure Code.

Convictions and sentences set aside. Accused acquitted and discharged.

Cases referred to in judgment

(1) *Abdul Rasul G. Sabur v. R.*, [1958] E.A. 126 (U).

(2) *Harbans Singh Isher v. R.*, [1957] E.A. 635 (K).

Judgment

Sir Udo Udoma CJ: The accused in this case was charged with two counts as follows:

Statement of Offence

First Count: Failing to display "L" plate contrary to s. 9(*b*) (sic. under s. 123) of the Traffic Ordinance.

Particulars of Offence

Keneri Opidi on the 14th day of November 1964 at about 09.15 hours at Gulu township in Acholi District, being the holder of a provisional driving permit, whilst driving a vehicle registered number UED 946 failed to display in a conspicuous position on the front and at the back a distinguishing mark set out in the third schedule of the Traffic Regulation, 1951.

Statement of Offence

Count 2: Learner driver not accompanied by a competent driver contrary to s. 9(*a*) and 12 of the Traffic . . . 1951.

Particulars of Offence

Keneri Opidi on the above date time and place, being the holder of a provisional driving permit did drive motor vehicle registered as above on a road when not under the supervision of a person who had held a driving permit for at least two years valid for the class of vehicle being driven, who was not in the vehicle sitting next to him."

The accused, on being served with the summons containing the charges, endorsed on the back thereof as follows:

"I plead guilty."

On the return day the trial magistrate convicted the accused on his plea of guilty and sentenced him in absentia to a fine of Shs. 100/- on the first count and Shs. 70/- on the second count.

The Resident Magistrate, Gulu, now applies for a revisional order against the conviction and sentence on two grounds, namely:

(1) that the plea of guilty being in general terms was referable only to one count of the charge and therefore bad in law;

(2) that the charges were manifestly wrong in law. The first count was wrongly laid under s. 9(*b*) and 123 of the Traffic Ordinance whereas it should have been laid under s. 9 of the Traffic Regulations. The second count failed to indicate the law under which the charge was laid.

The State Attorney, who appeared for the Director of Public Prosecutions, submitted that the conviction on both counts was maintainable in law as the accused was in no way prejudiced by the charge being laid under the Ordinance instead of the Regulations. The error, it was contended, was merely a technical one and does not affect the merits of the case, or the plea of guilty by the accused. It was further submitted that the plea of guilty was referable to the two counts and that the accused was rightly convicted. In support of these submissions the court was referred to *Abdul Rasul G. Sabur v. R.* (1) and *Harbans Singh Isher v. R.* (2).

In *Abdul Rasul G. Sabur v. R.* (1), where a charge had cited a wrong section of the Traffic Ordinance but set out clearly the particulars of offence, it was held by this court (Sir Audley McKisack, C.J.) that there had been no failure of justice and that the defect was curable under s. 347 of the Criminal Procedure Code as the particulars of the offence were adequate to inform the appellant of the offence with which he was charged.

There the appellant was served with a summons to answer two charges preferred against him under the Traffic Ordinance 1951. The first count charged

the appellant with exceeding the speed limit for commercial vehicles and the second with reckless driving. Written upon the face of the summons before service were the words:

> "Written plea of guilty on count 1 will be accepted, in which case count 2 will be withdrawn by Police."

The appellant, when served with the summons, endorsed thereon a plea of guilty to the first count only and returned the same to the court. He was on that plea convicted on that count by the magistrate.

On appeal, it was contended that he should have been charged under s. 40(1) of the Traffic Ordinance and not under s. 39 of the Ordinance under which he was in fact charged. It was submitted further that the charge as laid was defective.

I think that the decision of the court in the above case is distinguishable from the circumstances of the instant case. There the charge was laid under s. 39 instead of s. 40 of the same Ordinance, namely the Traffic Ordinance, 1951. As was pointed out by the court in that case, even s. 39 under which the charge was laid specifically prohibits excessive speed. For under the section excessive speed is absolutely prohibited. The difference between it and s. 40 is that while s. 39 of the Ordinance contains general prohibition, s. 40 not only creates the offence of excessive speed but also provides punishment for such an offence.

In the instant case, the first count of the charge was laid under ss. 9(*b*) and 123 of the Traffic Ordinance. There is no s. 9(*b*) of the Traffic Ordinance in our Statute book. There is only s. 9, the provisions of which are in the following terms:

> "The Minister may by notice published in the *Gazette* exempt any vehicle, class or description of vehicle from the provisions of this part of the Ordinance."

It is obvious that s. 9 of the Traffic Ordinance creates no offence and the particulars set out in the first count of the charge as constituting an offence contrary to s. 9(*b*) of the Traffic Ordinance – a non-existent section of the Ordinance – cannot however clearly stated of themselves create an offence. The error in this case is therefore not a mere technical defect, omission or irregularity as in the case of *Abdul Rasul G. Sabur v. R.* (1). It is not curable by the verdict on the ground that there was no failure of justice. The error is a fundamental one of law in that the accused was charged with a non-existent offence. Section 347 of the Criminal Procedure Code does not therefore apply.

It was further submitted by counsel for the prosecution that the particulars set out in the first count of the charge constitute an offence under s. 9(*b*) of the Traffic Regulations as distinct from the Traffic Ordinance and that it is probable that by s. 9(*b*) of the Traffic Ordinance the framers of the charge meant s. 9(*b*) of the Traffic Regulations. This may probably be so, but this being a statutory offence the charge must be strictly interpreted and the court cannot proceed on probabilities.

A submission of this kind is dangerously close to being a matter of mere speculation. It is not competent for this court to speculate on the intention of the framers of the charge; it must be guided in determining such intention by the expressions contained in the record of proceedings.

It is clearly and unambiguously stated in the record of proceedings that the charge was laid under s. 9(*b*) of the Traffic Ordinance. As laid in the charge, the offence is described as punishable under s. 123 of the Traffic Ordinance. It seems doubtful that an offence created by the Traffic Regulations would be made punishable under s. 123 of the Traffic Ordinance, which is the umbrella penalty clause for offences under the Traffic Ordinance.

Then there is the second count of the charge which is laid contrary to ss. 9(*a*) and 12 of the Traffic . . . 1951. Plainly it is impossible to ascertain from the record as to whether this charge was laid under the Traffic Ordinance or Traffic Regulations. Speculation here as in count 1 is fruitless.

The charge is palpably bad in law. It contravenes s. 136 of the Criminal Procedure Code, which provides as follows:

> ". . . if the offence charged is one created by enactment [it] shall contain a reference to the section of the enactment creating the offence."

I hold that the defect in the second count is also incurable by verdict.

On the first ground raised by the magistrate, it was submitted by counsel for the prosecution that by the authority of *Harbans Singh Isher v. R.* (2), a Kenya case, the plea endorsed on the reverse of the summons was good in law and was an unequivocal plea of the accused referable to the two counts in the summons. I am inclined to agree with this submission. I think it is sound. There can be no question that the plea of the accused was directed to the two counts contained in the summons. The magistrate was right, in my opinion, in accepting the plea and treating it as an unequivocal plea of guilty on the two counts with which the accused was charged.

Having regard to the view I take that the charges were incurably defective in law, I would set aside the conviction of and sentences imposed upon the accused and order that, if the fines have been paid, they should forthwith be refunded to the accused. The accused is accordingly acquitted and discharged. Court below to carry out this order.

Convictions and sentences set aside. Accused acquitted and discharged.

For the prosecution:
VM Patel (State Attorney, Uganda)
The Director of Public Prosecutions, Uganda

The accused did not appear and was not represented.

Cipiriano Jatho v Luiji Nyangili
[1965] 1 EA 617 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	12 August 1965
Case Number:	190/1964
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Native law and custom – Appeal – Award of African Court of compensation in kind – Ground of

appeal that award unenforceable sustained.

Editor's Summary

The appellant Cipiriano Jatho, sometime about March, 1958, having felled a beyo tree in the Arut forest in West Nile set to work with his workman to carve out a canoe. While the work was in progress the respondent Luiji Nyangili seized the tree thinking it was one he had been licensed to cut and prevented the appellant from completing his work. The respondent with his workman then proceeded to complete the canoe for himself claiming that he had at material times applied for and been granted a licence to fell the tree but had been forestalled by the appellant's action. After some preliminary court proceedings which are not material the District African Court of West Nile became seised of the complaint and entered judgment for the appellant and ordered the respondent to cut one beyo tree of 50 cubic feet for the appellant and to pay for the licence of the tree. The appellant appealed on the ground that the court

was wrong in law in not ordering the respondent to hand over the canoe to him as he had already started carving it. The respondent maintained that the tree was first found by him and that in any event the canoe in question had subsequently been burnt by fire.

Held –

(i) that the District African Court was right on the evidence in entering judgment for the appellant;

(ii) that the African court's order was unenforceable on the ground that its impracticality would not conclude the dispute and the court did not wish to do anything in vain;

(iii) the appellant should be compensated in money and not by another tree, such compensation assessed at Shs. 500/- on expert evidence called by consent by the court.

Appeal allowed. Nature of compensation varied.

Cases referred to in judgment

(1) *Ukejianya v. Uchendu*, 8 W.A.C.A. 45.

Judgment

Sir Udo Udoma CJ: This appeal has been instituted by Cipiriano Jatho (hereinafter called "the appellant") against the decision of the District African Court of West Nile sitting at Padyere in which the court had ordered Luiji Nyangili (hereinafter called "the respondent") to fell for him a beyo tree similar to the one which had been felled by him, but was wrongfully made use of by the respondent by converting the same into a dug out canoe.

The claim which had originated in the Jaogo Panyango court was dismissed by that court and judgment was entered in favour of the respondent. On review by the Assistant District Commissioner in the exercise of his powers as a magistrate, the case was ordered to be re-heard by the District African court of West Nile.

After re-hearing in due compliance with the order of the magistrate, the District African court, with the concurrence of the assessors, entered judgment for the plaintiff and ordered that the respondent should fell another beyo tree for the appellant.

The order reads as follows:

> "I set aside the judgment against the plaintiff and I order the defendant to cut one beyo tree of 50 cubic feet for the plaintiff and to pay for the licence of the tree".

The ground for this order was, as found by the court, that a dug out canoe which had been carved from the beyo tree seized from the appellant was later destroyed by fire.

The appellant now appeals against the order on the ground that the court was wrong in law in not ordering the respondent to hand over the canoe made from the tree to him as he had already started carving a dug out canoe from the tree felled by him before the same was wrongfully seized by the respondent.

In answer to the complaint of the appellant, the respondent maintains that he was himself not quite willing to fell another beyo tree, although he would reluctantly do so in obedience to the order of the

court, for the appellant, as he was entitled to use the tree in question in making his canoe, he having been the first person to have found the tree in the forest; and that, in any case, the canoe made from the tree was subsequently burnt by fire.

The facts of the case are as follows:

On March 3, 1958 the appellant decided to make himself a dug out canoe for his fishing trade. He then felled the tree known as beyo locally, but technically and scientifically by the forestry department as "Afzelia Africano" in the Arut forest in West Nile. He was apprehended by the local Administration Forestry Department for having felled a tree without a licence granted to him for that purpose. As a result he was ordered to pay for the licence covering the beyo tree, which he did on March 17, 1958, and thereby regularised the position. In addition the appellant was fined Shs. 30/- which he also paid.

The appellant with the help of his workmen dressed up the tree and got it ready for carving a canoe from it, and, indeed, started doing so.

Then while the work on the canoe was in progress, the respondent seized the beyo tree and prevented the appellant from completing the dug out canoe. He then proceeded himself with his workmen to complete the dug out canoe for himself. He explained that the beyo tree was first found in the forest by him; that for that reason he had applied for and obtained a licence for making a dug out canoe from the tree; and that after obtaining that licence he had discovered the tree had already been felled by the appellant, who had no right to do so.

In the course of the proceedings, it was discovered that the licence issued to the respondent had referred to a beyo tree of 98 cubic feet at Nyaryegi forest, which is quite different from the Arut forest. On that evidence, the District African Court found as a fact that it was only on April 13, 1960 that the respondent had obtained his licence to fell a beyo tree for his canoe; that the beyo tree referred to in the respondent's licence was to measure 98 cubic feet in contrast to the appellant's beyo tree, which measured in terms of his licence only 50 cubic feet; that the beyo tree covered by the licence was to be found not in Arut forest, which was covered by the appellant's licence, but in Nyaryegi forest. For those reasons the court held that the respondent was wrong in law to have seized the beyo tree belonging rightfully to the appellant. As a result the court gave judgment in favour of the appellant as stated.

Having carefully examined the records of proceeding and considered the evidence before the court and the arguments of both parties before me, I am satisfied that the District African Court was right in entering judgment for the appellant. The judgment is fully supported by the evidence.

The only issue of some difficulty in this case is, having regard to the complaints of the appellant, whether the court was right in ordering the respondent to fell another beyo tree for the appellant similar to the one taken wrongfully by the respondent. The order is somewhat disturbing.

I am of the opinion that the complaint of the appellant is a reasonable one. He says he would rather have money than another beyo tree. The order, it seems to me, is a possible fertile soil for further dispute between the appellant and respondent. One can foresee the possibility of the respondent felling a beyo tree ostensibly for the appellant and the appellant refusing to accept the same on the ground that it was not similar to his beyo tree, which had been taken by the respondent.

There is also the further possibility that the respondent may, having regard to his attitude in this court, refuse even to carry out the order. In the latter eventuality, however, the court may resort to the unpleasant expedient of committing the appellant for contempt, which would be an unsatisfactory way of settling a dispute of this kind. It is always the duty of the court to do all in its power as much as possible to avoid and discourage multiplicity of suits, and to bring a dispute to a successful and satisfactory termination.

I think it is an accepted principle of law that a court of law will not issue an

order which is unenforceable. That was the view held by the old West African Court of Appeal, in the Nigerian case of *Ukejianya v. Uchendu* (1) (8 W.A.C.A. at p. 46). I am, however, aware that the decision of that court is not in any way binding on this court. But the principle enunciated in the case of *Ukejianya v. Uchendu* (1) seems to me to have a universal appeal and may well be of universal application.

On that principle, therefore, I am of the view that the order of the District African Court of West Nile is an unenforceable order. As I am desirous of bringing this somewhat interminable dispute to an end, I have in the exercise of the power conferred upon this court by s. 33 of the African Courts Ordinance, 1957, decided with the consent of both the appellant and the respondent to take and did take evidence from James William Batesaki, the Central Government Chief Forestry Officer as an expert witness on the value of the tree known as beyo. Mr. Batesaki was most helpful to the court, and is well conversant with the forestry regulations and the value of trees of different types and, in particular, of beyo trees in the forests of West Nile.

I have, therefore, no hesitation in accepting his evidence; and I find as a fact that the value of a beyo tree of 50 cubic feet is Shs. 60/-; that the costs of labour for felling and dressing it for the purposes of making a dug out canoe by two persons for a period of two months, which is usually the normal period the carving of a canoe from such a tree takes would be Shs. 320/-; and that the costs of feeding such labourers within the period would be Shs. 120/-.

Accepting that evidence, as I do, I have reached the conclusion that the appellant is entitled to recover from the respondent the total sum of Shs. 500/-, being the price of his beyo tree and the cost of labour expended by him and his workmen in felling and dressing the same and preparing it for making his dug out canoe.

To that extent this appeal is allowed. The judgment of the District African Court is accordingly amended to read as follows:

> There will be judgment for the plaintiff/appellant in the sum of Shs. 500/- with costs of this appeal against the defendant/respondent. The plaintiff/ appellant will also recover the costs of Shs. 15/- awarded him by the District African Court. Order accordingly. The court below to carry out this order.

Appeal allowed. Nature of compensation varied.

Parties appeared in person

Girisomu Bakaye and others v Uganda
[1965] 1 EA 621 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	9 December 1965
Case Number:	141/1965
Before:	Sir Samuel Quashie-Idun P, Sir Clement de Lestang and Law JJA
Sourced by:	LawAfrica

Appeal from: High Court of Uganda – Baerlein, Ag J

[1] Criminal Law – Murder – Evidence – Confession – Retracted statement – Corroboration – Assessors not directed of danger of relying on uncorroborated retracted statement – Necessity for judge to record in detail heads of address to assessors.

Editor's Summary

The three appellants were convicted of murder, their retracted confessions made to the police being taken into account. There was nothing on the record to show that the assessors were directed that in practice such retracted statements should be corroborated, nor was any such direction to be found in the judgment. The trial judge found corroboration, so far as first and second appellants were concerned, from the fact that they subsequently led the police to where the deceased had been killed. As regards the third appellant, the trial judge relied as corroboration on his confession to the detective constable on arrest, which confession was inadmissible. On appeal,

Held –

(i) notwithstanding the failure of the trial judge to direct himself and the assessors as to the necessity for corroboration, the retracted confessions of the first and second appellants were in fact corroborated and their appeals against conviction and sentence should be dismissed;

(ii) as regards the third appellant there was no corroboration of his retracted statement and the conviction for murder must be set aside.

Appeals of the first and second appellants dismissed. Appeal of the third appellant allowed.

No cases referred to in judgment

Judgment

Law JA: read the following judgment of the court: The three appellants were jointly charged in the High Court of Uganda (Baerlein, Ag.J.) with the offence of murder. A fourth man was also jointly charged with the offence; he was convicted on the basis of being an accessory after the fact and has not appealed.

The facts of the case were that on December 12, 1964, the dead body of Gasta Nviri was found tied in a sack in a swamp near Kasambia village. A detective constable arrested the third appellant, and deposed that, after being cautioned, the third appellant said that he had murdered the deceased together with his brothers, the first and second appellants, because the deceased had murdered their father with poison. This statement amounted to a confession and was clearly inadmissible under s. 24 (1) of the Evidence Ordinance, which excludes from proof any confession made to a police officer below the rank of corporal; nevertheless it was allowed to be proved in evidence without objection by the defending advocate. The first and second appellants were duly arrested, and all three appellants made statements amounting to confessions to Assistant Inspector of Police Baraza. These statements were objected to at the trial, as having been obtained by torture, but the trial judge held that they were made voluntarily and admitted them. All three appellants gave evidence on oath, in the course of the "trial within a trial", to the effect that they were told by the

police what to say. Their confessions were accordingly retracted. Although there is no rule of law which requires corroboration of a retracted statement, it is a salutary rule of practice to seek such corroboration, and a court should direct itself and the assessors to that effect, and that great caution should be exercised before relying on an uncorroborated retracted statement. Where no such direction has been given, this court will not normally give effect to an uncorroborated retracted statement. In this case there is nothing on the record to show that the assessors were directed to this effect, nor is any such direction to be found in the judgment, although the trial judge did find corroboration, so far as the first and second appellants are concerned, from the fact that they subsequently led the police to the scene of the crime and showed where the deceased had been killed and thrown into the water. As regards the third appellant, the trial judge relied as corroboration on his confession to the detective constable on arrest, which confession, as we have already pointed out, was inadmissible. Notwithstanding the failure of the trial judge to direct himself and the assessors as to the necessity for corroboration, we agree that the retracted confessions of the first and second appellants were in fact corroborated, and their appeals against conviction and sentence are accordingly dismissed. As regards the third appellant, George William Kabi, we are unable to find any corroboration of his retracted statement, and we can see no alternative but to allow his appeal, quash his conviction for murder and set aside the sentence of death passed on him, and we order accordingly. He must be set at liberty forthwith.

We once again remind the trial judge of the necessity to record in sufficient detail the heads of his address to the assessors.

Appeals of the first and second appellants dismissed. Appeal of the third appellant allowed.

For the appellants:
GK Patel
Girish K Patel, Mbale

For the respondent:
AG Deobhakta, (State Attorney, Uganda)
The Attorney General, Uganda

Fabiano Obeli and others v Uganda
[1965] 1 EA 622 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	9 December 1965
Case Number:	156/1965
Before:	Sir Clement de Lestang Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Baerlein, Ag J

[1] Criminal Law – Evidence – Accomplice – Corroboration – Failure of judge to direct assessors or himself on need for corroboration.

Editor's Summary

The appellants were convicted of murder and the case against the first two depended entirely on the evidence of an accomplice. With regard to the third appellant in addition to the evidence of the accomplice there was evidence of a full confession made by him while in prison to a fellow prisoner. The trial judge did not direct the assessors or himself as to the need for corroboration of the evidence of the accomplice but merely referred in his direction to the assessors and in his judgment, to the need to consider the evidence of the accomplice "with the greatest caution". On appeal,

Held –

(i) the trial having failed to direct the assessors or himself on the need for corroboration of accomplice evidence and there being in fact no evidence

except accomplice evidence against the first two appellants their conviction must be quashed;

(ii) with regard to the third appellant the confession made by him to the fellow prisoner corroborated the accomplice evidence against him and accordingly he was properly convicted.

Appeals of the first two appellants allowed. Appeal of the third appellant dismissed.

Cases referred to in judgment

(1) *Bassan and Wathobia v. R.*, [1961] E.A. 521 (C.A.).

Judgment

Spry JA: read the following judgment of the Court: The three appellants were charged before the High Court with the offence of murder, contrary to s. 183 of the Penal Code (Cap. 22) (U.), were convicted and were sentenced to death. They appealed to this court, and on December 6, 1965, we allowed the appeals of Fabiano Obeli and Paulo Ogwata, quashed their convictions and set aside the sentences passed on them. We dismissed the appeal of Benedicto Okai. We now give our reasons.

The case against Fabiano and Paulo depended entirely on the evidence of a witness, Misaki Ebwalu, who was, undoubtedly, an accomplice. Even on his own evidence, he had taken part in all the preparations for a deliberate killing by hired murderers. There could therefore be no question of basing the conviction of any of the accused persons on his evidence without sufficient corroboration.

It is unfortunate that the learned trial judge does not appear to have directed the assessors or himself as to this need for corroboration: he merely referred, both in his direction to the assessors and in his judgment, to the need to consider the evidence of this witness “with the greatest caution”. That is not enough. Furthermore, a careful examination of the record does not disclose any evidence corroborating that of Misaki and implicating the appellants Fabiano and Paulo. Counsel for the State felt himself unable to support the conviction of these two appellants and we agreed that their appeals must succeed.

The case of the other appellant, Benedicto Okai, was different, because in his case there was evidence of a full confession made by him while in prison to a fellow prisoner, Sebastiano Lwanga. The learned trial judge said in his judgment that he had given “most careful consideration” to the evidence of this witness and that he was “completely satisfied” of its truth. We have ourselves scrutinized that evidence, bearing in mind that Sebastiano is himself a man of bad character and that, on his own evidence, he had heard something, at least, of the murder before he went to prison. In spite of some curious features concerning this evidence, particularly in the cross-examination, we see no reason to interfere with the learned judge’s finding.

Sebastiano’s evidence is capable in law of affording corroboration of the accomplice evidence of Misaki. As was said by this court in *Bassan and Wathobia v. R.* (1) ([1961] E.A. at p. 530):

> “We think that a statement made by an accused person, whether amounting to a confession or not, may in a proper case amount to corroboration of accomplice evidence.”

In fact, Sebastiano’s evidence affords very full and consistent corroboration of Misaki’s evidence, which the learned trial judge had accepted as true and

accurate. If that evidence were true, there could be no doubt that Benedicto was guilty of this murder. We accordingly dismissed his appeal.

Appeal of the first two appellants allowed. Appeal of the third appellant dismissed.

For the appellant:
C Mboijana
Binaisa, Mboijana & Co, Kampala

For the respondent:
AG Deobhakta (*State Attorney*, Uganda)
The Attorney General, Uganda

Eriyazali Senkuba v Uganda Credit and Savings Bank
[1965] 1 EA 624 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	4 November 1965
Case Number:	463/1963
Before:	Bennett J
Sourced by:	LawAfrica

[1] Mortgage – Statutory power of sale – Statutory notice required to be served on mortgagor demanding payment before sale – Statutory notice sent by registered post but returned unclaimed – Whether notice properly served.

Editor's Summary

The plaintiff mortgaged certain land to the defendant to secure a loan of Shs. 2,500/- and having defaulted in payment of instalments of the principal and interest the defendant sent by registered post a statutory notice under s. 115 of the Registration of Titles Ordinance (U.) demanding payment of the amount due. This notice never reached the plaintiff and was returned by the Post Office as unclaimed. The plaintiff failed to pay as required by the notice. The defendant sold the land by public auction and the plaintiff filed a suit claiming damages on the ground that the sale was unlawful for want of statutory notice before the sale. On behalf of the defendant it was contended that the posting of the notice by registered post was a proper service for the purpose of s. 115 of the Registration of Titles Ordinance (U.), notwithstanding that the notice never reached the plaintiff.

Held –

(i) under s. 34 of the Interpretation and General Clauses Ordinance (U.), the presumption of service

which arises from the act of posting a document by registered post is capable of being rebutted and it had been rebutted in this case;

(ii) section 210A (1) of the Registration of Titles Ordinance (U.) does not exclude personal service as a means of effecting service of notices but provides a substitute for personal service and substituted service having proved ineffective, the defendant should have taken steps to serve the plaintiff personally with the statutory notice;

(iii) as the plaintiff was not served with the statutory notice required by s. 115 and s. 117 of the Registration of Titles Ordinance (U.) before the land was sold, the sale was wrongful and the plaintiff was entitled to damages.

Order accordingly.

Judgment

Bennett J: In this suit the plaintiff claims damages from the defendant bank for what is said to have been a wrongful sale of 35.1 acres of Mailo land of which the plaintiff was the registered proprietor.

By a mortgage dated January 24, 1961, the plaintiff mortgaged the land to the defendant to secure a loan of Shs. 2,500/-. The plaintiff covenanted to

repay the loan by half-yearly instalments of Shs. 417/- each and also to pay interest on the unpaid balance of the principal sum. On August 21, 1962, the plaintiff was in arrears in payment of instalments of the principal sum to the extent of Shs. 780/75 and was also in arrears in payment of interest to the extent of Shs. 95/05. Accordingly, on August 21, 1962, the defendant sent a statutory notice under s. 115 of the Registration of Titles Ordinance (Cap. 123) (U.) to the plaintiff by registered post. This notice never reached the plaintiff and was returned by the Post Office as unclaimed on October 3, 1962. The plaintiff having failed to pay Shs. 803/80 to the defendant as required by the notice, the defendant sold the land by public auction on November 17, 1962. The plaintiff claims that this sale was unlawful, first because it was a breach of an arrangement made between the plaintiff and the bank to give the plaintiff further time to pay the instalments in arrears and, secondly, because no statutory notice was given to the plaintiff before the sale.

Paragraph 4 of the plaint reads:

> "During the year 1962, the plaintiff defaulted to pay certain instalments as required by the mortgage. On November 13, 1962, the plaintiff entered into an arrangement with a representative of the bank, whereby it was agreed that the bank would accept instalments to the end of December, 1962, in discharge of the arrears of the loan. The said instalments were to be paid as follows:
>
> On November 13, 1962 Shs. 200/-
>
> On November 30, 1962 Shs. 300/-
>
> On December 30, 1962 Shs. Remainder."

In giving evidence in support of this paragraph the plaintiff alleged that the arrangement had been made between him and the manager, a clerk, Mr. Lule, acting as interpreter. The defendant denies that any such arrangement was made. The then manager, Mr. Dodwell, was not called to give evidence, he having left the service of the bank some time ago.

After hearing the evidence of the plaintiff and Mr. Lule, I am satisfied that the plaintiff never had any interview with the manager, and that no such arrangement was made between the plaintiff and the manager, or any other representative of the bank, as is alleged in para. 4 of the plaint.

I now turn to the question whether or not the plaintiff was duly served with a statutory notice. On the evidence of Mr. Odwe, the Assistant Registrar of Titles, I am satisfied that the statutory notice was correctly addressed to the plaintiff at the address shown in the Register Book. Section 115 of the Registration of Titles Ordinance requires the statutory notice to be "served" on the mortgagor but it does not specify the manner in which the notice is to be served; this is provided for by s. 210A of the Ordinance (as enacted by Ordinance 37 of 1962). Sub-sections (1) and (2) of s. 210A read as follows:

> "(1) Any notice under the provisions of this Ordinance may be served or given by letter posted to the person concerned at his address for service or, if he has no address for service within the meaning of this section, at his last known place of abode.
>
> (2) Any address of a person as entered in the Register Book may be used as his address for service."

On behalf of the defendant it is contended that the posting of the notice by registered post was a proper service for the purpose of s. 115 of the Registration of Titles Ordinance (U.), notwithstanding that the notice never reached the plaintiff. In my judgment, this contention is unsound since it overlooks s. 34

of the Interpretation and General Clauses Ordinance (Cap. 1) (U.) which was in force in 1962, when the land was sold.

Section 34 reads:

> "Where any law authorises or requires any document to be served by post, whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary be proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

A similar provision is contained in the Interpretation Act, 1963 (U.) (see s. 6 thereof), which repeals and replaces the Interpretation and General Clauses Ordinance. It will be observed that the presumption of service which arises from the act of posting a document by registered post is capable of being rebutted. That is plain from the words "unless the contrary is proved". In the instant case the presumption has been rebutted since it is common ground that the statutory notice and the letter accompanying it were returned by the Post Office.

I have also considered the effect of s. 210A (6) of the Registration of Titles Ordinance, which reads:

> "When a notice is sent by letter posted to any person at his address for service and the letter is returned by the Post Office the Registrar may if in the circumstances and having regard to the provisions of this Ordinance he thinks fit:
>
> (*a*) direct any further notice to be given; or
>
> (*b*) direct substituted service; or
>
> (*c*) proceed without notice."

Counsel for the plaintiff, contends that this sub-section applies only to notices sent by the Registrar himself, and I am inclined to agree with his contention. If, however, the sub-section is construed as applying to all notices, by whomsoever sent, it would appear that the sender can only proceed without notice if the Registrar dispenses with it. It has not been pleaded or proved that the Registrar authorised the defendant to sell without giving the statutory notice. Thus sub-s. (6) does not assist the defendant.

In my judgment, s. 210A (1) is an enabling section. It does not exclude personal service as a means of effecting service of notices but provides a substitute for personal service. Substituted service having proved ineffective, the defendant should have taken steps to serve the plaintiff personally with the statutory notice.

I find that the plaintiff was not served with a statutory notice as required by ss. 115 and 117 of the Registration of Titles Ordinance before the land was sold, and that consequently, the sale was wrongful. He is, therefore, entitled to damages.

At the close of the plaintiff's case, both counsel agreed that the question of liability should be determined first and that there should be a separate inquiry as to damages. Accordingly, a date will be fixed by the Registrar for the taking of such evidence as the parties may wish to adduce on the question of damages.

Order accordingly.

For the plaintiff:
C Mboijana

Binaisa Lubowa & Ibingira, Kampala

For the defendant:
RE Hunt
Wilkinson & Hunt, Kampala

Otende Osejani v Uganda
[1965] 1 EA 627 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	9 December 1965
Case Number:	129/1965
Before:	Sir Samuel Quashie-Idun P, Sir Clement de Lestang and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Faud, J

[1] Criminal Law – Murder or manslaughter – Provocation – Accused and woman lived together for two years as man and wife – No marriage recognised by customary law – Woman leaving accused on orders from relatives – Intention to resume cohabitation if balance of dowry paid by accused – Discovery of woman and deceased in flagrante delicto – Whether sufficient provocation to reduce murder to manslaughter.

Editor's Summary

The appellant and a woman had lived together as man and wife for about two years, but no marriage recognised by customary law had actually taken place as the appellant had not paid the bride price of eight cows although he had paid Shs. 130/- on account. The woman was ordered by her relatives to return home because of the appellant's failure to pay the bride price in full, and she did so. She left her belongings at the appellant's house, and would have resumed cohabitation with him had he paid the balance of the dowry. Some eight days later the appellant went to the house in which the woman was living, and found her together with a man in circumstances indicating that they had had, or were about to have, sexual intercourse. The appellant immediately struck the man a heavy blow on the head, causing death. The appellant was charged and convicted of murder. The trial judge found that the circumstances in which the appellant found the woman and the deceased together would have been sufficient to afford the appellant a defence to a charge of murder, had the appellant and the woman been living together, but he held that as their concubinage had ended, the killing of the deceased was an act of murder and not manslaughter. On appeal,

Held –

(i) the relationship between the appellant and the woman immediately prior to the killing of the

deceased was that of husband and wife, although they were not regularly married, and the woman's temporary absence had not brought that relationship to an end;

(ii) the discovery of the woman and the deceased by the appellant in circumstances which would have amounted to adultery, had the appellant and the woman been regularly married, was such as to raise the presumption that the killing was done under provocation having regard to the long subsisting concubinage between the appellant and the woman.

Appeal allowed. Conviction of murder quashed and conviction of manslaughter substituted.

Cases referred to in judgment

(1) *Kalume wa Tuku v. R.* (1954), 21 E.A.C.A. 201.

Judgment

Law JA: read the following judgment of the court: This is an appeal from a conviction of murder in the High Court of Uganda (Faud, J.). The facts are reasonably clear. The appellant and Maria (P.W. 1) had lived together as man and wife for about two years, but no marriage

recognised by customary law had actually taken place as the appellant had not paid the bride price of eight cows, although he had paid a sum of Shs. 130/- on account. Maria was ordered by her relatives to return home because of the appellant's failure to pay the bride price in full, and she did so. She left her belongings at the appellant's house, and would have resumed cohabitation with him had he paid the balance of the dowry. Some eight days later the appellant went to the house in which Maria was living at her brother's boma, at some time during the night. He found Maria together with a man called Okanya in circumstances indicating that Maria and Okanya had had, or were about to have, sexual intercourse. The appellant immediately struck Okanya a heavy blow on the head, causing death, and ran away. The learned judge found that the circumstances in which the appellant found Maria and Okanya together would have been sufficient to afford the appellant a defence to a charge of murder, had he and Maria been living together at the time, but he held that as their concubinage had ended some eight days before the appellant surprised Maria and Okanya together in what would have constituted adultery had Maria not left him, the killing of Okanya by the appellant was an act of murder and not manslaughter. The learned judge held that the separation was not merely a temporary suspension of the liaison between the appellant and Maria, but we are unable to agree with this view. Maria left the appellant not of her own volition but at the insistence of her family. That she intended to return to him as soon as he paid the balance of the bride price is shown by the fact that she left her clothes and other belongings with the appellant. The relationship between the appellant and Maria immediately prior to the killing of Okanya was that of husband and wife, although they were not regularly married (*Kalume wa Tuku v. R.* (1)), and we do not consider that in the circumstances of this case Maria's temporary absence had brought that relationship to an end. In our view the discovery of Maria and Okanya by the appellant in circumstances which would have amounted to adultery, had he and Maria been regularly married, was such as to raise the presumption that the killing of Okanya was done under provocation, having regard to the long-subsisting concubinage between the appellant and Maria, which constituted to all intents and purposes a customary marriage which only required payment of the balance of the bride price to regularise it.

In our opinion this appeal succeeds. The conviction for murder is quashed, and a conviction for manslaughter substituted. The sentence of death passed on the appellant is set aside and a sentence of five years' imprisonment substituted.

Appeal allowed. Conviction of murder quashed and conviction of manslaughter substituted.

For the appellant:
MC Ghelani
MC Ghelani, Kampala

For the respondent:
VM Patel (*State Attorney*, Uganda)
Attorney-General, Uganda

C H Patel and another v Pankaj S Thakore

[1965] 1 EA 629 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	28 October 1965
Case Number:	27/1965
Before:	Newbold V-P, Sir Clement de Lestang and Spry JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Dalton, J

[1] Contract – Undue influence – Undue influence by father on son – Father not party to contract – Loan obtained by father on security of son's property – Indian Contract Act, 1882, *s.* 16 *– Whether s.* 16 *affected by English principles of equity.*

Editor's Summary

The respondent, a schoolboy of approximately nineteen years of age, was the owner of a property which was mortgaged as a security for a loan from the appellants. The loan was arranged by the father for his own use and he in fact received the money. Later an action was filed for the recovery of the money advanced and the trial judge held that the respondent was acting under the influence of his father and as he did not receive independent advice his defence of undue influence succeeded. The judge in arriving at his decision purported to apply the law of England on the subject of undue influence, no reference being made to the relevant provisions of the Indian Contract Act, 1882 which then applied. On appeal it was contended *inter alia* that the judge had failed to direct himself on the proper law applicable which was s. 16 of the Indian Contract Act, 1882; that s. 16, ibid., should be interpreted free from any gloss imported from other systems of law; and that the section deals only with the exercise of undue influence (either directly or through the intermediary of a third party) by one party to the contract on another party.

Held –

(i) section 16 of the Indian Contract Act which defines undue influence is exhaustive and the English doctrines of equity relating to undue influence cannot override the plain provisions of the section;

(ii) for the defence of undue influence under s. 19A of the Indian Contract Act, 1882, to succeed the court must be satisfied that one of the parties to the contract must have been in a position to dominate the will of the other and that he must have used that position to obtain an unfair advantage;

(iii) the appellants obtained no unfair advantage and were at no time in a position to dominate the will of the respondent. Mere knowledge on their part that undue influence was being used by the respondent's father cannot make him their agent or establish a conspiracy between them and accordingly the case did not come within s. 16.

Appeal allowed.

Cases referred to in judgment

(1) *Poosathurai v. Kannappa Chettiar* (1920), 43 Mad. 546.

(2) *Rama Patter v. Manikham* (1935), 58 Mad. 454.

(3) *Dhanipal Das v. Raja Maneshar Bakhsh Singh* (1906), 33 I.A. 118.

(4) *Tungabai v. Yeshvant* (1945), 32 A.I.R. (P.C.) 8.

(5) *Lancashire Loans, Ltd. v. Black*, [1943] 1 K.B. 380.

October 28. The following judgments were read.

Judgment

Sir Clement De Lestang JA: The respondent was the owner

of a property in Nairobi which apparently his father, with whom he was living, had purchased in his name in 1957. In 1959 his father arranged for him to borrow from the appellants Shs. 40,000/- at twelve per cent. interest per annum on the security of a second mortgage on the property, it being already mortgaged for Shs. 70,000/- to someone else. The respondent though of full age was then a schoolboy of approximately nineteen years of age and still living with his father. The indenture of second mortgage contained the usual personal covenants by the borrower including that for the repayment of the amount of the loan with interest. The loan in question was, however, for the use of the respondent's father who indeed received the money, a cheque made out to him, direct from the lenders. Only a sum of Shs. 4,400/- in respect of interest was ever paid to the lenders and this by the respondent's father.

The security having been exhausted by the foreclosure of the first mortgage and the loan being overdue for repayment the appellants in 1964 brought an action on the personal covenant against the respondent to recover what was then owned to them, namely Shs. 63,417/20. The respondent resisted the claim on the ground *inter alia* that the loan was induced by undue influence on the part of his father.

The learned judge though satisfied that the parties were aware of the true nature of the transaction, in particular that the respondent knew he was borrowing money on the security of his property in order to give that money to his father, that the document was explained to him and that no coercion was used by his father who, merely requested him to sign the document, held that the respondent was acting under the influence of his father and, as he did not receive independent advice, his defence of undue influence succeeded. He accordingly dismissed the action. In arriving at his decision the learned judge purported to apply the law of England on the subject of undue influence, no reference being made throughout the case to the relevant provisions of the Indian Contract Act which applied here, namely, ss. 14, 16 and 19A. Those sections in so far as they are material read as follows:

> "14. Consent is said to be free when it is not caused by–
>
> (2) undue influence as defined in s. 16 . . .
>
> 16. (1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
>
> 19A. When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.
>
> Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder; upon such terms and conditions as to the court may seem just."

Counsel for the appellants contended that the trial judge failed to direct himself on the proper law applicable which is s. 16 of the Indian Contract Act, that s. 16 should be interpreted free from any gloss imported from other systems of law, that the section deals only with the exercise of undue influence (either directly or through the intermediary of a third party) by one party to the contract on another party, that for the section to apply in the present case it had to be shown that the appellants (*a*) were in a position to dominate the will of the respondent and (*b*) used that position to obtain an unfair advantage for themselves, that as neither of the elements was established the learned judge was wrong to find undue influence proved.

Counsel for the respondent, while conceding that s. 16 of the Indian Contract Act applied, contended that the law of Kenya as set out in that section was identical with the law of England, for just as in India the English principles of equity were made applicable by s. 89 of the Indian Trusts Act, so in Kenya those principles apply by virtue of the incorporation into the law of Kenya of English doctrines of equity, that consequently in Kenya as in India and in England a third party benefiting from a transaction who has notice of the circumstances establishing undue influence is in no better position than the person who exercises the influence, that the appellants derived benefit from the present transaction and since they were aware of the circumstances constituting undue influence by the father the learned judge was right to find undue influence established.

To the respondent's contention counsel for the appellants replied that English rules of equity only apply where there are no specific statutory provisions which is not the case here, that while he concedes that the Indian Contract Act as a whole is not exhaustive, s. 16 is, since it deals with a specific topic and provides the circumstances under which a contract is induced by undue influence and that consequently there is no room for the introduction of English equitable principles into the section.

Section 16 is couched in very clear language. It defines undue influence and states that undue influence exists where one party to the contract is in a position to dominate the will of the other and has in fact used that position to obtain an unfair advantage over that other. Of course a party may be able to dominate the will of another party through the instrumentality of a third person. In such a case the third person is but a projection of the party and any undue influence by the third person will attach to the party as if it had been exercised by him. As Lord Shaw said in *Poosathurai v. Kannappa Chettiar* (1) (43 Mad. at p. 549):

> "Their Lordships do not doubt that in the category of cases of undue influence might be covered cases where the party to a transaction exercised that influence in conspiracy with or through the agency of others."

It is generally accepted that the Indian Contract Act is not a complete code on the law of contract. This, however, does not mean that the provisions of the Act must never be taken to be exhaustive. It seems to me that where it deals specifically with a particular topic and indeed does so at variance with the law of England upon which it is founded it can only be taken to be exhaustive. In the present case s. 14 provides that consent is said to be free when it is not caused by "undue influence, as defined in s. 16". In the case of this provision it is difficult to see how a wider meaning can be given to the expression "undue influence" than that given to it by s. 16. In India the courts have applied equitable principles of English law to cases of undue influence not because s. 16 is not exhaustive but because those principles have been embodied in the law of India by s. 89 in the Indian Trusts Act. It is on this principle that *Rama Patter v. Manikkam* (2), on which counsel for the respondents relies, was decided. In that case two brothers stood in a fiduciary relation to their nephew and used influence to obtain an undue advantage and got him to undertake on their behalf certain liabilities to their creditor, the plaintiff. The plaintiff gained a substantial advantage in that the nephew made himself jointly liable for the amounts advanced by the plaintiff to the brothers. The plaintiff was aware of all the circumstances constituting the undue influence. It was held that s. 16 of the Contract Act did not apply since that section deals with the exercise of undue influence on one party to the contract by the other party whether directly or in conspiracy with or through the agency of others; but that apart from s. 16 the principles of English law had been made applicable in India by s. 89 of the Indian Trusts Act with the result that once it was established that the plaintiff was aware of the existence of a fiduciary relationship between the brothers and

their nephew, the plaintiff would be under the same disability as the brother who occupied the position of confidence.

Support for the view that s. 16 is exhaustive is also to be found in *Dhanipal Das v. Raja Maneshar Bakhsh Singh* (3) (33 I.A. 118, at p. 126) where their Lordships of the Privy Council applied the test whether the plaintiff "was in a position to dominate the will of the defendant within the meaning of the amended s. 16 of the Indian Contract Act" and said, ibid., at p. 127:

> "The subordinate judge was wrong in deciding the case in accordance with what he supposed to be English equitable doctrines. He ought to have considered the terms of the amended s. 16 only."

Again in *Poosathurai's* case (1) s. 16 was expressly referred to and applied and the court considered whether a party had received an unfair advantage from the other.

If I am right in the view that s. 16 is exhaustive on the question of undue influence then it is obvious that the English principles of equity cannot be called in aid by the respondent. Those principles which were applied in the past under s. 4 of the Kenya Order in Council, 1921, now apply by virtue of r. 3 of the Kenya (Jurisdiction of Courts and Pending Proceedings) Regulations 1963 and continued in force by s. 6 (8) of the Constitution of Kenya (Amendment) Act 1965 are specifically stated to be subject to "the existing laws and any written law for the time being in force in Kenya", and "so far as the same shall not extend or apply". It is common ground that the Indian Contract Act applied at the material time to Kenya. It follows therefore that the decision of the court below can stand only if this court applying s. 16 is satisfied (i) that the appellants were in a position either directly or indirectly to dominate the will of the respondent and (ii) that they used that influence to obtain an unfair advantage from him. The learned judge in effect found that it was the respondent's father who by virtue of his status was in a position to dominate his will and that since the respondent had no independent advice and derived no benefit from the transaction the father used his influence to obtain an unfair advantage for himself and that the appellants were aware of all those circumstances. Can it be said in these circumstances that the father was a projection of the appellants and that they are consequently in no better position than him? I have found the answer to this question somewhat difficult. In *Rama Patter's* case (2) the learned judge said:

> "We are not sure whether the observation of Lord Shaw in that case [*Poosathurai's* case (1)] about the exercise of influence 'in conspiracy with or through the agency of others' is not wide enough to take in the full scope of the doctrine as illustrated by the English cases; for 'agency' may in such cases well include instances in which the creditor or transferee knowingly or intentionally leaves everything in the hands of his principal debtor."

Having expressed this doubt he went on to apply English principles but only by reason of s. 89 of the Indian Trusts Act. Conspiracy and agency are well known legal terms and it is inconceivable that Lord Shaw would have used them in any sense other than their true meaning, but they are also very wide terms and may arise in a variety of circumstances which it is not possible to enumerate exhaustively. Each case must be decided on its own facts. In the present case the appellants were themselves at no time in a position to dominate the will of the respondent and mere knowledge on their part that undue influence was being used by the respondent's father cannot make him their agent or establish a conspiracy between them. It might well be otherwise if they had obtained an unfair advantage from the respondent but this is not the present case. The transaction was a straightforward one, the terms were reasonable

and fair, the mortgage being in the usual form. In these circumstances it seems to me that the case does not come within s. 16. I would accordingly allow the appeal with costs, set aside the decision of the court below and substitute therefor a judgment and decree ordering that the defendant do pay to the plaintiff the sum of Shs. 63,417/20, together with interest thereon at twelve per cent, from August 26, 1964, to the date of payment thereof, and the costs of the suit.

Spry JA: The facts out of which this appeal arises are set out in the judgment of Sir Clement De Lestang, J.A., which I have had the advantage of reading.

Put briefly, the case for the appellants, as I understand it, falls into two parts. First, as a matter of fact, the transaction, so far as the appellants were concerned, was fair and reasonable. The consideration for the mortgage was money actually advanced; the rate of interest was not excessive and the mortgage itself was in common form. Secondly, as a matter of law, s. 16 of the Indian Contract Act 1882, as amended by the Indian Contract Act Amendment Act 1899, which applied in Kenya at the relevant date, defines the circumstances in which a contract is said to be induced by undue influence and the circumstances so defined do not include the present case, since an essential element is missing; that is to say, the appellants did not obtain any unfair advantage. It was contended that the learned trial judge erred in looking to English case law, based on principles of equity, which had no application.

The case for the respondent, as to the facts, is that as a mere schoolboy he was induced by his father to execute the mortgage, although he was not to receive, and did not in fact receive, any of the mortgage money or derive any other benefit from the transaction and that before doing so, he did not receive any independent advice. It was pointed out that the respondent's circumstances were well known to the appellants' advocate. It was argued that the appellants gained an advantage which, as against the respondent, was unfair, because the respondent gave his personal covenant to repay the loan. As regards the law, it was argued that s. 16 is not exhaustive, that it does not relate to circumstances such as the present, and that there is a gap in the law which should be filled by reference to English principles of equity, as applied to Kenya.

The first question to be considered is, I think, whether the matter is or is not exclusively covered by s. 16. Counsel for the appellants, in his argument, relied entirely on the wording of the section itself. I would agree with his submission, but I would base my reasons on a rather wider examination of the Act.

The relevant provisions are, I think, contained in s. 10, which provides:

> "All agreements are contracts if they are made by the free consent of parties competent to contract . . .";

in s. 14, which reads:

> "Consent is said to be free when it is not caused by–
>
> | | |
> |---|---|
> | 'Free consent' defined. | (1) coercion, as defined in s. 15, or |
> | | (2) undue influence, as defined in s. 16, or |
> | | (3) fraud, as defined in s. 17, or |
> | | (4) misrepresentation, as defined in s. 18, or |
> | | (5) mistake subject to the provisions of ss. 20, 21, and 22. |
>
> Consent is said to be so caused when it would not have been given but for the existence of such coercion,

undue influence, fraud, misrepresentation or mistake."

in s. 16, which provides:

Undue influence' defined	"(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other,"

and in s. 19A, which makes a contract consent to which was caused by undue influence voidable at the option of the party whose consent was so caused.

Reading those sections together, and having regard particularly to s. 14, I find the conclusion irresistible that the statutory provisions relating to undue influence are exclusive.

On the interpretation of s. 16, it appears to me that there are two essential elements that are required to be shown before s. 19A can be invoked: the first is that one of the parties to the contract must have been in a position to dominate the will of the other and the second, that he must have used that position to obtain an unfair advantage.

As regards the first of these elements, I have no doubt that influence may be exercised directly or indirectly; this seems to me clearly within the wording of s. 16. A more difficult question arises where the prime mover is a third party. The wording of s. 16 clearly requires that the ability of one contracting party to dominate the will of the other must spring from the relations between them and not from external circumstances. In principle, however, I think that where one party to a contract knew that the other was acting under the influence of a third person who was personally interested in the contract, or knew of facts that gave rise to a presumption of such influence, the court is entitled to interpret the expression "the relations subsisting between the parties" as including the relationship of all three and may, in appropriate circumstances, find that out of that multiple relationship, one contracting party was "in a position to dominate the will" of the other.

To put the matter in another form, I think that where one party to a contract obtains an unfair advantage over the other, knowing that he is able to obtain that advantage only because a third person is exerting influence over the other contracting party, influence which he is able to exert because of the relationship between them, the first contracting party must be regarded as adopting the conduct of the third person as his own.

In the present case, the transaction was arranged by an advocate, who testified at the hearing that he had known the appellants for about twenty-two years and the respondent for about nine. He also said that he knew the respondent's late father very well. The advocate acted for all parties in this transaction, but it appears from his evidence that it was the appellants whom he regarded primarily as his clients. The appellants appear to have stipulated the rate of interest and the date for repayment but otherwise to have left matters entirely to their advocate. They appear to have taken little or no interest even in the matter of security. There must, however, be imputed to them the knowledge possessed by their advocate, including the knowledge that the loan was on behalf of the respondent's father, to whom the money was to be paid.

According to the respondent, he was, at the time when the mortgage was executed, still at school and living with his parents. These facts must, I think, raise a presumption, which has certainly not been rebutted, that he was under the influence of his father, even though he had recently attained his majority (eighteen years of age). If the respondent was under the influence of his father and if that fact was known to the appellants, through their advocate, and if the appellants knew, as appears from the evidence, that the respondent's father

needed a loan urgently, I think the appellants might be deemed to have been "in a position to dominate the will" of the respondent.

That would, however, meet only one of the requirements of s. 16. The other is that the appellants should have used that influence to gain an unfair advantage over the respondent and, as I have said, it was the case for the appellants that there was no such unfair advantage. They made a loan of Shs. 40,000/- at twelve per centum per annum interest and obtained as security a second mortgage and the personal covenant of the owner of the mortgaged land. The security appears at the time to have been regarded as ample, although in the event it proved worthless. There is nothing in the evidence to suggest that the respondent's covenant was more valuable than, or even as valuable as, that of his father. The appellants, in other words, obtained nothing more than any other lender on mortgage would have required.

Even if it could be shown that the transaction was unfair as between the respondent and his father, I cannot see that that unfairness could prejudice the appellants, unless, of course, they had been guilty of a fraudulent conspiracy with the respondent's father, which has never been suggested, still less proved.

To sum up, this matter is, in my view, governed by s. 16 of the Indian Contract Act and the learned judge was accordingly in error in applying English principles of equity. Applying s. 16, the respondent could only have succeeded if he could have shown not only that the appellants were in a position to exert influence but also that by so doing they had secured an unfair advantage over the respondent. In my view, it has not been shown that the appellants obtained any unfair advantage and for that reason I do not think the respondent was entitled to invoke ss. 16 and 19A. I therefore agree that this appeal should succeed and with the order proposed.

Newbold V-P: The facts relating to this appeal are fully set out in the judgment of Sir Clement De Lestang, J.A., so I shall only recapitulate those facts as are necessary to give point to my reasoning.

On June 15, 1959, the appellants (whom I shall refer to as the plaintiffs) loaned money to the respondent (whom I shall refer to as the son) on the security of a second mortgage of property belonging to the son. This second mortgage included a personal covenant by the son to repay the amount of the loan and the terms of the contract were in all respects perfectly normal. At the time of the contract of mortgage the son, though of full age, was still a schoolboy and the property had apparently been given to him by his father. As was known to the plaintiffs, the money, though borrowed by the son, was intended for and was received by the father. The son, however, was fully aware that the loan had legally been made to him. The relationship between the plaintiffs on the one hand and the son and the father on the other hand was in no way abnormal; nor, so far as is known, were the plaintiffs in any position to bring pressure on either the father or the son, whether directly or indirectly. Default was made in repayment; the property was sold but the proceeds were insufficient to satisfy the debt; and the plaintiffs sued the son on the personal covenant. The defence was that the contract of mortgage was induced by undue influence. It is not in dispute that the provisions of the Indian Contract Act (which I shall refer to as the Act), as applied to Kenya, apply. The trial judge held that the contract had been induced by undue influence, but he did not refer to s. 16 of the Act and he based his decision on British cases. The question on appeal is whether the trial judge was correct in his conclusion.

I have had the advantage of reading in draft the judgments of Sir Clement De Lestang, J.A., and Spry, J.A., and for the reasons they give I agree that the issue on this appeal is to be determined by the provisions of s. 16 of the Act and that those provisions are exhaustive.

Section 16 provides that a contract is induced by undue influence if

> "the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other".

Thus, subject to the other provisions of the section and free from any gloss placed on the section by the decided cases, I consider that before a contract can be regarded as induced by undue influence three elements are necessary: first, some particular relationship, other than which of necessity arises by virtue of the contract itself, must exist between the parties to the contract; secondly, one of such parties must be in a position to dominate the will of the other of such parties; and thirdly, such a party must use his position to obtain an unfair advantage.

Counsel for the appellants urges that such is the law to be applied in Kenya and that the trial judge applied not the law of Kenya but the law of Britain. Counsel for the son, urges that the cases have construed the section as doing no more than apply the British doctrines of equity in relation to undue influence.

Before examining the cases to which reference has been made, I shall assume that British law does not require any particular relationship between the parties to the contract nor any undue influence to emanate from such a party and that it is sufficient if such party has notice of the fact that the other party has been subjected to undue influence by a third person. While accepting such to be the British law for the purposes of this appeal, I should not wish to be taken as accepting such to be the position necessarily. There are undoubtedly dicta to that effect, for example, the dicta of Lord Goddard when delivering the judgment of the Privy Council in *Tungabai v. Yeshvant* (4) (32 A.I.R. (P.C.) at p. 10); but I am aware of no decision which does not in some way depend on some circumstances other than bare knowledge of the facts, and, indeed, this is clearly brought out in the leading case of *Lancashire Loans, Ltd. v. Black* (5).

I turn now to an examination of the cases. In *Tungabai's* case (4) no consideration was given to the question whether British law was different from that set out in s. 16. In *Dhanipal v. Raja* (3) Lord Davey delivering the judgment of the Privy Council said (33 I.A., at p. 127):

> "The subordinate judge was wrong in deciding the case in accordance with what he supposed to be English equitable doctrine. He ought to have considered the terms of the amended s. 16 only."

On the particular facts of that case it was held that the lender was in a position to dominate the will of the borrower. In *Poosathurai v. Kannappa* (1) Lord Shaw stated that it was unnecessary to consider whether there was any difference for it was not submitted that any difference was relevant to the issues. Later in the judgment he stated (43 I.L.R. at p. 549):

> "Their Lordships do not doubt that in the category of cases of undue influence might be covered cases where the party to a transaction exercised that influence in conspiracy with or through the agency of others."

In *Rama Patter v. Manikkam* (2) Varadachariar, J., delivering the judgment of the court said (58 Mad. at p. 464):

> "It may be conceded that s. 16 of the Contract Act deals in terms with the exercise of undue influence by one party to the contract on the other. Indeed, this is the ordinary type of cases of undue influence. The question of the effect of undue influence exercised by somebody other than the grantee or promise does not seem to have arisen in the cases that went

> up to the Judicial Committee from India, except in *Poosathurai v. Kannappa Chettiar* (1).
>
> Confining ourselves however to the statute law of India, it is clear that the principle of the English cases referred to by Venkatasubba Rao, J., has been made applicable in this country by s. 89 of the Indian Trusts Act."

From an examination of these cases it will be seen that in no case has it been held, after consideration of the point, that s. 16 is merely a statutory restatement of the British equitable doctrines relating to undue influence; indeed, quite the reverse. In *Rama Patter's* case (2) the court held that these doctrines had been incorporated into the law of India under s. 89 of the Indian Trusts Act 1882, which section specifically refers to the position when a person gains an advantage from undue influence "with notice that such influence has been exercised". No similar section exists in the law of Kenya, but counsel for the respondents submits that the same position is achieved by reason of the incorporation into the law of Kenya of British doctrines of equity. This incorporation is now achieved under r. 3 of the Kenya (Jurisdiction of Courts and Pending Proceedings) Regulations 1963, as continued in force under s. 6 (8) of the Constitution of Kenya (Amendment) Act 1965, but these doctrines are specifically stated to be subject to "any written law for the time being in force in Kenya". In my view, therefore, these doctrines cannot override the plain provisions of a legislative enactment having effect in Kenya. Consequently it is to s. 16, and to that section alone, to which the courts must look in order to determine whether a contract has been induced by undue influence.

Turning now to the facts of this appeal in order to determine whether the three elements to which I have earlier referred are present, there is no evidence of any particular relationship between the plaintiffs on the one hand and either the son or the father on the other. Nor is there any evidence that the plaintiffs were in a position to dominate or did dominate the will of the son. I accept that if the plaintiffs were able to dominate the will of the son through the instrumentality of some third person then the act of the third person is the act of the plaintiffs. But there is no evidence that the plaintiffs acted through the father in dominating the will of the son. Finally there is no evidence that the plaintiffs obtained any unfair advantage, as I do not regard the perfectly normal personal covenant of the son as an unfair advantage.

For these reasons I agree with Sir Clement De Lestang, J.A. and Spry, J.A., in considering that this appeal should be allowed and there will be an order in the terms proposed by Sir Clement De Lestang, J.A.

Appeal allowed.

For the appellants:
Bryan O' Donovan, *QC* and *RD Patel*
Patel & Patel, Nairobi

For the respondents:
SG Amin and *BC Syal*
SG Amin, Nairobi

The Bank of India Ltd v Manibhai M Patel, Ltd

[1965] 1 EA 638 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	5 November 1965
Case Number:	113/1965; 454/1963
Before:	Jones J
Sourced by:	LawAfrica

[1] Practice – Pleadings – Striking out – Counterclaim – Striking out on grounds that matters pleaded res judicata and tend to prejudice trial – Civil Procedure Ordinance (*Cap.* 6) *s.* 7 *and s.* 101 (*U.*) *– Civil Procedure Rules, O.* 6, *r.* 17 (*U.*).

Editor's Summary

The plaintiff applied under O. 6, r. 17 of the Civil Procedure Rules for striking out of certain paragraphs in the counterclaim filed by the defendant on the grounds that the matters raised were res judicata and therefore likely to tend to prejudice the trial of the suit. At the hearing of the application the plaintiffs relied on s. 7 of the Civil Procedure Ordinance and on the inherent powers of the court under s. 101, ibid. For the defendant it was submitted that s. 7 of the Civil Procedure Ordinance had no application and that the inherent powers of the court could not be invoked.

Held –

(i) section 101 of the Civil Procedure Ordinance is wide in its scope and that raising points which are res judicata is an abuse of the process of the court and properly falls within the ambit of s. 101;

(ii) the matters raised in the paragraphs complained of were res judicata and should be struck out by virtue of the inherent powers of the court under s. 101, ibid.

Application allowed.

Cases referred to in judgment

(1) *MacDougall v. Knight* (1890), 25 Q.B.D. 1.

(2) *Reichel v. Magrath* (1889), 14 App. Cas. 665, H.L.

(3) *Humphries v. Humphries*, [1910] 2 K.B. 531, C.A.

(4) *Cooke v. Rickman*, [1911] 2 K.B. 1125.

(5) *Greenhalgh v. Mall*ard, [1947] 2 All E.R. 255, C.A.

(6) *Conquer v. Boot*, [1928] 2 K.B. 336.

(7) *Green v. Weatherill*, [1929] All E.R. Rep. 428.

(8) *Henderson v. Henderson* (1843), 3 Hare, 100.

(9) *Trustees of the Port of Aden v. Gohra Bint Salem* (1959), E.A. 87, C.A.

Judgment

Jones J: The plaintiff is a limited liability company carrying on business of banking at Jinja and elsewhere in Uganda.

The defendant is a limited liability company incorporated in Uganda.

On July 16, 1960, the plaintiff agreed to grant the defendants overdraft facilities. In consideration of this agreement the defendant company deposited with the plaintiff certificates of title to certain leasehold properties of which the defendants were registered owners. It is not necessary for the purposes of this order to particularise those leasehold properties. An equitable mortgage was created, and a memorandum of charge was executed. A caveat was entered with the Registrar of Titles on the said leasehold lands by the plaintiffs to protect their interests.

Under the terms of the memorandum of charge the defendants agreed when called upon by the plaintiffs to execute a legal mortgage in their favour to secure all monies due from the defendants to the plaintiffs.

On August 26, 1964, the defendants were called upon to execute a legal mortgage in pursuance of the memorandum of charge. They neglected or refused to do so.

This action was accordingly filed praying for specific performance of that part of the memorandum of charge which required or obliged the defendant to execute a legal mortgage and further orders.

The defendants filed a defence out of time with the consent of the plaintiffs. They also counterclaimed for damages arising out of the appointment by the plaintiffs of a Receiver over the defendants' property in December, 1962 under a purported exercise of its powers under a debenture dated July 16, 1960. They averred that the appointment was wrongful, and the seizure of the assets by the Receiver illegal and void. In paras. 8 and 9 of the counterclaim they claim that the plaintiffs seized immovable property which was specifically excluded from the operation and scope of the debenture under para. 2 thereof and sought damages for the loss resulting to the defendants by reason of the unlawful seizure.

A reply to this counterclaim was filed by the plaintiffs, joining issue on paras. 1, 2, 3 and 4 of the defence. As to paras. 5, 6 and 7 they averred that the matters raised were substantially in issue in a former suit before this court in Civil Case 454/63 brought by the defendants in this case against the plaintiffs. The said issue was tried before Sheridan, J., who dismissed the action with costs. The defendant, i.e., the plaintiffs in Civil Case 454/63, appealed to the Court of Appeal for East Africa but the appeal was dismissed.

The plaintiffs also pleaded that the allegation that the immovable property was seized unlawfully was not made a ground of attack at the previous hearing in Civil Case 454/63 so that the issue was res judicata.

The matter came before me by way of notice of motion for an order that paras. 5–9 inclusive of the defence dated April 11 be struck out as being res judicata and therefore likely to tend to prejudice the trial of the suit. The notice of motion was supported by an affidavit dated October 6, 1965 setting out the reasons for the notice of motion.

The plaintiffs relied on s. 7 of the Civil Procedure Ordinance, O. 6, r. 17 and the inherent powers of the Court under s. 101 of the Civil Procedure Ordinance.

Section 7 of the Ordinance defines res judicata and reads thus:

> "7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

Counsel for the plaintiff relied on explanation 4 of the section. Order 6, r. 17 deals with the striking out of unnecessary matters in the following terms:

> "17. The court may at any stage of the proceedings order to be struck out or amended any matter in any endorsement or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if it shall

> think fit, order the costs of the application to be paid as between advocate and client".

Counsel for the defendant argued that s. 7 of the Ordinance does not provide a ground for this motion. He further urged as the whole matter of striking out pleadings was dealt with in O. 6, r. 17 the inherent powers of the court could not be invoked.

Section 7 clearly refers to the meaning of 'res judicata' with illustrations, and it cannot be that counsel for the plaintiff rested his motion on it but referred to it, for the meaning of res judicata for the purpose of his arguments.

I now turn to counsel for the defendant's second point.

The matters which can be struck out under O. 6, r. 17 are those which are *inter alia*:

(*a*) unnecessary

(*b*) may lead to

(i) embarrass

(ii) delay the fair trial of the action.

Counsel for the plaintiff in his notice of motion seeks to have the offending paragraphs in the counterclaim struck out as being matters which are res judicata and tend to prejudice the trial.

This question has been dealt with by the Rules of the Supreme Court O. 25, r. 4: see The Annual Practice, 1961 at p. 577. In the notes on inherent jurisdiction it says:

> "So, if a party seeks to raise anew a question which has already been decided between the same parties by a court of competent jurisdiction, this fact may be brought before the court by affidavit, and the statement of claim, thought good on the face of it, may be struck out, and the action dismissed; even though a plea of res judicata might not strictly be an answer to the action; it is enough if substantially the same point has been decided in a prior proceeding (*MacDougall v. Knight* (1); *Reichel v. Magrath* (2); *Humphries v. Humphries* (3); *Cooke v. Rickman* (4); *Greenhalgh v. Mallard* (5); cf. *Conquer v. Boot* (6); *Green v. Weatherill* (7)."

It is well established that a counterclaim is a plaint so these principles enunciated above clearly apply to counterclaims, and can be invoked under the inherent powers of the court. Section 101 of the Civil Procedure Ordinance clearly states that nothing in this ordinance shall be deemed to limit or affect the inherent powers of the court to make such order as may be necessary for the ends of justice or to prevent abuse of the process of the court.

This is a section which is very wide in its scope. It seems to me perfectly clear that raising points which are res judicata are an abuse of the process of the court and properly falls within the ambit of the section.

I must, therefore, proceed to consider whether the matters raised in paras. 5–9 in the defendants' counterclaim are res judicata.

The issues referred to in paras. 5–7 were substantially in issue in Civil Case 454/62 and adjudicated upon and in my view are res judicata.

As to paras. 8 and 9 it is alleged that in December, 1962 the plaintiff wrongfully seized and took possession of immovable property at Bujuta. Neither the date of the seizure nor the reasons why it was unlawful are mentioned. The Receiver when appointed on December 3, 1962, seems to have taken the property over. That seems to be the burden of the defendant's complaint. Although the pleadings are silent on this point, it would appear from argument of counsel for the defendant that it was wrongful, as

immovable property was

specifically excluded from the terms of the debenture. If that were so the matter ought to have been raised in Civil Case 454/63. In any event it was a matter in dispute in 1964. That being so, ought it to have been a ground of attack in the former suit?

The law on this point has been well covered in *Green v. Weatherill* (7) ([1929] All E.R. Rep. at p. 432). Maugham, J., in his judgment said:

> "In the leading case of *Henderson v. Henderson* there is to be found the following statement of law by Wigram, V.-C. (3 Hare at p. 114):
>
> > 'I believe I stated the rule of the court correctly when I say that where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time'."

What I have to consider is whether the point raised in paras. 8 and 9 of the counterclaim was one which properly belonged to the subject of litigation and one which the parties exercising reasonable diligence might have brought forward at the time of the previous trial.

The facts stated in paras 8 and 9 stem from the appointment of the Receiver and could and ought to have been raised in Civil Case 454/63 (see *Trustees of the Port of Aden v. Gohra Bint Salem* (9)).

That being so I consider it has been caught by the doctrine of res judicata and I so rule.

I, therefore, order that paras. 5 to 9 of the counterclaim be struck out. I do this under my inherent powers under s. 101 of the Civil Procedure Ordinance.

I award the costs of this application to the plaintiff.

Application allowed.

For the plaintiff:
BD Dholakia
Parekhji & Co, Kampala

For the defendant:
MP Vyas
MP Vyas, Kampala

Hansraj Ranmal Shah v Westlands General Stores Properties, Ltd and another

[1965] 1 EA 642 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	8 November 1965
Case Number:	44/1965
Before:	Crabbe, Duffus and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Madan, J

[1] Practice – Action for recovery of possession and mesne profits – Order for possession and enquiry to determine amount of mesne profits – Enquiry held before Deputy Registrar – Consent order fixing amount of mesne profits – Objection to consent order on ground that advocate had no authority – Application to set aside consent order – Application dismissed – Judgment entered for mesne profits on basis of consent order – Whether judge entitled to enter judgment.

[2] Advocate – Advocate's authority to compromise – Action for recovery of possession and mesne profits – Amount of mesne profits fixed by consent – Whether client bound by advocate's act.

Editor's Summary

The respondents sued *inter alia*, for possession of the suit premises, mesne profits and if necessary, an enquiry into the amount of such mesne profits and rent. The trial judge gave an order for possession of the premises and for an enquiry to be held as to the amount of the mesne profits. The enquiry was taken before the Deputy Registrar, where counsel for the parties agreed to a consent order fixing the amount of mesne profits. The appellant having changed his advocate objected to the consent order and applied to set it aside. The judge held that the consent order made by the Deputy Registrar was valid and the appellant was bound by his advocate's act. He then proceeded to enter judgment for the respondents on the basis of the consent order. The main grounds of appeal were that the judge had no jurisdiction to enter judgment in respect of the mesne profits on the basis of the consent order; that the order made by the Deputy Registrar was invalid and made without jurisdiction; and that the appellant was not bound by his advocate's act.

Held –

(i) the appellant had not withdrawn his instructions from the advocate who retained full control over the conduct of the case and had apparent authority to compromise all matters connected with the action; accordingly the advocate had the necessary authority to agree to the fixing of the mesne profits as appellant's counsel and agent;

(ii) the consent order made before the Deputy Registrar fixing the amount of the mesne profits was binding and there was no need for the judge to hold or order any further enquiry to be held as to the amount of the mesne profits; the judge correctly ordered mesne profits to be paid in accordance with the consent order.

Appeal dismissed.

Cases referred to in judgment

(1) *H. Clark* (*Doncaster*), *Ltd. v. Wilkinson*, [1965] 2 W.L.R. 751; [1965] 1 All E.R. 934.

(2) *Strauss v. Francis* (1866), L.R. 1 Q.B. 379.

November 8. The following judgments were read.

Judgment

Duffus JA: This is an appeal by the appellant against that portion of the judgment and decree of the High Court of Kenya which awarded the respondents mesne profits at the rate of Shs. 3,100/- per month. The respondents brought this action against two appellants, the first appellant J. G. Magner & Co., Ltd. not being a party to this appeal, and in the action claimed, *inter alia*, possession of the suit premises, a shop at Westlands, mesne profits or if necessary, an enquiry as to the amount of such mesne profits and rent. The respondents obtained judgment which included an order against both defendants for possession of the premises and for an enquiry to be held as to the amount of the mesne profits. The relevant portion of the decree which awarded the mesne profits and ordered the enquiry states:

> "It is ordered:
>
> (2) The defendants do jointly and severally pay mesne profits with interest to the plaintiffs for which purpose an enquiry be made as to the amount of such mesne profits which have accrued due prior to the institution of the suit but as from December 20, 1962, being the date on which the lease was forfeited and thereafter until the delivery of possession to the plaintiffs."

The plaintiff also appealed against that judgment and that appeal, Civil Appeal No. 439 of 1965, has been duly heard by this court and dismissed.

This appeal deals solely with the fixing, by the court, of the mesne profits at the rate of Shs. 3,100/- per month. This order was made by Madan, J., the trial judge, in his ruling delivered on July 12, 1965. The relevant portion of the final decree which the learned judge then settled and which followed as a result of his ruling, states:

> "Now it is finally ordered:
>
> . . .
>
> (2) The defendants do jointly and severally pay to the plaintiffs mesne profits at the rate of Shs. 3,100/- per month with interest thereon at court rates from December 20, 1962 being the date on which the lease was forfeited until the delivery of possession of the suit premises to the plaintiffs."

This final decree followed proceedings before the Deputy Registrar. The appeal record is incomplete and does not show how this matter came before the Deputy Registrar and the only reference to this appears in a supplementary affidavit of the appellant, the relevant part of which states:

> "according to the information given to me by my advocate, which I believe to be true that on March 1, 1965, the Deputy Registrar Mr. V. Kapila recorded an order on the court file reading as under:
>
> 'March 1, 1965.
>
> *Akram* for plaintiff.
>
> *Sampson* for first defendant (absent) (presence dispensed with).
>
> *Sandhu* for second defendant.
>
> *Sandhu*: In so far judgment orders mesne profits we agree that they should be assessed at Shs. 3,100/- per month.
>
> *Akram*: I accept the figure of Shs. 3,100/- as mesne profits.
>
> By consent it is ordered as follows:

The mesne profits be and are hereby calculated at Shs. 3,100/- per month.

V. Kapila.'

The said order appears to have been made notwithstanding the absence of the first judgment-debtor or their advocate."

The court therefore called for the original records and from these it appears that the following further notes had been made of appearances before the Deputy Registrar. These are as follows:

"February 9, 1965.

Mr. Akram for the plaintiffs.

Vergee for Mr. Wollen for the second defendant.

By consent date fixed for an enquiry as to the amount of mesne profits for February 26, 1965.

Deputy Registrar."

"February 26, 1965.

Akram for plaintiff.

Reg. Sampson for first defendant.

No appearance for second defendant.

Akram: Date was fixed by consent of all parties – there is going to be a consent order in this matter – it mainly concerns second defendant. I suggest it by S.O.

Order: S.O. to March 1, 1965 at 2.30 p.m.

Sampson: Sir, could my presence be dispensed with on March 1, 1963.

I consent to the order be recorded.

Order: Presence of *Mr. Sampson* on March 1, 1965 dispensed with and consent order to be recorded in his absence.

V. Kapila,

Deputy Registrar."

It is clear that these notes of the proceedings before the Deputy Registrar should have been included in the record of appeal, and also placed before the trial judge, especially as the appellant was contending that the Registrar was acting without jurisdiction and further that the consent order was made in the absence of the first defendant. The court brought these further notes to the attention of learned counsel appearing in this case and both agreed that the court could properly consider these notes as part of the original record. Two facts appear from these further notes, first, that the enquiry for mesne profits was before the Deputy Registrar by the consent of all the parties and further that the consent order was made with the approval of counsel for all the parties.

The record is not altogether clear as to the procedure by which this matter came before the court, it however appears that there were three interlocutory matters before the judge which were taken together. These were:

(1) An application by way of motion seeking to set aside an attachment of goods belonging to the second defendant and also to set aside the orders for possession of the suit premises.

(2) An application made by the appellant's counsel at the hearing of this motion, and supported by an affidavit of the appellant, to set aside the consent order made by the Deputy Registrar on March 1, 1965, fixing the amount of the mesne profits. This was apparently a verbal application. In his ruling

the judge said:

> "The applicant, second defendant, (hereinafter called Shah) moves the court to set aside orders by the Deputy Registrar on May 18, 1965 in execution proceedings for attachment and sale of shop goods and for delivery of possession of the suit premises to plaintiffs. Shah also asks to set aside a consent recorded by the Deputy Registrar on March 1, 1965 to the effect that mesne profits be and are to be calculated at Shs. 3,100/- per month. These two applications are being dealt with together at the request of the parties although perhaps they cannot correctly be said to have been consolidated."

(3) A reference made by the Deputy Registrar on June 10, 1965, asking the court to settle the terms of the final decree under O. 20, r. 7 (2) as the parties were unable to agree as to the terms, the appellant having refused to approve the draft decree as set out in his letter of June 4, 1965, attached to the record of appeal.

These various matters were fully argued by counsel before the learned judge and in a carefully considered judgment, he first upheld the appellant's application under head (1) above and ordered that the warrants for the attachment of goods and the possession of the suit premises be recalled; there has been no appeal against this part of his ruling. Then on the second application he found that the Consent Order made by the Deputy Registrar was valid and binding and he then proceeded to enter judgment for the respondents on the basis of this Consent Order fixing the amount of the mesne profits at Shs. 3,100/- per month. He then further proceeded on the third application before him to settle the terms of the final decree.

These last two orders form the subject of this appeal. The appellant relies largely on the facts stated in his further affidavit which I have already referred to dated May 1, 1965, and in particular to paras. 2 and 3 of his affidavit which stated:

> "2. I am further informed by my advocate Mr. B. D. Bhatt and believe it to be true that the aforesaid consent order purported to have been made on March 1, 1965 was ultra vires of the powers and jurisdiction of the said Deputy Registrar Mr. Kapila in that no directions have been obtained by the judgment creditors as to by whom and the mode and basis of the enquiries ordered by the court on January 29, 1965, as to the mesne profits and that in any case no final decree has been passed by the court up to now in accordance with the result of any such enquiry if held at all.
>
> 3. I say that I did not instruct or authorise Mr. G. S. Sandhu at any time to agree to the mesne profits in the sum of Shs. 3,100/- per month or in any other sum and that the said Mr. Sandhu's purported act in so agreeing was without my knowledge or consent or authority and therefore the said order does not bind me."

The first ground of appeal reads:

> "1. That the learned judge was wrong in law and had no power or jurisdiction to enter judgment against the appellant for mesne profits at the rate of Shs. 3,100/- per month on August 12, 1965, in absence of any or any appropriate application by the plaintiffs to the court for entering any such judgment – the only application before the court at the material time was an oral one by the plaintiffs for settling the final draft decree drawn and submitted to the court in pursuance of the consent order for mesne profits purported to have been entered by the Deputy Registrar Mr. V. Kapila on March 1, 1965, which application was not acceded to."

This ground is incorrect for as I have pointed out there were, in fact, three applications before the judge which were all taken together by consent. Assuming

for the purpose of considering this ground of appeal that the consent order made by the Deputy Registrar was valid, the question is whether the judge was justified at that stage of the proceedings in entering judgment for the amount of the mesne profits. Order 20, r. 12 is relevant here. This states, *inter alia*:

> "12. (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree–
>
> (*a*) for the possession of the property;
>
> (*b*) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an enquiry as to such rent or mesne profits;
>
> (*c*) directing an enquiry as to rent or mesne profits from the institution of such suit until–
>
> . . .
>
> (2) Where an enquiry is directed under clause (*b*) or clause (*c*) a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry."

Assuming then that the enquiry was properly held and the consent order passed was a valid and effectual result of such enquiry, then in my view, the trial judge was seized of the matter at this stage of the proceedings and justified in passing his final decree ordering the payment of the mesne profits. The matter of the validity of the consent order was then before him and was fully argued. There was also an application before the court to settle the terms of the final decree.

I will consider the second and third grounds of appeal together. These grounds in substance first attack the authority of the appellant counsel at that time to consent to the fixing of the mesne profits at Shs. 3,100/- per month, and secondly, questioned the legality of the enquiry and consent order before the Deputy Registrar.

On the question of the advocate's authority, I would here refer to the following passage from Madan, J.'s ruling, which in my view, correctly sets out the position on the facts before him:

> "It is I think clear Shah's advocate was acting within his ostensible authority when he entered into the agreement settling the quantum of mesne profits on behalf of his client. In neither of his two affidavits does Shah say that he instructed his advocate not to compromise or prohibited him from reaching a compromise except on certain terms or at all. It was undoubtedly I think within the scope of the advocate's ostensible or apparent authority to come to a compromise in regard to the mesne profits. There is no suggestion the advocate was acting under a misapprehension or mistake or that the other party had notice of any limitation or restriction on his authority. The advocate has not come forward to say he acted under a misapprehension or mistake. Shah does not say the quantum of mesne profits was not to be settled without an enquiry being first held or that he has suffered any loss, prejudice or disadvantage by his advocate's act. The figure of Shs. 3,100/- agreed by the advocate corresponds exactly with what Shah himself freely agreed to pay and did pay under the service agreement. No doubt, I think it safe to say, Shah considered it reasonable monthly value for the premises. His advocate made as good a bargain as Shah himself."

The learned trial judge fully considered the law on this question of counsel's authority to compromise the case. It is clear that so long as counsel is acting

for a party in a case and his instructions have not been terminated, that he has full control over the conduct of the trial and has apparent authority to compromise all matters connected with the action.

There is a difference between admissions by counsel in the course of the proceedings and the position that arises when a definite compromise or settlement has been reached. This was fully explained by Lord Denning in the case of *H. Clark* (*Doncaster*), *Ltd. v. Wilkinson* (1) ([1965] 2 W.L.R. at p. 756) as follows:

> "An admission made by counsel in the course of proceedings can be withdrawn unless the circumstances are such as to give rise to an estoppel. If the other party has acted to his prejudice on the faith of it, it may not be allowed to be withdrawn . . . but otherwise an admission can be withdrawn . . .
>
> We were referred to cases where a compromise or settlement has been made by counsel acting within his ostensible authority. That of course is binding, as in *Strauss v. Francis* (2). But those are very different, and they rest on the simple principle that a principal is bound by a contract made by his agent within his ostensible authority."

In this case, there has been a definite agreement between the parties, and the appellant has shown no reason why this agreement entered into by his agent with his apparent authority should not be binding. Indeed as the learned judge points out, the figure agreed on appears to be a reasonable one. The only advantage that would appear likely to accrue to the appellant if the agreement was held to be not binding is the fact that the matter would be further delayed and he would have a longer time to pay, to the disadvantage and prejudice of the respondents.

I am of the view therefore that counsel had the necessary authority to agree to the fixing of the mesne profits as appellant's counsel and agent, and that the appellant was accordingly bound by this agreement.

Then there is the question of the legality of the enquiry before the Deputy Registrar. There is nothing on the records to show that the trial judge appointed the Deputy Registrar to hold the enquiry but from the record of the proceedings before the Deputy Registrar which I have earlier quoted in my judgment, it is clear that all the parties agreed that the Deputy Registrar should hold the enquiry and the trial judge later approved and confirmed his consent order. It must be presumed that the enquiry was properly and legally held. Apart from this, the Registrar of the High Court, and this includes the Deputy Registrar, has wide power to act under O. 48 and this includes power under r. 2 to enter judgment in all cases in which the parties consent to judgment being entered in agreed terms.

I am therefore of the opinion that the consent order made before the Deputy Registrar fixing the amount of the mesne profits was legal and binding and that there was no need for the judge to hold or order any further enquiry to be held as to the amount of the mesne profits, and that the judge correctly ordered mesne profits to be paid in accordance with this agreement.

Counsel for the appellant also submitted that the judge should have ordered a further enquiry or taken evidence on the question of counsel's authority to enter into a consent order but it appears that the appellant did set out such facts as he desired in his further affidavit and he had every opportunity to put forward any other facts that he desired to support his application during the rather protracted hearing of these various applications.

I find therefore that the learned trial judge acted correctly in this matter

and in my opinion, this appeal should be dismissed with costs. I would certify for two counsel.

Crabbe JA: I agree with the judgment of the learned Justice of Appeal and I find it quite unnecessary to add any words of my own. An order will be made in the terms he has proposed.

Law JA: I agree with the judgment of Duffus, J.A., and with the orders proposed by him, and I have nothing to add.

Appeal dismissed.

For the appellant:
CW Salter, *QC* and *BD Bhatt*
BD Bhatt, Nairobi

For the respondent:
Satish Gautama and *SM Akram*
Akram & Esmail, Nairobi

National and Grindlays Bank, Ltd v P T Punater
[1965] 1 EA 648 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 10 December 1965

Case Number: 1043/1964

Before: Harris J

Sourced by: LawAfrica

[1] Landlord and Tenant – Monthly tenancy – Condition to hand over premises in good order and condition on termination of tenancy – Breach of condition by tenant – Whether reasonable wear and tear excluded – Damages – Measure of damages – Indian Transfer of Property Act 1882, *s.* 108 (*m*).

[2] Damages – Landlord and tenant – Monthly tenancy – Condition to hand over premises in good order and condition on termination of premises – Breach of condition by tenant – Whether reasonable wear and tear excluded – Calculation of injury to reversion – Indian Transfer of Property Act 1882, *s.* 108 (*m*).

Editor's Summary

The defendant, a monthly tenant, had agreed in writing to deliver up to the plaintiff the premises in good order and condition on termination of the tenancy. The plaintiff filed an action claiming damages for breach of this agreement. Under s. 108 (*m*) of the Indian Transfer of Property Act, 1882, in the absence

of a contract or local usage to the contrary, the tenant is bound to keep, and, on the termination of the tenancy, to restore the demised premises in or to as good condition as they were at the time when he was put in possession, subject to an exception in his favour for reasonable wear and tear. For the defendant it was submitted that in spite of the condition in the agreement to hand over the premises in good order and condition on the termination of the tenancy the exception in respect of reasonable wear and tear was still applicable.

Held –

(i) the presence of the express covenant to repair in the agreement had the effect of completely excluding the provision of s. 108 (*m*) of the Indian Transfer of Property Act, 1882, and the defendant was not entitled to say that his express covenant was made subject to the exception in respect of reasonable wear and tear;

(ii) the plaintiff was entitled to damages for the sum of Shs. 1362/50 made up as follows:–

(*a*) Shs. 675/- for cleaning and repairing arising out of the defendant's default and necessary for the purpose of relating;

(*b*) Shs. 437/50 for loss of rent for the period while repairing work was being carried;

(*c*) Shs. 250/- for damage to the bath and the step.

Judgment for the plaintiff.

Cases referred to in judgment

(1) *Proudfoot v. Hart* (1890), 25 Q.B.D. 42.

(2) *Jones v. Herxheimer*, [1950] 2 K.B. 106; [1950] 1 All E.R. 323.

(3) *Smiley v. Townshend*, [1950] 2 K.B. 311; [1950] 1 All E.R. 530.

Judgment

Harris J: This is an action for damages for the failure of the defendant, as a former tenant of premises owned and let to him by the plaintiff, to fulfil his obligations in regard to handing back the premises to the plaintiff in a proper state of repair.

The premises, which consist of seven living rooms (including bedrooms) on the second floor and a bathroom on the third floor of a stone building, standing on plot number 138/91 on Varma Road in the city of Nairobi, were let to the defendant on a monthly tenancy from March 1, 1964, at a rent of Shs. 875/- per month. It appears that the premises formed portion of the estate of one, Gurbaksh Singh, who died intestate on May 6, 1963, and to whose property letters of administration were issued by this Court on November 20, 1963, in favour of the plaintiff Bank, which some time afterwards placed the management of the premises in the hands of the deceased's sons, Mr. Ajit Singh and Mr. Amrik Singh. At the end of January, 1964 these last-named, acting on behalf of the Bank, agreed with the defendant for the letting to him of the premises upon the terms and subject to the conditions set out in a printed instrument dated January 31, 1964, which had been prepared or procured by or at the instance of the deceased's sons, was addressed to the Bank and signed by the defendant alone, in which he agreed to "hire" the premises on a monthly tenancy for an unspecified term at the rent already mentioned.

Among a number of conditions set out in this instrument were the following:

> "Condition No. 2: I agree to keep the interior of the premises in good repair and clean condition and to hold myself responsible for any damage that may be done to the premises during my occupation. On the termination of the tenancy I undertake to deliver over to you the said premises in good order and condition and to hand you all the keys thereof.
>
> "Condition No. 9: Should I fail to pay the rent due hereunder or should you institute proceedings against me by reason of any default on my part of the conditions herein contained, then I undertake and agree to pay all costs incurred by you by reason of my default, including charges as between solicitor and client, and 5 per cent. commission on collection."

The instrument also contained a recital reading:

> "I acknowledge that the premises are in good order and condition with all necessary electric light fittings and fixtures and keys complete."

The defendant went into possession of the premises at the commencement of the tenancy on March 1 and remained in possession until its termination on September 30, 1964, pursuant to a notice in that behalf

given by him to the plaintiff. The plaintiff's claim is, in short, that the defendant failed, at the termination of the tenancy, to deliver up the premises in the state of repair

required by the terms of the agreement as a result of which the plaintiff, it is said, has suffered loss and damage amounting to Shs. 3,045/50.

It appeared that the ground floor and first floor of the building were completed in 1954, and the second floor in 1956, and that some time in the middle of 1962 a tiled bathroom with a fitted, European-style, enamelled metal bath was added as a third or top floor. There was already an Asian-type bathroom on the second floor. The deceased or members of his family had occupied the second floor from 1956 and the third floor from its completion until the commencement of the defendant's tenancy and one of the sons with his wife had alone used the tiled bathroom.

Evidence was given on behalf of the plaintiff by the deceased's sons, Ajit Singh and Amrik Singh, by one, Ruffle, a former employee of a firm of valuers at Nairobi, by Mr. Frere, a security consultant who when he inspected the premises in October, 1964, was employed by an insurance assessor, and by two contractors named Darsem Singh and Dannant Singh Johar. The evidence of the deceased's sons was to the effect that at the commencement of the tenancy the premises were in very good condition, the second floor having just been repainted, there were no holes in the walls or broken window panes, and the enamelled bath was in the same condition as when new. Ajit Singh stated that during the month of September, 1964, after receipt of the defendant's notice of intention to terminate his tenancy at the end of that month, he visited the premises and found them very dirty, with pencil and charcoal marks on the walls, holes in the walls and ceilings, some window panes broken and the bath damaged. The evidence of this witness as to the state of the premises at the termination of the tenancy was generally supported by that of several of the other witnesses who visited them at about the same time.

In what appeared to be a carefully compiled report, dated October 6, 1964, which was put in without objection, Mr. Frere gave particulars of the state of each room as he found it on the second day of that month, mentioning the dirty condition of the walls and extensive scratching of the paintwork in every room, holes in the ceiling of one room, two windows broken, and wall plugs inserted in several walls, and concluding with the observation that the whole area which had been occupied by the defendant had been left in an exceedingly filthy condition and that no attempt seemed to have been made to clear up before departure. Dealing with the kitchen area he reported that:

> "This section was generally in an exceedingly dirty condition. All the paintwork was discoloured. This appeared to be due to smoke, possibly from burning charcoal. There was a considerable amount of charcoal dust over the floor, window sills and other areas."

The defendant did not give evidence, but two witnesses were called on his behalf, including his son who said that he visited the premises in February, 1964, just prior to the commencement of the tenancy and that the seven living rooms, but not the kitchen or bathroom, were being painted with, as he was then informed, one coat of paint, which, however, left some scratches visible underneath. He also stated that at the commencement of the tenancy in March the kitchen had charcoal dust lying around and, together with the bathroom, had litter in it, and that it was smelling so badly that it could not be used until cleaned. In his view the kitchen and bathroom were in a better condition at the end of the tenancy than they had been at its commencement, but he admitted that the other rooms had suffered ordinary wear and tear, including marks on the walls made by furniture.

The other witness called for the defence was Mr. Levitan, a fellow of the Valuers' Institute and for a number of years senior partner in a firm of land and

estate agents, assessors and valuers in Nairobi. Having visited the premises on September 30, he submitted a report to the defendant three days later, which was put in without objection, and in which he stated that the rooms occupied by the defendant, which had been re-painted prior to the tenancy, showed dirt marks and scoring on the walls, obviously of recent origin, but little evidence of scribbling or writing on walls by children. In his evidence the witness stated that, from his recollection, fortified by reference to notes made at the time, although the walls were dirty and scored by furniture and the bathroom was far from clean, he would not agree that the rooms were in what could be described as a filthy condition, and he considered that, since the premises were in a working-class suburban area, a new tenant of the type likely to rent them would not necessarily have required them to be re-decorated before he moved in.

At the time of the hearing more than twelve months had elapsed since the witnesses had inspected the premises and I attach more weight to the written reports made immediately after such inspection than to the oral evidence based largely or entirely on memory. I am satisfied that when the defendant surrendered the premises to the plaintiff at the termination of his tenancy they were in a state of disrepair requiring cleaning and re-painting throughout.

Apart from the general condition of the rooms and walls the plaintiff alleges that the enamelled bath on the third floor was damaged to such an extent as to require replacement at a cost of Shs. 1,100/-. It appears that this utensil had been imported from abroad and, when installed in 1962, was new, but that by the time the defendant's tenancy had come to an end it had been damaged. The witness, Ruffle, who visited the premises on September 15, said in a written report made on the following day, which was put in without objection, that the bath was "very badly chipped", but he admitted in evidence that the damage consisted mainly of a circular chip about half an inch or an inch in diameter, of a superficial nature, which in no way rendered the bath unusable, The witness Darsem Singh stated that the enamel on the bath was very thin, being merely a polish of less than one-eighth of an inch thick. The chip appears to have been somewhat elusive, for while Ruffle said it was higher than the normal water level and Mr. Frere thought it may have been "fairly near the top", Darsem Singh stated that it was on the floor of the bath. The defendant's witness, Levitan, described it as a "very bad chip" and said that he would not have expected such damage after only two years normal usage, but he thought that the injury could be repaired in Nairobi by the application of a "filler", followed by repainting with enamel, at a cost of a few pounds although this would not make it "as good as new". I am satisfied that the bath was damaged but I do not accept the view which appeared to prevail among some of the plaintiff's witnesses that this type of bath is of such a special nature that a severe chip, measuring an inch in diameter, so lessens its value as to justify a replacement. I venture to think that in comparatively few European houses, particularly in working-class districts, would one find an enamelled metal bath which had been in constant use for a number of years and had not had the enamel chipped at some time.

In addition to the foregoing dilapidations the plaintiff claimed that one of the steps on the terrazzo stairs had been chipped to the extent of two or three inches on one side and one inch on the other side, probably by a heavy object having fallen on it. This injury was also observed by Mr. Frere, though he described the material damaged as "concrete", and I am satisfied that the step was in fact damaged.

It is now necessary to consider the legal implications of the matter. The obligations undertaken by the defendant, as set out in para. 2 of the conditions already referred to, were two-fold, and required him, in the first place, to keep

the interior of the premises in good repair and clean condition and to hold himself responsible for any damage that might be done to the premises during his occupation, and, in the second place, to deliver over to the plaintiff, on the termination of the tenancy, the premises in good order and condition. The plaintiff's claim is that the defendant failed to comply with the second of these obligations.

It is well settled that *prima facie* such an obligation must be construed having regard to the age and nature of the premises at the commencement of the tenancy and that, in the absence of evidence to the contrary, the premises will be presumed to have been in a tenantable condition at that time. Counsel for the plaintiff, sought to rely on the acknowledgement by the defendant in the written instrument dated January 31, 1964, that on that date, which was one month prior to the commencement of the tenancy, the premises were in good order and condition, and he referred to the note appearing at page 860 of the tenth edition of Sarkar on Evidence, based on s. 109 of the Indian Evidence Act (corresponding to s. 115 of the Evidence Act, 1963) to the effect that where a state of things has been once shewn to exist it is for the person seeking to disturb that state of things to prove that it has in fact discontinued. The presumption created by this section, however, applies rather to legal relationship than to matters of pure fact, but even if the section were to be accorded the wider interpretation I am satisfied on the evidence that on January 31, 1964, the premises were not in the state of repair for which the plaintiff contends and that it was not until some time during the following month that, at least in regard to the paintwork, they were brought to that state of repair in which the plaintiff says they should have been left when handed back at the end of September. However, quite apart from the provisions of s. 115, I am satisfied that at the commencement of the tenancy on March 1 the premises had been entirely or almost entirely newly painted and were in good tenantable order and condition.

Although both counsel accepted as correct and applicable to this case the statement of the law contained in paras. 1254 to 1257 (inclusive) of 21 Halsbury's Laws (3rd Edn.), it is necessary to look also at the provisions of the Transfer of Property Act, 1882, of India, as applied to this country, in order to ascertain the legal position of the parties to each other. Under s. 108 (*m*) of the Act of 1882, in the absence of a contract or local usage to the contrary, the tenant is bound to keep and on the termination of the tenancy to restore, the demised premises in or to as good a condition as they were at the time when he was put in possession, subject to an exception in his favour for "reasonable wear and tear", and I understood counsel for the defendant, to contend that that exception applies in this present case notwithstanding that no mention was made of it in the tenancy agreement. No authority on the point was referred to by either counsel, but in my opinion the presence of the express covenant to repair in the agreement has the effect of completely excluding the provisions of para. (*m*) of s. 108 and the tenant is not entitled to say that his express covenant is made subject to the exception in that paragraph in respect of reasonable wear and tear. The liability of the defendant under the terms of the agreement was therefore to return the premises to the plaintiff in good order and condition. If I were satisfied that, as the defendant's son appeared to suggest in evidence, the premises were so dirty at the commencement of the tenancy as not to be in good order and condition I would be bound to hold, by reason of the decision in *Proudfoot v. Hart* (1), that the defendant was obliged, if and so far as was necessary, to put the premises into good order and condition, and, indeed, he may possibly have done so in regard to the kitchen, bathroom and passages. However that may be, his obligation to keep them and deliver them up in that state applies to the whole of the premises let to him.

It is clear, therefore, that the defendant has failed to fulfil his obligations and the question next arises as to the measure of damage which the plaintiff has suffered. Generally speaking the measure of damage in a landlord's action for breach of covenant to repair, brought on or after the termination of the lease, is the amount in money by which the value of his reversion expectant upon the determination of the lease has been depreciated by the breach. In *Jones v. Herxheimer* (2), to which counsel for the plaintiff referred me, it was said that in a simple case, such as one where the tenancy comprises only a few rooms in a house and there could be no question of the sale of the rooms apart from the house the amount required to put the premises into the state of repair into which the tenant should have put them is *prima facie* evidence of the extent of such depreciation, and it was there held that where rooms in a house had been let for the purpose of being used as a residence and it was the landlord's intention to re-let them for the same purpose, the cost of the repairs actually effected by him to make a new letting possible was the measure of damage to the reversion due to the tenant's breach of covenant. On the other hand, in *Smiley v. Townshend* (3), it was held that where it is plain that the repairs are not going to be done by the landlord the cost of them is little or no guide to the diminution in value of the reversion, which may be nominal; and it has been said that in such a case evidence of actual loss or damage must be given to entitle the landlord to more than nominal damages: see Woodfall: Landlord and Tenant (26th Edn.) p. 736, para. 1672. Although each of those decisions must be regarded in the light of the local legislation applicable in England, I see no reason for thinking that the principles underlying them should not be followed in this country.

In the present case the plaintiff, after the termination of the defendant's tenancy, found it more convenient to divide the premises into two and to make two separate lettings, which it did at a combined monthly rent of Shs. 1,000/-. The cleaning and repairing which were necessitated by the defendant's default and were effected by the plaintiff for the purpose of making the new lettings cost Shs. 675/-, and rent for a short period, stated to amount to Shs. 437/50, was lost to the plaintiff while this work was being carried out. I consider that the plaintiff is entitled to include in its claim (as it has done) both of these sums. Various estimates were given as to the probable cost of doing the more elaborate repair work which the plaintiff considered would be necessary to bring the premises up to the standard of repair and decoration that they enjoyed when the defendant went into possession, but in the absence of any evidence that the plaintiff had undertaken with the new tenants to carry out this additional work, or even that it had reserved to itself the right to compel the tenants to permit the work to be carried out, it seems to me highly improbable that the plaintiff intends to spend, or, as an administrator, would be justified in spending, any further monies on making good the defendant's omissions in regard to painting and decorating the premises. I cannot award any damages computed on the basis of expenditure which the plaintiff has not thought it necessary to incur and which will almost certainly never be incurred by it in the matter.

With regard to the damage to the bath, although I think it unlikely that this will lead to any loss of income from lettings or to any diminution of purchase price in the event of the premises being sold, there is a possibility that, if not attended to, it might result in the working lifetime of the bath being slightly shortened. I approach the damage to the step in the same way, and I measure the sum to which the plaintiff is entitled in respect of these two items at Shs. 250/-.

No other evidence of damage to the reversion was given, nor were the nature or length of that reversion disclosed, and, accordingly the damages to be awarded to the plaintiff will be the said sums of Shs. 675/-, Shs. 437/50 and Shs. 250/-, making a total of Shs. 1,362/50.

There will therefore be judgment for the plaintiff for the sum of Shs. 1,362/50, with interest thereon at court rates from the date of filing suit and cost. The plaintiff has not sought to rely on the provisions of cl. 9 of the conditions of the tenancy in regard to costs, which, in any event, are, in my opinion, ultra vires, as purporting to oust the jurisdiction of the court conferred by s. 27 of the Civil Procedure Act. As the case was of some difficulty, however, and was proper to be brought in this Court, the plaintiff will have its costs on the High Court scale.

Judgment for the plaintiff.

For the plaintiff:
RN Khanna
Khanna & Co, Nairobi

For the defendant:
A Jamidar
JJ & VM Patel, Nairobi

K R Patel v Tribhovan Monji Ramji
[1965] 1 EA 654 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	2 June 1965
Case Number:	20/1964
Before:	Bannerman J
Sourced by:	LawAfrica

[1] Rent Restriction – Assessment of standard rent – Rent Restriction Act 1962 (*T.*) *s.* 14 *and s.* 24 *– Power of Rent Restriction Board to fix standard rent retrospectively – Whether Board required to fix standard rent retrospectively – Date upon which standard rent applies.*

Editor's Summary

Under previous Rent Restriction legislation the rent of a certain flat in Tanga had been Shs. 200/- per month on July 1, 1959, but after that legislation ceased to have effect in 1960 the rent was increased to Shs. 250/- per month from January 1, 1961 and to Shs. 300/- per month from July 1, 1963. In the meantime there was passed the Rent Restriction Act 1962 by which a Rent Restriction Board could fix any date not earlier than February 14, 1962, from which a "standard rent" was to have effect in relation to any premises, and which also made excess rent paid since February 14, 1962, recoverable. Under the Act the "standard rent" of the flat was that paid on July 1, 1959, until a new "standard rent" was fixed by the Board. A Board was not established for the Tanga area until January 1, 1964. The tenant applied to the

Board to fix the “standard rent” of the flat from February 14, 1962 at Shs. 200/- per month and to order a refund of rent paid in excess of that figure since that date. The Board fixed the standard rent at Shs. 200/- but with effect from January 1, 1964, and ordered a refund of excess rent paid since that date. From this decision the tenant appealed, contending that the Act should be interpreted to mean that the “standard rent” (i.e., that paid on July 1, 1959) should have been applied retrospectively from February 14, 1962, and also that the Board should have fixed a date for the application of the standard rent retrospectively and ordered a refund of excess rent paid since.

Held –

(i) the “standard rent” of premises (until a new “standard rent” is fixed by a Board) applies to premises from the date upon which the Act itself becomes applicable to such premises and does not operate retrospectively;

(ii) between the expiry of the old Rent Restriction legislation and the coming into force of the new there was no “standard rent” of the flat and therefore there could be no “excess rent” to be recovered under the Act. Any rent paid in the interval was paid under a vested right of the landlord which it would be against all principles of construction to impair by giving retrospective effect to the Act.

Appeal dismissed.

Cases referred to in judgment

(1) *Gower v. Field*, [1944] 1 All E.R. 151.

(2) *Hirji Devraj & Co. v. Hassanali Rajan Lalji* (1946), 13 E.A. 41.

(3) *Reid v. Reid* (1886), 31 Ch.D. 402.

(4) *Re Athlumney*, [1898] 2 Q.B. 551.

(5) *Jimmy Fannceca v. E. S. Amrolia*, [1957] E.A. 263 (T.).

Judgment:

Bannerman J: This is an appeal from a ruling of the Rent Restriction Board (hereinafter referred to as "the Board") sitting at Tanga on an application filed by the appellant herein as a tenant for the Board to determine or assess the standard rent of the premises, a three-roomed residential flat, occupied by him in House No. 47/9, Usambara Street, Tanga, and for the Board to order the respondent herein "to charge standard rent from February 14, 1962 at Shs. 200/- per month and refund excess rent collected Shs. 1,450/- with cost of this suit". The statement of facts upon which the application was based was as follows:

> "The residential building was completed in 1950 and was rented for three-roomed flat at Shs. 200/- per month and two-roomed flats at Shs. 120/-per month each. The three-roomed flat was rented to us at Shs. 200/- per month on December 1, 1954, but on revocation of Rent Restriction Ordinance it was increased from January 1, 1961 to Shs. 250/- per month and from July 1, 1963 to Shs. 300/- per month. On coming into operation of Rent Restriction Ordinance though rent was demanded for January, February and March at Shs. 300/- per month it is paid at the standard rent of Shs. 200/- per month . . ."

After taking evidence and hearing the advocates of the parties, the Board, on October 16, 1964, gave the following ruling:

> "In this case the evidence clearly shows that the rent for the suit premises as at July 1, 1959 was 200/-. The landlord has adduced no evidence to justify the Board increasing this figure. The standard rent is fixed at Shs. 200/-per month.
>
> As to the tenants' application for recovery of excess rent paid, the Board has carefully considered the submissions of counsel and has decided that the standard rent is to be effective in this case from January 1, 1964 and any rent paid in excess of the standard rate from that date shall be refunded to the applicant by the respondent forthwith."

The appellant herein, in his Memorandum of Appeal, raised the following grounds against the said ruling of the Board:

> "1. The standard rent of the premises under the Rent Restriction Act 1962 was and should be the rent of the premises as on the prescribed date until a new standard rent decided by it.
>
> 2. That the right of recovery of the amount paid by the appellant in excess of the standard rent being a statutory right should be strictly enforced as against the respondent and was retrospective.
>
> 3. That the powers of the Rent Restriction Board in fixing the date from which the standard rent fixed by it were subject to the objects of and limitations imposed by the Rent Restriction Act, 1962."

Before the application was made to the Board, the premises had been sold and transferred by the

respondent herein to the Hindu Mandal for Shs. 45,000/-

and notice had been given to the appellant to pay rent to the new landlord as from April 1, 1964. It is admitted that the appellant has paid rent at Shs. 200/-per month from January 1, 1964, so that the fact of the sale is of no consequence in this appeal in so far as the order for the recovery of excess rent which is appealed against does not affect the new landlord.

It is not disputed that the suit premises were in existence and were let to the appellants on the prescribed date, July 1, 1959, at a rental of Shs. 200/- per month. It is not disputed, further, that a Rent Restriction Board was established for the Tanga area under the provisions of the Rent Restriction Act, 1962 (hereinafter referred to as "the Act") on January 1, 1964, by *Gazette* Notice No. 2923 of December 20, 1963, and that the provisions of the Act became applicable to that area as from the date of such establishment by reason of s. 1 (2) of the Act.

In accordance with the definition of "Standard Rent" in s. 2 (1) and by virtue of s. 4 of the Act until a new rent is fixed or determined by the Board, the standard rent of the suit premises as soon as the Act became applicable to it was the rent paid on the prescribed date, July 1, 1959. It is not necessary for me to stress that the effect of the provisions of the two sections of the Act is that as from the date that the Act becomes applicable to any premises the standard rent of such premises until a new one is fixed by a Board is the rent at which such premises were let on the prescribed date if the premises were then existing and let. The two sections cannot be interpreted to mean that the standard rent, being the rent at which the premises were let on the prescribed date, is to apply retrospectively as from the prescribed date. It is only in the light of such interpretation that Ground 1 of the Memorandum of Appeal, which is not very clearly worded, can be understood, otherwise it must fail. In *Gower v. Field* (1), Goddard, L.J., as he then was, said ([1944] 1 All E.R. at p. 157):

> "The standard rent operates in rem as has more than once been held in this court. The effect of that is that the standard rent attaches from the moment when the house is brought under control . . ."

This statement was approved and applied in the case of *Hirji Devraj & Co. v. Hassanali Rajan Lalji* (2). In the instant case, although the Act came into operation on August 20, 1962, it was, by reason of s. 1 (2) thereof, made applicable to the Tanga Area on January 1, 1964, and therefore the suit premises were brought under control as from that date. Until a determination or assessment of the standard rent was made by the Board the standard rent was therefore Shs. 200/- as from January 1, 1964.

The real issue in this appeal is the extent of the power of the Board, on determining a standard rent, to fix a date from which the standard rent is to be applicable retrospectively. Under ss. 4 (4) and 7 (1) (*d*) of the Act the Board has the power "to fix any date not being earlier than the prescribed date from which a standard rent is to have effect in relation to any premises". In arguing grounds 2 and 3, which deal with this issue together, the advocate for the appellant contended that the power and discretion of the Board to fix such a date should be exercised judicially so as not to affect or abrogate any rights conferred on the tenant by ss. 14 and 24 of the Act or so as generally not to conflict with and defeat the objects, intents and purposes of the Act. Under s. 14 of the Act "where the rent of any premises has been since February 14, 1962, or is, after the commencement of this Act, increased, then, if the increased rent exceeds the standard rent by more than the amount, if any, permitted under this Act, the amount of such excess shall, notwithstanding any agreement to the contrary, be irrecoverable". By s. 24 of the Act "any such amount made irrecoverable, if paid by the tenant, shall be recoverable from the landlord or

other person or from his legal representatives by the tenant or other person by whom it was paid" subject to the limitation that such claim shall not be for more than the total of payments made within a period of two years from the date of the claim. It was argued that payments of rents made by the appellant over and above the standard rent of Shs. 200/- from February 14, 1962, amounting to Shs. 1,450/-, were recoverable by the appellant from the respondent and that the Board in ruling that "the standard rent is to be effective in this case from January 1, 1964 and any rent paid in excess from that date shall be refunded to the applicant by the respondent forthwith" failed to take into consideration the amount of excess rent paid by the appellant prior to January 1, 1964, thus not only nullifying the express provisions of the Act but also defeating the intent and purpose of the Statute to control rents at a level not above the standard rent. Further, by so ruling, the Board overlooked and failed to give effect to s. 37 of the Act whereby "no effect shall be given by any court or board to any agreement or contract or to any term or condition thereof which is at variance with any provisions of this Act" and that by disallowing the claim for excess rent paid from February 14, 1962, to December 31, 1963, the Board was thereby giving effect to agreements which were at variance with the provisions of the Act and by which the standard rent of Shs. 200/- per month had been increased to Shs. 250/- per month from January 1, 1961, and again to Shs. 300/- per month from July 1, 1963. As I understand the arguments advanced in favour of the appellants, although the Act became applicable to the suit premises from the date when the Board was established for Tanga Area the provisions of the Act should be applied retrospectively and the date from which the standard rent should have been made applicable should have been so fixed as at least to include the period during which, according to the appellant, he had paid excess rents. On the other hand, the respondent's advocate submitted that the Board exercised its discretion judicially and was justified in fixing January 1, 1964, as the date from which the standard rent fixed by it should be applicable to the suit premises, since to fix an earlier date as claimed by the appellant would mean giving retrospective effect to the Act during a period when the suit premises had not been brought under control.

In *Reid v. Reid* (3) ((1886), 31 Ch.D. at p. 408), Bowen, L.J., said:

> "The particular rule of construction which has been referred to but which is valuable only when the words of an Act of Parliament are not plain is embodied in the well-known maxim, 'omnia nova constitutio futuris temporibus formam inponere debet non praeteritis' – that is, except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act which is to a certain extent retrospective, and in construing a section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is a necessary corollary of the general proposition that you ought not to give a larger retrospective power to a section even in an Act which is to some extent intended to be retrospective, that you can plainly see the legislature meant."

Again, in *Re Athlumney* (4), Wright, J., as he then was, said:

> "Perhaps no rule of construction is more firmly established than this – that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure unless that effect cannot be avoided without doing violence to the language of the enactment."

The question to be decided here, therefore, is whether the Board by fixing

the date from which the standard rent was to be applicable as it did without necessarily giving it retrospective effect to February 14, 1962, as claimed by the appellant, impaired or interfered with some vested right or obligation. In my considered opinion the arguments of the appellant's advocate would have been convincing and tenable to some extent if the Act had been made applicable to the Tanga Area, and therefore to the suit premises, from the date it came into force and not, as pointed out by the respondent's advocate, from the date the Board was established for that area under the Act.

The building in which the suit premises are situated had, according to the evidence, been erected between 1949 and 1950 while the Land (Rent and Mortgage Interest Restriction) Ordinance, 1941, was in force but there was no evidence to show what rent, if any, was paid or whether any standard rent was determined in respect of the suit premises up to the time of the repeal of the said Ordinance. After the Rent Restriction Ordinance, 1951, a Temporary Statute which, on coming into force, had expressly repealed the Land (Rent and Mortgage Interest Restriction) Ordinance, 1941, expired on December 31, 1960, there was no standard rent applicable to the suit premises, there being no enactment or saving clause to make any standard rent, or any provisions of the expired Ordinance, expressly or by necessary implication, applicable for any period after such expiry. Until the new Rent Restriction Act, 1962, came into force on August 20, 1962, the respondent and the appellant were free to enter into any agreements for the payment of any rent they chose to fix in respect of the suit premises and this situation continued until the Board was established and the Act became applicable to premises within the Tanga Area on January 1, 1964. It follows, in my opinion, that the respondent was legally entitled to enter into agreement with the appellant for the payment of a new rent in respect of the suit premises on January 1, 1961, at Shs. 250/- per month and again on July 1, 1963, at Shs. 300/- per month before the suit premises became controlled on January 1, 1964, when the standard rent automatically became Shs. 200/- by virtue of the proviso to the definition of Standard Rent in s. 2 (1) of the Act. Since there was no standard rent for the suit premises between January 1, 1961, and December 31, 1963, there could not have been any increased rent paid in excess of a non-existent standard rent and any rent paid during that period was rent lawfully due and payable at the time of payment so that there was no excess which was made irrecoverable by s. 14 of the Act and therefore recoverable under s. 24 of the Act. The sum of Shs. 1,450/- which the appellant claimed as excess rent paid by him was in fact money paid under an existing and vested right of the landlord and it would be against all principles of construction to give retrospective effect to any provision of the Act so as to impair such right as had accrued and been satisfied before the suit premises became controlled on January 1, 1964.

Turning to the power of the Board under ss. 4 (4) and 7 (1) (*d*) of the Act, there is no doubt that the Board is specifically empowered to fix a date not being earlier than the prescribed date from which a standard rent is to have effect in relation to any premises and that "while it may well be desirable, particularly so when an application is strongly contested, for a board to set out the reasons for its decision, there are no statutory requirements . . . as to the form which the decision must take", *Jimmy Fannceca v. E. S. Amrolia* (5). It is true that the Board gave no reasons for its ruling. Nevertheless such power to fix a date. which is discretionary, should be exercised judicially and if, as already stated, the rent paid by the appellant to the respondent between February 14, 1962 and December 31, 1963, was lawful rent then due to the respondents under agreements which were perfectly legal and enforceable, the Board would not have done justice between the parties if it had so fixed the date of the application of the standard rent retrospectively in such a way as to affect the legal

rights which had already accrued to the respondent and make him refund amounts to which he was lawfully entitled at the time they were paid. Whatever obscure reason the legislature had for picking on the date February 14, 1962, for the purposes of both ss. 14 and 24 of the Act, the Board was empowered to fix a date, not necessarily February 14, 1962, as it did. From the facts and circumstances of this case I am quite satisfied that the Board exercised its discretion judicially in ruling that the standard rent is to be applicable as from January 1, 1964, and grounds 2 and 3 must fail.

In the result, this appeal must be dismissed with costs to the respondent.

Appeal dismissed.

For the appellant:
JM Dave
JM Dave & Co, Dar-es-Salaam

For the respondent:
BR Patel
BR Patel, Dar-es-Salaam

Claud Salum v Republic
[1965] 1 EA 659 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	30 October 1965
Case Number:	103/1965
Before:	Sir Samuel Quashie-Idun P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – Kimicha, J

[1] Criminal law – Murder – Plea of self-defence – Provocation – Misdirection – Whether conviction of murder should be reduced to manslaughter.

Editor's Summary

The appellant was convicted of murder. At the trial the defence was of self defence and provocation. The evidence was that the deceased and the appellant had been living together as man and wife for nine years, although not legally married; that they had quarrelled and separated in 1963; that in 1964 the appellant met the deceased and asked if she had been pregnant and had miscarried and the deceased agreed that it was true; that the appellant became angry and slapped her whereupon the deceased seized his penis, at the same time saying that it was not he who had caused her pregnancy; and that the pain caused the

appellant to feel dizzy and he lost his senses and stabbed her with a knife without realising what he was doing. The trial judge in his summing up to the assessors dealt fully with the plea of self defence and found that the evidence could not sustain such a plea, but dealt only briefly with the question of provocation, apparently related it only to the insults the deceased was alleged to have uttered, and considered the alleged assault by the deceased only in relation to self-defence and not in relation to provocation. On appeal,

Held – (Sir Samuel Quashie-Idun, P., dissenting) the trial judge having misdirected himself, and presumably the assessors, on the possibility that the appellant acted under provocation, the appellant was deprived of a possible verdict of manslaughter and accordingly the appellant must be given the benefit of the doubt and the conviction of murder be reduced to one of manslaughter.

Appeal allowed. Conviction of murder quashed and conviction of manslaughter substituted.

Cases referred to in judgment

(1) *Okeny Kamau Okok v. R.*, [1960] E.A. 178 (C.A.).

(2) *Washington Odindo v. R.* (1954), 21 E.A.C.A. 392.

(3) *Msoro Galime v. Republic*, [1964] E.A. 488 (C.A.).

(4) *Mdiu Mande v. Republic*, [1965] E.A. 193 (C.A.).

(5) *Rajab Salum v. Republic*, [1965] E.A. 366 (C.A.).

(6) *R. v. Moor* (1920), 15 Cr. App. R. 31.

(7) *R. v. Elizabeth Prefect* (1917), 12 Cr. App. Rep. 273.

(8) *R. v. Prince*, [1941] 3 All E.R. 37.

(9) *R. v. McPherson* (1957), 41 Cr. App. Rep. 213.

(10) *Mancini v. Director of Public Prosecutions* (1942), 28 Cr. App. Rep. 65; [1942] A.C. 1.

October 30. The following judgments were read.

Judgment

Spry JA: The appellant was convicted of murder. At his trial, he did not deny that he had killed the deceased but he claimed that he had done so in circumstances that amounted to extreme provocation, sufficient to reduce his offence to manslaughter. It is true that he used the words "I defended myself" but reading his evidence as a whole, the case for the appellant is clearly one of provocation rather than self-defence, and it was provocation that was argued by his counsel.

The appellant and the deceased had formerly lived together as man and wife for nine years, although not legally married, and they had one child. They quarrelled and separated in 1963. In September, 1964, the deceased and another woman, Sibeda, were resting near a river while carrying crops back from a shamba. The appellant appeared and sat down near them. Sibeda went to wash in the river. Then she heard a cry and returned to see the deceased lying on the ground. The appellant had just stabbed her and he then stabbed her twice more. She died as a result of those wounds.

Those facts are not in dispute. The appellant gave evidence and said that after Sibeda went to the river, he had asked the deceased if it was true as he had been told that she had been pregnant and had miscarried. He said that she at first prevaricated but then agreed that it was true. He was angry and slapped her twice. She then seized his penis, at the same time abusing him, saying that it was not he who had caused her pregnancy. He said that the pain caused him to feel dizzy and to lose his senses and that he stabbed her without realizing what he was doing.

The learned trial judge directed the assessors that in the absence of any conflicting evidence they should accept the appellant's story as the truth. With respect, that was a misdirection, as the credibility of a witness is not a matter on which assessors should be given directions; it is a matter on which assessors should be free to express their opinions. As, however, the direction was in the appellant's favour, he cannot have been prejudiced by it.

It is not clear from his notes how the learned judge directed the assessors on the law relating to provocation. In his judgment, he appears to have treated self-defence and provocation together. He dealt fully with the former and found that the evidence could not sustain a plea of self-defence. I think that was undoubtedly correct. He dealt only briefly with the question of provocation, and apparently related it only to the insults the deceased is alleged to have uttered. It would seem that the learned judge considered the alleged seizing of the appellant's penis only in relation to self-defence and not in relation to provocation.

I would in this connection refer to the following passages from the judgment. First in dealing with the plea of self-defence the learned judge said:

“Now turning to the accused’s plea of self-defence. If the accused’s version of the incident is true – all that the deceased did to the accused was

> to pull his penis, this act as he alleges caused him much pain, but apart from causing him much pain, the deceased's act did not threaten the immediate destruction of the accused's life. Moreover the accused has said in evidence that he was older and stronger than the deceased and that he stabbed her while she was lying on her back on the ground. She was unarmed. She was therefore not in a position of inflicting any serious injury to the accused.
>
> It could also be argued that as it was the accused who attacked the deceased first it was the deceased rather than the accused who was entitled to the defence of self-defence and that she was justified in acting in the way she did.
>
> On these grounds the plea of self-defence is not available to the accused."

The judge then proceeded in his judgment to deal with the defence of provocation and in this respect he said:

> "The accused has alleged that he was gravely insulted by the deceased after he had slapped her twice, by telling him that the pregnancy was caused by another man and that it was not in his mother or sister. But here again, the insults, if uttered at all, were uttered after the accused had started to attack the deceased. They cannot therefore be held to have caused the attack. Again if it is argued in the accused's favour that the insults, although uttered after the accused had attacked the deceased, they inflamed the accused's anger, thus causing the stabbing. But in order to reduce murder to manslaughter the mode of resentment must bear a reasonable proportion to the provocation. I find it as a fact that the accused was not married to the deceased and had therefore no right of imposing his authority on her in the way he did.
>
> Both the assessors who have sat with me have unanimously held that the mere refusal of the deceased that she was pregnant and the words that she uttered after the slapping did not bear any proportion to the accused's mode of resentment which resulted in the deceased's death."

It is therefore apparent that the judge in directing himself on provocation did not consider the appellant's defence that he had been assaulted and as a result suffered intense pain; but only took into account the verbal insults and provocative words used by the deceased.

In this connection, it will be noted that the learned judge interpreted the opinions of the assessors as meaning that the acts of the appellant were out of proportion to any provocation he had received. This was, of course, most relevant because, under the provisions of s. 202 of the Penal Code (Cap. 16), an act or insult only constitutes provocation in law if it is of such a nature or degree that an ordinary member of the accused's community would be likely in similar circumstances to react in a way similar to that actually taken by the accused. The value of the assessors' opinions is, however, completely vitiated if, when they considered the question of provocation, they believed they had only to take into account the words uttered by the deceased, and not her actions also. We cannot know what advice they would have offered had they been directed correctly on the legal meaning of provocation.

The learned judge made no express finding on the evidence given by the appellant. It would appear from his direction to the assessors that he accepted it – certainly he did not expressly reject it. If he accepted it, it is not now open to us to review that decision, since the matter is entirely one of credibility. And if the appellant's evidence were true, it would appear that he suffered extreme pain at least for a few moments from the action of the deceased in seizing his penis. I think that alone might have amounted to legal provocation, and more

particularly so if coupled with insults. The fact that the deceased may have been acting in retaliation for the slaps she had received is, I think, immaterial (see *Okeny Kamu Okok v. R.* (1)), and her action would not appear to have been one of self-defence. Counsel, for the Republic, suggested that the evidence of the appellant regarding the pain he suffered was inconsistent with the evidence of Sibeda that after the killing she was chased by the appellant. With respect, however, I do not think there is any necessary contradiction. Where the more sensitive parts of the body are concerned, it is possible to feel great pain without sustaining any disabling injury.

The question for this court is not whether we think the acts and words of the deceased amounted to provocation but whether any reasonable court properly directed might have thought so. If the answer to that question is affirmative, then the misdirection amounts to a miscarriage of justice, since it has deprived the appellant of a possible verdict of manslaughter. In my view, the appellant must be given the benefit of the doubt and the conviction of murder be reduced to one of manslaughter.

I would add two comments on matters of practice. First, I note that the former practice of showing the tribes to which assessors and witnesses belong appears to have been abandoned and instead their nationality alone appears. I think this change undesirable. In the majority of cases, the difference is immaterial, but it may be of the greatest importance when questions of tribal custom or of conduct amounting to provocation are concerned. I hope there will be a return to the former practice.

Secondly, I note that in several cases, expert medical witnesses have merely produced reports. I think this is wrong and that the correct course is for such witnesses to give their evidence viva voce, like any other witnesses, merely refreshing their memories, where necessary, from notes or reports made at the time when the examinations as to which they are testifying were carried out.

For the reasons given above, I think this appeal should be allowed, and the conviction of murder quashed and a conviction of manslaughter, contrary to ss. 195 and 198 of the Penal Code substituted. I would set aside the sentence of death and substitute a sentence of imprisonment for ten years.

Sir Samuel Quashie-Idun P: The appellant was convicted of murder by Kimicha, J., sitting at the High Court of Morogoro and was sentenced to death.

The following were the facts of the case as led in evidence by the prosecution.

The deceased, Consolate Mashindanga and the appellant had lived together as man and wife since the year 1954 but were not married because the appellant did not pay the “bride money”. In 1963, the deceased left the appellant and took with her the child born as a result of her association with the appellant. Although the appellant and the deceased lived in the same village after they had been separated, the appellant did not visit the deceased. On September 5, 1964, the deceased and her niece, Sibeda, the second P.W. went to carry paddy (rice) from the deceased’s farm. On the way from the farm the second P.W. and the deceased sat by the road side resting. While there, the appellant appeared behind them and sat down about four yards from where the second P.W. and the deceased were sitting. The appellant did not speak to the two women, neither did they speak to the appellant. The second P.W. left to wash herself and her baby in a stream nearby. While washing her baby, the second P.W. heard the deceased cry that she had been hurt by the appellant. Second P.W. then ran back to where she had left the deceased and the appellant. Second P.W. found the deceased lying down on her back and the appellant pulling out a knife from the deceased’s body. The witness who was standing about 15 yards away,

saw the appellant stab the deceased a second time and again for the third time while the deceased was still lying down. Witness raised an alarm, but nobody came. The appellant then stood up and walked away. The deceased stood up, staggered for a few yards and fell down. The witness then followed the appellant who turned back and chased the witness. Witness ran into a house and the appellant then ran into the bush. The appellant was dressed in a pair of khaki trousers, a shirt and a vest. After a report had been made at the village, the deceased's body was carried to the dispensary. The body was examined by a Medical Aid who found three stab wounds on it. The body was buried but was exhumed later and examined by a Medical Officer whose report showed that there were three deep stab wounds at the root of the neck, the right shoulder and the right upper arm.

An uncle of the appellant, Juffari Mbagule, the sixth P.W. testified that he joined a search party for the appellant on the night the deceased was killed. The appellant was not found. But early in the morning of the following Monday, the appellant knocked at witness's door. The uncle asked him where he had been and he said he was afraid because he had fought with the deceased. To prevent the appellant escaping, the uncle told him that the deceased was not dead, but was at the hospital, although the deceased was already dead. The uncle spoke loudly to the appellant and the villagers who heard him came and arrested the appellant. The appellant was taken to the Police Station and was charged with murder. He did not appear to have made any statement to the Police.

At the trial however, the appellant gave evidence and stated that he and the deceased started to quarrel in 1963. He suspected the deceased of having committed adultery. He took her to the Local Court, but he had no evidence to establish his complaint and so his case was dismissed. He and the deceased returned home after the court proceedings. On the next morning he instructed the deceased to go and collect "paddy" from the Shamba. The deceased refused to go and so the appellant gave her a beating. The deceased made a report to the mission where according to him, he and the deceased had been married. He was ordered to pacify the deceased with Shs. 20/-.

The deceased refused to accept the money when it was offered to her. The deceased left the appellant and went to her parents; later the deceased refused to go back to the appellant and they were separated. The appellant said he discovered later that the deceased was pregnant and the appellant approached the deceased's father for a reconciliation alleging that the deceased was pregnant. The deceased denied that she was pregnant. According to the appellant he learned that the deceased had miscarried. On the day he killed the deceased, he found the deceased and her companion resting by the road side. He said he asked her about the miscarriage after second P.W. had left and that the deceased admitted that she had been pregnant and had had a miscarriage. The appellant continued his evidence as follows:

> "I got angry. I slapped her twice and she then got hold of my private. She then abused me saying that the pregnancy was not her mother or sister. She was at the same time holding my private parts. She said that the pregnancy was by someone else. I defended myself. I felt a lot of pain, I lost my senses. I had a knife in my pocket-I just found that I had stabbed her. I do not know how many times. I felt dizzy because of the pain. It was my habit to walk about with a knife on me. I did not intend to harm my wife. I have always wanted to live with her. I am sorry that my wife is dead. I then ran into the bush because I was afraid . . ."

Under cross-examination, the appellant stated that the deceased was sitting down when he beat her with his hand, and that the deceased was not as strong as he the appellant was.

After a summing-up to the assessors, with which I shall deal later, the first assessor gave the following opinion to the learned trial judge:

> "Accused has no justification in using a knife against the deceased. I also do not believe that he was provoked as he alleges; he had no ground for provocation. I think there is no legal excuse for killing the deceased."

The second assessor stated:

> "I entirely agree with my colleague."

It is observed at this juncture that the assessors did not give their opinions on the case as a whole or on the general issue as to the guilt or innocence of the accused. I would refer to the following decisions of the court:

Washington Odindo v. R. (2), *Msoro Galime v. Republic* (3), *Mdiu Mande v. Republic* (4), Criminal Appeal No. 126 and also *Rajabu Salum v. Republic* (5). It is hoped that these decisions which are based on s. 283 of the Criminal Procedure Code will be strictly followed.

The learned trial judge accepted the opinions of the assessors and convicted the appellant of murder.

A number of grounds of appeal were filed by the appellant but when the case came up before this court, his counsel indicated that he was unable to contest the decision. The court, however, asked the State Attorney, who appeared for the respondent, whether he thought that the assessors had been properly directed on the issue of provocation. The learned State Attorney submitted that there was no sufficient evidence that the appellant was provoked before he killed the deceased and that the evidence that he chased the second P.W. after he had killed the deceased showed that he could not have suffered the pains he said he felt when the deceased held his penis.

The learned trial judge's summing-up cannot be said to be quite satisfactory. For one thing, he appears to have confused the defence of self-defence with that of provocation. This, I think, is partially due to what the accused said in his evidence that he defended himself. The confusion is clearly shown in his judgment in which he stated as follows:

> "I further advised them (the assessors) that as nobody saw or heard what had happened when the fight started and that as the deceased and the accused said nothing when Sibeda arrived at the scene of the crime, the benefit of the doubt should be given to the accused and his allegations that the deceased had insulted him and that she had pulled his penis should be accepted as true, and that what should be considered is whether on the evidence, the pleas of self-defence and provocation are available to him . . . Now turning to the accused's plea of self-defence – if the accused's version of the incident is true – all the deceased did to the accused was to pull his penis; this act as he alleges caused him much pain but apart from causing him much pain, the deceased's act did not threaten the immediate destruction of the accused's life. Moreover the accused has said in evidence that he was older and stronger than the deceased and that he stabbed her while she was lying on her back on the ground. She was unarmed. She was therefore not in a position of inflicting any serious injury to the accused: on these grounds, the plea of self-defence is not available to the accused."

It is clear from the above portion of the learned trial judge's judgment and what he stated later that he was dealing with "self-defence" which was not the

only defence put up by the accused. This is a misdirection on the part of the trial judge; and I would have held that it has occasioned a miscarriage of justice if there was no direction on the defence of provocation. Although both the summing-up and the judgment were not happily put, it is clear from both that the other defence available to the appellant, namely that of provocation was put to the assessors. In fact, the summing-up was rather in favour of the appellant in this respect. The assessors also heard the evidence of the appellant that the deceased held his penis, that he felt pain, he defended himself and lost his senses before he used the knife three times on the deceased. In spite of that evidence, the assessors gave their opinions that the accused was not provoked. The fact that the summing-up of the learned trial judge was favourable to the appellant is not a sufficient ground to impugn the opinions of the assessors which were accepted by the trial judge. In the case of *R. v. Moor* (6), it was held that, even where the learned judge disagreed with the verdict, the Court of Appeal would not dismiss the appeal where there was no ground for impugning the verdict. I would also refer to the case of *R. v. Elizabeth Prefect* (7), in which the Lord Chief Justice stated in his judgment as follows:

> "The summing-up was very favourable to the accused. It is obvious that the Judge wished the jury to acquit her. The questions in issue at the trial were purely questions of fact and were, therefore, for the determination of the jury and not for that of the judge. Unless we, sitting in this court, are prepared to say that, when a judge differs from a jury on a finding of fact, we ought to conclude that the verdict is unreasonable or that there has been a miscarriage of justice, we cannot quash the conviction."

It is my view that as the assessors heard the evidence and the defence which the appellant put up, any defect in the summing-up of the learned trial judge which I have said was more favourable to the appellant than it was to the prosecution, is immaterial, unless it can be argued that the defect has occasioned a miscarriage of justice. In the case of *R. v. Prince* (8), it was held that in a trial for murder, the jury should be directed that, if, after a review of all the evidence, they are left in reasonable doubt as to whether, even if the prisoner's explanation is not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted. See also *R. v. McPherson*, (9).

I have stated earlier in this judgment that the summing-up of the learned trial judge in the present case was not quite satisfactory but it is my view that he directed the assessors and himself on the two defences put up, namely that the appellant was provoked and that he defended himself. Indeed he summed up in favour of the appellant. He did what was expected of him and as was stated in *R. v. Prince* (8) as far as the defence of provocation was concerned.

Whether or not the appellant in the present case was provoked was a question for the assessors whose opinion was given to the trial judge. In rejecting that defence the assessors must have considered the whole circumstances of the case. There was the evidence that although the deceased was not the wife of the appellant, when he was left alone with the deceased and he had questioned her about her pregnancy, he became angry and assaulted her twice. Up to that moment the appellant was the aggressor whose action was unprovoked by the deceased and unjustified. Even if the deceased was somehow able to get hold of the appellant's penis while the appellant was wearing a pair of trousers, the appellant was in a position to use his hands to stop the deceased continuing to hold his penis. He admitted in evidence that he was stronger than the deceased. Instead of using his hands he gave the deceased three stabs with a knife. According to the evidence, the second and the third injuries were inflicted while the deceased was lying down.

In the case of *Mancini v. Director of Public Prosecutions* (10), it was held by the House of Lords that to reduce an offence of murder to manslaughter it is necessary to take into account the instrument with which the homicide was effected.

This is what the learned Lord Chancellor said in his judgment in the Mancini case.

> "In applying the test it is of particular importance . . . to take into account the instrument with which the homicide was effected, for to retort, on the heat of passion induced by a simple blow is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter."

The statement that the deceased held the appellant's penis was made by the appellant only when he was giving evidence and was not accepted by the assessors. Even if this was true, the conduct of the appellant in accosting the deceased on the road after he had failed in his attempts to persuade the deceased to go back to him, his admission that he became angry and assaulted her without any legal provocation, the manner in which he stabbed her and also chased the second P.W. who had done nothing to provoke him and to whom he obviously intended to do some bodily harm, are, in my view, sufficient to enable any court to come to the conclusion that the appellant was actuated by malice, if this was necessary, and to warrant the court returning a verdict of guilty of murder as the opinion of the assessors clearly indicated.

For the reasons I have stated, I regret that I am unable to agree with my brothers Duffus and Spry that the appeal should be allowed. I think the appeal should be dismissed. In view, however, of their majority decision, I make an order setting aside the sentence of death and substituting therefor a sentence of 10 years' imprisonment starting from the date of conviction.

Duffus JA: I agree with the judgment of Spry, J.A.

It is clear that the learned trial judge misdirected himself, and probably also the assessors, on the question of provocation. This is not, in my view, a case in which we can apply the proviso to r. 41 (1) of the Eastern African Court of Appeal Rules, as the trial judge might, if he had properly directed himself, have come to the conclusion that there was sufficient provocation to have reduced the offence from murder to manslaughter. I agree therefore with Spry, J.A. that this appeal should be allowed and the conviction of murder quashed and having regard to the established facts that a verdict of manslaughter be substituted, and the appellant be sentenced to imprisonment for ten years.

Appeal allowed. Conviction of murder quashed and conviction of manslaughter substituted.

For the appellant:
SJ Jadeja
SJ Jadeja, Dar-es-Salaam

For the respondent:
OT Hamlyn (*State Attorney*, Tanzania)
The Attorney General, Tanzania

Dafasi Magayi and others v Uganda
[1965] 1 EA 667 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	30 December 1965
Case Number:	162/1965
Before:	Sir Clement De Lestang, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Fuad, J

[1] Criminal Law – Practice – Confession – Retracted confession – Trial within trial – Right of accused to make unsworn statement – Criminal Procedure Code (*Cap.* 24) *s.* 278 (*U.*).

[2] Criminal Law – Murder – Beating of suspected thief – Beating by sticks by persons escorting thief until he died – Common intention.

[3] Criminal Law – Offence committed in obedience to unlawful order – Whether malice aforethought.

Editor's Summary

The appellants were jointly tried and convicted of murder of a suspected thief whom they had beaten with sticks until he died. As regards the first appellant there was a retracted confession and in order to ascertain its admissibility a trial within a trial was held. The first appellant wished to make an unsworn statement but was not allowed to do so, the trial judge being of the opinion that the right conferred by s. 278 of the Criminal Procedure Code on an accused person to make an unsworn statement only arises when he enters upon his defence and does not apply in "a trial within a trial". On appeal, this matter was raised and also questions as to the common intention of some of the appellants and the effect of obedience by them to the orders of a chief.

Held –

(i) in *Kinyori Karuditu v. R.* (1) the court sanctioned the right of an accused to make an unsworn statement in a trial within a trial and the practice should be followed;

(ii) although the trial judge deprived the first appellant of his right to make an unsworn statement the court was satisfied that this had not occasioned a failure of justice as there was abundant evidence apart from the confession implicating the first appellant;

(iii) since it was abundantly proved that the deceased was beaten mercilessly with sticks by the appellants until he died there was enough evidence of "common intention" to kill or cause grievous harm;

(iv) none of the appellants could shelter behind the invitation or order of the chief, which they must have known was not a lawful order which they were bound to obey.

Appeal dismissed.

Cases referred to in judgment

(1) *Kinyori Karuditu v. R.* (1956), 23 E.A.C.A. 480.

(2) *Bampamyiki Buhile v. R.*, [1958] E.A. 398 (C.A.).

(3) *Lamabutu Makalya v. R.*, [1958] E.A. 706 (C.A.).

(4) *Connelly v. Director of Public Prosecutions*, [1964] 2 All E.R. 401.

(5) *R. v. Tabulayenka Kirya* (1943), 10 E.A.C.A. 51.

(6) *Dracaku Afia v. R.*, [1963] E.A. 363.

Judgment

Sir Clement De Lestang JA: read the following judgment of the court.

The nine appellants were jointly tried and convicted in the High Court of Uganda at Kampala of the murder of Webisa Kadondi. Originally the indictment contained two other counts charging the appellants with the murder of two other persons but at the trial the learned judge upheld an objection by counsel for the appellants and having put State counsel to his election, directed the trial to proceed on the third count only and ordered separate trials of the other two counts at the following sessions of the High Court at Mbale. Because the objection was raised and the ruling given in the presence of the assessors, it was contended in the appeal that the learned judge ought to have discharged the assessors and begun the trial de novo with new assessors, on the ground that knowledge by the assessors that there were three charges against the appellants, was prejudicial to them. We are satisfied that the appellants could not have been prejudiced by what occurred as it was impossible to avoid the disclosure at the trial of the other two deaths and we can see no merit in this ground of appeal.

With the exception of the first appellant Difasi the case against the appellants rests almost entirely on the evidence of two eye-witnesses namely Wesonga Wakoboca, the clan-brother of the deceased and Zelida Malongo, the daughter of one of the other persons allegedly killed in the same incident. They testified to the following effect. The deceased and two other persons were arrested independently on suspicion of stealing foodstuff and other property belonging to the first appellant Difasi. They were tied together with ropes about 18 inches apart and made to walk balancing the suspected stolen property on their heads, their arms being tied, bent, at their sides. They were being marched towards the Gombolola Headquarters, their escort consisting of two chiefs, second and third appellants, Daudi and Ongango and the other appellants with possibly a few others. They had not gone far when the pot on the deceased's head fell to the ground, whereupon the second appellant Daudi struck the deceased on the head with a stick he was carrying and the deceased fell to the ground bringing the other two prisoners down with him. All the appellants then started to beat the deceased and the other two prisoners with sticks. During the beating the second appellant Daudi incited the crowd saying "beat them I will face the case", and the beating continued until the deceased and the others died. According to the doctor whose report was put in evidence in his absence from the country, the deceased had very many abrasions on the head, chest and trunk, the left side of his skull had been smashed in and the brain damaged. According to the doctor the injuries were caused by a heavy blunt instrument such as a stick used with considerable force, and the cause of death was damage to the brain.

As regards the first appellant Difasi there was also an extra-judicial confession (with which we will deal later), which the learned judge held, after "a trial within a trial", to have been voluntarily made and properly recorded and also a statutory statement which he made at the preliminary inquiry in which he admitted having beaten the deceased.

The learned judge in an exhaustive and careful judgment, after considering such discrepancies as existed in the evidence of the two eye-witnesses and after warning himself of the danger of accepting the evidence of witnesses who were related to one or other of the deceased, and the inherent difficulties of accurate identification in the circumstances of the incident, believed these two witnesses

and found the facts as above stated proved. We can see no good reason to disagree with the learned judge and none of the arguments advanced to us on the facts has caused us to doubt the correctness of his findings. It was strongly urged upon us that the confession of the first appellant in which he said that he killed the deceased exonerated the other appellants, since, as the learned judge said, it might be inferred that he was saying that he alone had killed the deceased. The learned judge did not accept that part of the confession as being true and we think rightly since it was both contrary to the evidence of the two eye-witnesses whom he believed and contradicted by the first appellant himself in his statutory statement at the preliminary inquiry. It does not, therefore, cast any doubt on the case against the other appellants.

There are nevertheless two matters raised in the appeal with which we must deal specifically.

The first relates to the "trial within a trial", which was held in order to ascertain the admissibility of the confession of the first appellant Difasi. The first appellant wished to make an unsworn statement but was not allowed to do so, the learned judge being of opinion that the right conferred by s. 278 of the C.P.C. on an accused person to make an unsworn statement only arises when he enters upon his defence and does not apply in "a trial within a trial". He purported to base his decision *inter alia* on *Kinyori Karuditu v. R.* (1). With great respect the learned judge must have misread that case. In it this court laid down the procedure to be followed in "a trial within a trial", and clearly sanctioned the right of an accused person to make an unsworn statement. We need only refer to the following passage:

> "The assessors having left the court, the Crown, upon whom the burden rests of proving the statement to be admissible, will call its witnesses, followed by any evidence or statement from the dock which the defence elects . . ."

The practice laid down in *Kinyori's* case (1) was expressly approved in *Bampamyiki Buhile v. R.* (2) and *Lamambutu Makalya v. R.* (3). "A trial within a trial" is purely a rule of practice and not a rule of law. As Lord Devlin said in *Connelly v. Director of Public Prosecutions* (4) [1964] 2 All E.R. at p. 446, when comparing a rule of practice with a rule of law:

> "A rule of practice is in my opinion different. When declared by a court of competent jurisdiction, the rule must be followed until that court or a higher court declares it to be obsolete or bad or until it is altered by statute."

Until therefore, any of these events happen, the practice of allowing an accused person to make an unsworn statement in "a trial within a trial" should be followed and the learned judge deprived the first appellant of that right. It may be that in England an accused person must give evidence on oath but having regard to the vastly different conditions applying in both countries, it does not necessarily follow that the English practice should be followed here. The practice laid down in *Kinyori's* case (1) has endured for ten years and we can see no good reason to alter it at present.

We have considered whether the non-observance of that rule of practice has occasioned a failure of justice in so far as the first appellant was concerned and we are satisfied that it has not. There is abundant evidence apart from the confession implicating the first appellant and we have no doubt that if the learned judge had disregarded the confession he must necessarily have come to the same conclusion. Indeed the case against the first appellant is stronger than that against any of the appellants save possibly the second appellant.

The other question relates to common intention. Where a number of persons jointly beat another person causing his death and it is not possible to establish which blow actually caused the death none of the persons taking part in the beating may be convicted of murder unless it is proved that he had a common intention with the others to kill or cause grievous harm to the deceased. Common intention is dealt with in s. 22 of the Penal Code (Uganda) thus:

> "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

The learned judge dealt with the question of common intention in these words:

> "Giving the medical evidence of Dr. Harris (who could not be called) its most favourable construction, it was clear that this was a most terrible beating. A.S.P. Amuchu described too, the ghastly injuries he saw on the very day they were inflicted before any decomposition could have taken place. It seems clear to me that whether the deceased was rightly suspected or not of being a thief, any person who was identified as having taken part in that beating must be guilty of murder. Here was ample evidence of 'common intention'. The unlawful purpose was to beat a so-called thief. He was tied up, so there was no question of force being used to affect his arrest. The inference, from the actions of all the accused persons in taking part in this unmerciful beating, is irresistible – not only did none of the accused persons disassociate himself from the assault but they each prosecuted it with vigour. Not only was the deceased's death the probable consequence of the prosecution of their common purpose but the inevitable one. No one could have survived such a beating and no one could have suspected that he might. A clearer case for the application of s. 22 of the Penal Code is difficult to imagine. The facts of this case are on all fours with those in *R. v. Tabulayenka Kirya and Others* (5). The facts in *Dracaku Afia v. R.* (6) are patently distinguishable."

We can see no good reason to differ from the conclusion of the learned judge, and are unable to accept the contention that the appellants' intention was merely to chastise a thief. It is clear from the evidence that the deceased was attacked mercilessly with sticks until he died.

It was contended on behalf of some of the appellants that since they went in answer to an alarm and behaved lawfully in assisting the chief to arrest the thieves and convey them to the chief's Headquarters, they had no malice aforethought when in obedience to the chief they beat the deceased to death. We are unable to accept this contention. Although it is the custom in Uganda and elsewhere in East Africa to beat thieves the appellants cannot shelter behind the invitation or order of the chief. It was not a lawful order which they were bound to obey and they must have known as much. The fact that the chief said that he would "face the case" is itself an indication that he and they knew that what they were doing was wrong.

In conclusion we are satisfied that the appellants were properly convicted of murder and we dismiss their appeals.

Appeal dismissed.

For the first, second, third and eighth appellants:
SV Pandit
SV Pandit, Kampala

For the fourth, fifth, sixth and seventh appellants:

AK Mayanja
Mayanja Clerk & Co, Kampala

For the ninth appellant:
SH Dalal
Dalal & Singh, Kampala

For the respondent:
AG Deobhakta (*State Attorney*, Uganda)
The Attorney General, Uganda

Hassanali Rahemtulla Walji Hirji v Jamal Pirbhai and Sons
[1965] 1 EA 671 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	1 October 1965
Case Number:	27/1964
Before:	Chanan Singh J
Sourced by:	LawAfrica

[1] Landlord and Tenant – Distress – Agreement to pay higher fees than that allowed by Distress for Rent Rules – Subsequent claim for the excess by the landlord – Whether agreement illegal – Whether parties in pari delicto.

[2] Bailiff – Distress – Remuneration – Whether officer of court entitled to retain commission in excess of that provided by Distress for Rent Rules.

Editor's Summary

The appellant appointed the respondent bailiff to distrain for rent due and undertook in writing on the distress warrant to pay a commission, in excess of that allowed by the Distress for Rent Rules (K.), which the respondent retained from the proceeds of the distress. The appellant later discovered that the commission was greater than that allowed and sued for a refund of the excess in the magistrate's court, and lost. On appeal to the High Court:

Held –

(i) a bailiff is an officer of the Court and cannot be permitted to take advantage of an honest mistake such as that by which the excess payment was promised in this case;

(ii) the agreement being contrary to r. 21 of the Distress for Rent Rules, was illegal and void ab initio; but the main purpose of that rule being to protect tenants and landlords against exorbitant demands and because the rule is a prohibition against receiving, not against paying, excess fees, the parties were not in pari delicto and the appellant could recover.

Appeal allowed.

Cases referred to in judgment

(1) *Re Opera Ltd*. (1891), 2 Ch. 154.

(2) *Re Caidan, Ex parte Official Receiver v. Regis Property Co*., [1942] Ch. 90; [1941] 3 All E.R. 491.

(3) *Souza Figeiredo & Co. v. George Panagopaulos*, [1959] E.A. 756 (C.A.).

(4) *Day v. Davies* (1938), 107 L.J.K.B. 696; [1938] 1 All E.R. 686.

(5) *Bisgood v. Henderson's Transvaal Estates, Ltd*., [1908] 1 Ch. 743.

(6) *Cowan v. Milbourn* (1867), L.R. 2 Ex. 230.

(7) *Kiriri Cotton Co., Ltd. v. Dewani*, [1960] E.A. 188 (P.C.).

Judgment

Chanan Singh J: Messrs Inamdar & Inamdar, advocates of Mombasa wrote to Messrs. Akram & Esmail, advocates of Nairobi, on January 14, 1964, seeking their assistance in entrusting to "a reliable certified bailiff" the work of levying distress with the object of recovering Shs. 20,000/- rent due to the appellant by Messrs. J. H. Gidoomal (Nairobi) Limited. A warrant of distress was attached to the letter.

The name of the "certified bailiff" was apparently left blank on the warrant of distress and the name "Shamsudin Jamal Pirbhai, c/o Jamal Pirbhai & Sons" appears to have been inserted later in Nairobi.

The warrant was signed at the bottom by the appellant. The amount of Shs. 20,000/- mentioned in it was later reduced to Shs. 15,000/- so that the bailiff

was required to levy distress for the reduced amount. These facts are not in dispute. In fact no evidence was led in the lower court the case being argued on the basis of the pleadings and two exhibits (No. 1 the warrant of distress and No. 2 the covering letter to Messrs. Akram & Esmail) put in by consent.

The cause of the dispute are the two last sentences of the warrant of distress reading as follows:

> "And I also undertake to allow you a commission of ten per cent, on the amount of this warrant. This commission is beyond the legal and other reasonable expenses."

The respondent firm levied the distress and realised the sum of Shs. 15,000/- on the authority of the warrant. They deducted their ten per cent. commission (Shs. 15,000/-) and remitted the balance of Shs. 13,500/- to the appellant.

It is clear that the warrant of distress was prepared by the appellant in Mombasa and that the respondent firm had no hand in drafting it. The commission of ten per cent. was mentioned in the warrant by the appellant on his own initiative or on some independent person's advice. Later the appellant learnt from some source that the commission allowed to bailiffs by rules made under the Distress for Rent Act (Cap. 293) was less than ten per cent. and he demanded a refund of the excess. The refund was refused and the appellant filed Civil Case No. 3750 of 1964 in the Resident Magistrate's Court at Nairobi.

The contentions of the appellant before the learned Senior Resident Magistrate were two: first, that the agreement to pay ten per cent. commission was illegal in view of the provision in r. 21 of the Distress for Rent Rules made under s. 27 of the Distress for Rent Act, secondly, that the parties not being in pari delicto the appellant was entitled to a refund of the sum deducted by the respondent.

The learned Senior Resident Magistrate decided against the appellant on both these points. The present appeal is against that decision.

Rule 21 which has, naturally, loomed large in these proceedings reads as follows:

> "No person shall be entitled to any fees, charges, or expenses for levying a distress or for doing any act or thing in relation thereto, other than those specified in the Second Schedule to these Rules, unless a judge otherwise orders."

The charges in fact deducted by the respondents on the authority of the warrant of distress are in excess of those specified in the Schedule. They say they are entitled to keep the excess by virtue of the special agreement in the warrant.

Before I deal with the points raised by counsel, I wish to deal with a matter of general policy that arises. Section 18 (1) of the Distress for Rent says:

> "18 (1) No person shall act as a bailiff to levy any distress for rent unless he is authorized to act as a bailiff by a certificate in writing to that effect . . ."

Sub-section (5) of s. 18 says that a certificate "may at any time be cancelled or declared void by a judge". Section 27 gives the rule making power to the Chief Justice.

The Distress for Rent Rules were accordingly made under the powers given by s. 27. Rule 4 authorises "a judge or registrar" to grant a "special certificate" and provides that "a general certificate shall only be granted by a judge". Rules 9 to 11 relate to security which an applicant for a certificate may be required to furnish. Rule 15 empowers a judge (i) to cancel or declare void a

certificate, (ii) to forfeit security wholly or in part, and (iii) to direct that the amount forfeited shall be paid to an aggrieved party.

There is provision in r. 25 for taxation by the district registrar, in cases where the parties cannot agree on the amount of fees, charges, or expenses.

The question arises whether these provisions of law make the bailiff an officer of the Court. There is a well recognized principle of law which is stated by Chitty on Contracts (22nd Edn.) Vol. I, para. 1574, as follows: "Where it would be contrary to fair dealing, the Court will not allow one of its officers, such as a trustee in bankruptcy or official receiver to retain money paid to him under a mistake of law". Several authorities are quoted in support of this proposition. One of these says: "The principle which I think is to be deduced from the cases is this: if the assets in the hands of an officer of the court, on behalf of creditors or others, have been increased by a transaction occasioned by an honest mistake of law, then notwithstanding such mistake is not capable of rectification as between ordinary adverse litigants, the court will compel its officer to recognize the rules of honesty as between man and man, and to act accordingly". (*Re Opera Limited* (1) [1891] 2 Ch. at p. 162, per Kekewich, J.)

There is no doubt in my mind that excess payment was promised in the present case by an honest mistake. It is also abundantly clear that an officer of the court cannot be permitted to take advantage of such a mistake. Although the authorities quoted by Chitty all relate to bankrupt estates in which the officers of court received money, not for their personal benefit, but for the benefit of others, I think the principle of "honesty as between man and man" is of general application.

I am aware that decided cases made a bailiff the agent of the landlord and say that he is not an officer of the court. See *Re Caidan, Ex parte Official Receiver v. Regis Property Co*. (2) ([1942] Ch. at p. 96) and *Souza Figeiredo & Co., Ltd. v. George Panagopaulos* (3) ([1959] E.A. at p. 765). But these cases relate to liability for a bailiff's irregular acts done on the authority of the warrant of distress. In view of the facts that he is appointed by a judge or the registrar; that his charges are fixed by statutory rules made by the Chief Justice; that his charges can, like the fees payable to advocates by their clients, be taxed by the registrar; and that his certificate can be cancelled by a judge; the bailiff is an officer of the court in regard to the manner in which he serves his customers and especially in regard to the charges which he makes for his services and he is liable to be called upon to refund any money paid to him by mistake of law. I am therefore, inclined to allow the appeal on this point alone.

Counsel for the appellant has argued the appeal on the same basis as the appellant's former counsel had done in the lower court. His main argument is that the contract on which the respondent relies was illegal because it promised remuneration which r. 21 says "no person shall be entitled to". If the respondents are not "entitled to" something, there is a prohibition against taking it, so appellant's counsel argues. The authority which he quotes for this proposition is *Day v. Davies* (4). That was a case arising out of a special agreement to charge more than the law authorised. The amount of rent involved was less than £20. Our rules also use the figure £20 as the dividing line. Where the sum to be recovered does not exceed £20 the bailiff gets, for understandable reasons, a higher percentage as his remuneration. Where the sum exceeds £20 his remuneration is a smaller percentage of the sum of rent due.

The learned Senior Resident Magistrate rejected the submission based on the case of *Day v. Davies* (4) because, in his view, the proposition there laid down "applies to a specific provision in English Acts dealing with statutory Schedule where distress is for £20 or less. Our Act has no such restriction".

With respect, that would not appear to be correct. The provisions of law that were considered in that case were three:

(i) The Distress (Costs) Act, 1817, s. 1.

(ii) The Distress (Costs) Act, 1817, s. 2.

(iii) The Distress for Rent Rules, 1920, r. 22.

Sections 1 and 2 of the 1817 Act do seem to apply only to amounts not exceeding £20. See 12 Halsbury's Statutes (2nd Edn.) 148, para. 275, note (1). But r. 22 was a general provision applicable to all amounts. 12 Halsbury's Statutes (2nd Edn.), p. 148, note (*g*) says referring to the Day case (4): "the amount for which the distress was made did not exceed £20 . . . but it appears that the decision would have been the same if the amount had exceeded £20."

Slesser, L.J. said this in the *Day* case (4) (107 L.J.K.B. at p. 700):

> "The combined effect of ss. 1 and 2 of the 1817 Act and the Rules under the Act of 1888 appears to me to amount to a prohibition . . . As to reliance upon any special agreement, where a prohibition under a statute is absolute, it (the statute) cannot be waived by the party for whose benefit it is made *Bisgood v. Henderson's Transvaal Estates, Ltd*. (5), 'If an act be prohibited, it cannot be the subject of a valid contract' – per Bramwell, B., in *Cowan v. Milbourn* (6)."

Section 1 to which the learned Lord Justice refers reads thus, omitting unessential parts:

> "No person whatsoever making any distress for rent, where the sum demanded and due shall not exceed the sum of twenty pounds . . . shall have, take, or receive . . . any other or more costs and charges for and in respect of such distress . . . than such as are fixed and set forth in the schedule . . ."

Section 2 provided a convenient method of recovering any excess payment made: an application could be made to the justices of the peace who had power to order payment of treble the amount of the excess.

Of the rules made under the Law of Distress Amendment Act, 1888 the only one material to the judgment in the *Day* case (4) was r. 22 which provided: "No person shall be entitled to any fees, charges, or expenses for levying a distress, or for doing any act or thing in relation thereto, other than those specified in and authorised by the table in Appendix II, to these Rules".

Our r. 21 is similarly worded except that the words "and authorised by" are omitted and power is given to a Judge to vary the charges given in the Schedule in any individual case. Nothing like ss. 1 and 2 of the English Act of 1817 exists in our legislation; but I do not think the omission affects the issue before me. I hold that an agreement contrary to the provisions of r. 21 is illegal and void ab initio.

The learned Senior Resident Magistrate went on to say that even if he accepted the argument of the plaintiff (that the contract to pay 10 per cent. commission was illegal) the plaintiff could not recover because he was a party to an illegal contract. He based this part of his judgment on Chitty's exposition of the maxim "Ex turpi causa non oritur actio" the essential part of which reads: "It means that if a party has to rely on an illegal contract in order to found his cause of action he cannot succeed. As plaintiff he is not entitled to give evidence of a contract tainted with illegality to which he was a party."

The appellant's counsel's answer to this argument is that the appellant's cause of action was money had and received and that it was the respondents not the appellant, who pleaded the illegal contract. Quite clearly, the respondents had no other defence to the action.

This point was discussed by Lord Denning who delivered the judgment of the Privy Council in *Kiriri Cotton Co., Ltd. v. Dewani* (7) ([1960] E.A. at p. 192):

> "Their lordships were referred to some cases thirty or forty years ago where disparaging remarks were made about the action for money had and received: but their lordships venture to suggest that these were made under a misunderstanding of its origin. It is not an action on contract or imputed contract . . . It is simply an action for restitution of money which the defendant has received but which the law says he ought to return to the plaintiff."

That was an action for the return of "key money" paid for the grant of a tenancy. In determining whether or not the parties there were in pari delicto, Lord Denning referred to the provision which imposed a penalty on the "person who asks for, solicits or receives any sum of money", but not on the person who pays it. He concluded that the parties could not be said to be in pari delicto.

In the present case also, the rule says that "no person shall be entitled to any fees ", etc. It does not say that no person shall pay any fees other than those specified. The whole or the main purpose of the Rule seems to be the protection of landlords and tenants against exorbitant demands on the part of persons in whose hands law places powers of coercion.

I must hold therefore, that the parties to this appeal were not in pari delicto and the respondents cannot be allowed to keep the money to which the law says they are not "entitled".

Parties to illegal contracts come to courts generally when money has been "paid" by one person to the other. It is paid when the contract is entered into. In the present case, all that the appellant did was to say: "And I also undertake to allow you commission of ten per cent on the amount of this warrant". He did not actually "pay". It was the defendants who, later, retained Shs. 1,500/- from the rent they had collected. They could not retain this sum because the part of the agreement which purported to allow them this much commission was illegal and null and void. The fees or charges which they could either take from the tenant or retain from the rent were as prescribed by r. 21.

In the result, I allow this appeal and set aside the decree of the lower court and substitute therefor judgment for the appellant for the sum of Shs. 1,500/- less such sum as may be found due to the respondents on taxation by the Registrar of this Court under r. 23 of the Distress for Rent Rules. The appellant will have the costs of the appeal as well as the costs in the lower court.

Appeal allowed.

For the appellant:
IT Inamdar
Inamdar & Inamdar, Mombasa

For the respondent firm:
ML Anand
ML Anand, Nairobi

East African Road Services Ltd v J S Davis & Co Ltd

[1965] 1 EA 676 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	22 November 1965
Case Number:	25/1965
Before:	Farrell J
Sourced by:	LawAfrica

[1] Carriage of Goods – Carriage by road – Contract – Exemption clause – Loss of goods – No evidence as to how loss occurred – Exemption clause excluding liability of carrier unless fundamental breach in performance of contract proved – Burden of proof of proving fundamental breach – Whether burden of proof on carrier or consignee of goods.

[2] Contract – Carriage of goods – Exemption clause – Loss of goods – No evidence as to how loss occurred – Exemption clause excluding liability of carrier unless fundamental breach of performance of contract proved – Burden of proof of providing fundamental breach – Whether burden of proof on carrier or consignee of goods.

[3] Evidence – Burden of Proof – Non-delivery of goods by carrier – Evidence Act 1963 *s.* 112 (*K.*).

Editor's Summary

The respondent consigned certain goods to the appellant, a carrier, for carriage from Nairobi to Tanganyika. None of the goods were delivered and the respondent sued the appellant claiming damages for loss of the goods. At the trial no evidence was given as to the reason for non-delivery. The appellant relied on an exemption clause and *prima facie* the loss was within the terms of the clause and the appellant was not liable. However, it was common ground that the exemption clause could not be relied upon if there had been a fundamental departure from the performance of the contract by the appellant. The trial magistrate gave judgment for the respondent. On appeal the question in issue was whether the burden of proof lay on the respondent as customer to prove that there had been a fundamental breach of the performance of the contract or on the appellant as carrier of proving that there had not.

Held –

(i) the burden of proving that there had been a fundamental breach of the performance of the contract was on the respondent and as the respondent had failed to do so the appellant was entitled to rely on the exemption clause (*Hunt & Winterbotham* (*West of England*) *Ltd. v. B.R.S.* (*Parcels*) *Ltd*. (1) applied), and the clause was equally applicable whether the claim lay in contract or in tort;

(ii) the non-delivery of goods was neither in itself a fundamental breach nor did it raise such a *prima facie* case of fundamental breach as to cast upon the appellant by virtue of s. 112 of the Evidence Act the burden of disproving it.

Appeal allowed.

Cases referred to in judgment

(1) *Hunt & Winterbotham* (*West of England*) *Ltd. v. B.R.S.* (*Parcels*) *Ltd*., [1962] 1 Q.B. 617; [1962] 1 All E.R. 111.

(2) *Woolmer v. Delmer Price Ltd.*, [1955] 1 Q.B. 291.

Judgment

Farrell J: This appeal raises a short point, but one

which might present some difficulty if it had not been, as I think it has, conclusively decided by a decision of very high persuasive authority.

The facts proved are brief. Goods were consigned to a carrier for carriage from Nairobi to Tanganyika. The goods were not delivered. No evidence has been given as to the reason for non-delivery. The defendant relies on an exemption clause which is in very wide terms and excludes liability for loss "whether or not such loss . . . was caused by or through or due to the negligence of the (defendant) or its servants or agents or otherwise". *Prima facie* the loss falls within the terms of the exemption clause and the defendant is not liable. It is, however, common ground that an exemption clause cannot be relied upon if there has been a fundamental departure from performance of the contract. The short question is whether the onus lies on the plaintiff of proving that there has been a fundamental breach or on the defendant of proving that there has not.

This question was recently considered by the Court of Appeal in England in *Hunt & Winterbotham* (*West of England*) *Ltd. v. B.R.S.* (*Parcels*) *Ltd*. (1). In that case the plaintiff claimed against the defendants for non-delivery of three out of fifteen parcels of goods consigned to them for carriage. It was held that the exemption clause on its true construction – and I do not find it differs materially from the clause relied on in this case – did not impose on the defendants the burden of proving the absence of a fundamental breach of the contract by them. It was further held that since the plaintiffs made no allegation of such a fundamental breach in their particulars of claim as the cause of loss, and did not specifically put the defendants to proof of the absence of deviation from the carriage contract, nor make a specific claim for the loss sustained otherwise than arising out of the contract, it was impossible to say in the present case that the defendants were obliged to prove the absence of such a breach.

In commenting on and approving the decision Cheshire and Fifoot on The Law of Contract (6th Edn.), at p. 121, remark:

> "He who makes an allegation must prove it. It is for the plaintiff to make out a *prima facie* case against the defendant. If he succeeds in this, it is for the defendant to plead and to prove some special defence such as an exemption clause. The burden must then pass to the plaintiff who in turn must plead and prove some reason, such as a breach of fundamental obligation, why the exemption clause is to be disregarded."

I respectfully adopt this reasoning and the basis of the decision in the *Hunt & Winterbotham* case (1), and if that is right it is *prima facie* decisive of this appeal in favour of the defendant.

Counsel for the defendant seeks to distinguish the case cited on two grounds. The first is that the defendants in that case had delivered twelve out of the fifteen parcels consigned to them, and this, he says, indicates that they had at any rate begun to carry out the contract, whereas in the instant case, once the goods had been delivered to the defendants, there is nothing to indicate that they took any further step towards carrying out the contract of carriage. I do not regard this as a valid distinction. The decision in the English case does not appear in any way to proceed on the basis that the defendants had shown that the loss occurred in the course of their performance of the contract according to its terms. Nor does the absence of any evidence in the present case as to what happened after the goods were delivered to the defendant suggest any inference that the loss, however occasioned, did not occur in the performance of the contract. A defendant does not lose the benefit of an exemption clause unless and until it is shown that he has deviated from the performance of his contractual obligations, and while the essential obligation under the contract is carriage of goods, it would be unrealistic to suggest that the

exemption clause does not begin to operate until the goods are set in motion towards their destination. It becomes operative as soon as the goods are delivered to the defendant.

The second distinction sought to be drawn is that in the English case there was no specific claim for damages for the loss sustained otherwise than arising out of the contract. This fact is mentioned by Donovan, L.J., as he then was ([1962] 1 Q.B. at p. 637), but I am by no means clear in what way it is material. In the instant case there is an alternative claim in detinue. It is, I think, common ground (and if it is not, I so find) that whether the claim lies in contract or in tort, the exemption clause is equally applicable, since a party can contract out of his liability in tort as well as in contract. The reference in the judgment of Donovan, L.J., to the absence of any other claim for damages occurs in a passage which is clearly obiter, and if there is a distinction in that regard, it appears to me to be a distinction without a difference and to be of no assistance to the respondent.

In giving judgment in favour of the plaintiff the learned Senior Resident Magistrate relied to a great extent on the case of *Woolmer v. Delmer Price Ltd*. (2). That case was referred to by Donovan, L.J., in the *Hunt & Winterbotham* case (1) ([1962] 1 Q.B. at p. 628 et seq.), and he conceded that it was clear that McNair, J., treated the burden of proof that there had been no fundamental departure from the terms of the contract as, in the circumstances of the case, having been cast on the defendants. He goes on to distinguish the case as one of deposit, not of carriage of goods. Whether or not that is a valid distinction (and Cheshire and Fifoot (loc. cit.) at p. 121 express doubt as to its validity), the decision of the Court of Appeal is of higher persuasive authority than that of a judge, however distinguished, at first instance, and if the distinction is not valid the views of the Court of Appeal must prevail.

Counsel for the defendant finally prays in aid the provisions of s. 112 of the Kenya Evidence Act which reads:

> "In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

The commentaries on s. 106, the equivalent section of the Indian Evidence Act, do not suggest that there is any essential difference between the English and the Indian Law on the point, and indicate that in general some *prima facie* evidence must be given by the complainant in order to cast the burden on his adversary. See, for instance, Sarkar on Evidence (10th Edn.), p. 843. It is agreed that non-delivery is *prima facie* evidence of negligence; but the plaintiff in view of the exemption clause cannot succeed unless fundamental breach is established, and in spite of the forceful arguments of counsel for the defendant to the contrary, I am unable to accept that non-delivery is either in itself a fundamental breach or even raises such a *prima facie* case of a fundamental breach as to cast upon the defendants by virtue of s. 112 of the Evidence Act the burden of disproving it.

For the above reasons the appeal is allowed with costs to the appellant, the judgment of the lower court is set aside, and there will be substituted an order that the suit be dismissed with costs.

Appeal allowed.

For the appellant:
R Sampson
Sampson & Ransley, Nairobi

For the respondent:

P Le Pelley
Archer & Wilcock, Nairobi

Nemchand Premchand Shah and another v South British Insurance Co Ltd
[1965] 1 EA 679 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	24 November 1965
Case Number:	24/1965
Before:	Sir Samuel Quashie-Idun P, Sir Clement de Lestang and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Wicks, J

[1] Insurance – Policy against housebreaking – What burden of proof is on insured.

[2] Burden of proof – Insurance against housebreaking – What insured must prove.

Editor's Summary

The appellants were insured with the respondent against loss of goods as a result of housebreaking "causing actual visible damage to the premises or part thereof". The appellants made a claim in respect of the value of certain goods which had disappeared from the premises. The respondent rejected the claim and the appellants brought these proceedings contending that the premises had been broken into and the goods stolen. Evidence called by the respondent at the trial showed that it was highly improbable that the premises had been broken into. The trial judge found that the appellants had failed to satisfy him that the loss resulted from a housebreaking and dismissed the action (but without making any finding of fraud). On appeal the appellants argued that it was not for them to prove how their shop was broken into and that, on the evidence, the burden of proving that no theft had taken place was shifted onto the respondent, and that the trial judge had wrongly rejected their contention that a theft and a breaking-out would be covered by the policy.

Held – an assured need only prove that loss was caused by some event covered by the policy, but if his case is that the loss was caused by a breaking-in or a breaking-out then his evidence must prove it, which the appellants here had failed to do, not having satisfied the court that there was either a breaking-in or a breaking-out.

Appeal dismissed.

Cases referred to in judgment

(1) *British and Foreign Marine Insurance Co. v. Gaunt*, [1921] A.C. 41.

(2) *Greaves v. Drysdale* (1935), 53 LI.L. Rep. 16.

November 24. The following judgments were read:

Judgment

Sir Samuel Quashie-Idun P: This is an appeal against a decision of the High Court of Kenya (Wicks, J. sitting at Mombasa) dismissing a claim of the appellants against the respondents for the sum of Shs. 46,746/-. The appellants, who are dealers in wrist watches and other goods, entered into a policy of insurance with the respondents whereby the respondents agreed to insure the appellants against loss by theft of the appellant's goods as a result of housebreaking. The goods insured included property held by the appellants in trust or on commission or for which the appellants might be held responsible while the goods were in their custody. The case for the appellants is that on or about October 19, 1958, their shop was broken into and goods to the total value of Shs. 46,746/- stolen for which the respondents declined to accept liability.

The material evidence adduced by the plaintiffs in support of their claim came from the first plaintiff, Nemchand Premchand Shah. His evidence was

that on Saturday, October 18, 1958, he locked the shop at about 6.20 p.m. On Monday, October 20, he went to the shop at 7.40 a.m. and opened the front door. He then noticed that goods had been stolen from the shop. He could not remember if he inspected the shop at the time. He made a report to the police. At 8.45 a.m. he called at the respondents' office and made a report of the theft. Two askaris and other officers of the respondents inspected the premises. Later three European police officers arrived and also inspected the shop. Witness also inspected the premises and noticed that the steel straps of the back door had been removed and that the staple and padlock were missing. There were two windows at the back of the shop, one above the other. The lower window had a wooden frame with iron bars. The upper window was made of steel and had weldmesh on the inside. Witness noticed that the weldmesh had been cut on three sides and bent upwards. Witness stated that without using the keys of the doors of the premises it would not be possible to steal the goods in the store without breaking in and that it would also not be possible without using the keys to take and carry the goods away without breaking out. Witness stated under cross-examination that the thieves got into the shop by breaking the window, the weldmesh of which was found to have been cut. Witness admitted that there was glass outside the window through which the alleged thief or thieves gained entrance into the shop, that the glass was not broken and that he could not say how it was possible for anyone to open the window from the outside without breaking the glass. Witness also admitted that the window had not been cleaned at all and could not explain how a person could climb through that window without disturbing the dust on the window sill or injuring himself while trying to get through the window with the cut weldmesh. There were cobwebs between the window sill and the floor. These were not disturbed, and the witness could not explain how any person could get through the window without disturbing the cobwebs.

The defendants called John Desmond Irwin, a Senior Superintendent of Police, who gave evidence that it was highly improbable that a man could climb up a height of nine feet and through the gap in the weldmesh without disturbing the dust on the windowsill. This witness stated that he found cobwebs on the wall which had not been disturbed.

On the evidence led the learned trial judge came to the following conclusion:

> "Considering the evidence as a whole, I am not satisfied that the damage to the window resulted from a housebreaking, or had any connection with a housebreaking. I am not satisfied that there was any housebreaking, or that the plaintiffs' stock was lost as a result of a housebreaking.
>
> . . .
>
> The plaintiffs having failed to satisfy the court that the loss alleged results from a housebreaking the action must be dismissed.
>
> The action is dismissed with costs, together with costs of the former trial."

The following grounds of appeal were argued on behalf of the appellants:

> "1. The learned trial judge failed to appreciate–
>
> (i) sufficient unrebutted direct and circumstantial evidence, entitling the appellants to succeed, existed of–
>
> (*a*) theft of stocks and other insured goods;
>
> (*b*) breaking *out* on its own sufficient to have constituted 'house-breaking' in law and under the policy;
>
> (*c*) 'actual visible damage to the premises or part thereof' resulting on such breaking out.

> (ii) it was unnecessary further in order to have succeeded to have shown that (as was assumed) the breaking out had been preceded by a 'breaking in' and that such breaking in had been effected by damaging the premises, and not without."

In respect of the first ground argued, counsel for the appellants submitted that there was no burden on the appellants to prove how their shop was broken into beyond the evidence that theft of their goods from their shop had taken place, either by an unlawful entry into the shop or breaking out of the shop. It was further submitted that on the evidence led by the plaintiffs, the burden of proving that no theft of the goods had taken place was shifted on to the defendants and that although the defendants were not bound to plead fraud on the part of the plaintiffs, it was their duty to destroy the plaintiffs' case before they could succeed.

The plaintiffs' case was that theft of the goods in the shop was committed by housebreaking and the burden of proving this was on the plaintiffs. The mere fact that the goods had disappeared from the shop was not sufficient to satisfy the court that theft of the goods was a result of breaking in or breaking out. Learned counsel for the appellants has submitted that although the learned trial judge was right in holding that there was no evidence of breaking in, the court erred in rejecting the contention that there had been a breaking out. If all the onus to be discharged in such cases is that the property of an assured has disappeared and that there is no burden on him to prove that the disappearance was caused by theft, either by housebreaking or other unlawful means covered by the policy, then there would be no defence whatsoever available to an insurer to resist any claim against him. In the present case, the learned trial judge stated that he was not satisfied that either a breaking in or a breaking out had taken place and therefore was not satisfied that theft of the goods was caused by housebreaking.

I agree that the onus of proof which lies on an assured does not go beyond the proof that loss was caused by some event covered by the policy, but, I think that if his case is that the loss was occasioned by a breaking in or breaking out then the evidence he adduces must prove that fact.

Thus, in the case of *British and Foreign Marine Insurance Co. v. Gaunt* (1) ([1921] A.C. at p. 47), the House of Lords stated as follows:

> "We are, of course, to give effect to the rule that the plaintiff must establish his case, that he must show that the loss comes within the terms of his policies; but where all risks are covered by the policy and not merely risks of a specified class or classes, the plaintiff discharges his special onus when he has proved that the loss was caused by some event covered by the general expression and he is not bound to go further and prove the exact nature of the accident or casualty which, in fact, occasioned his loss."

It is clear from the judgment cited that it is not sufficient for an assured person to say he has lost goods, but that he must prove that the loss was occasioned by theft in the manner covered by his policy. Although he is not bound to go further and prove how the theft was committed, his evidence should show that such theft has occasioned the loss. Similarly, in the present case if there was evidence that the shop was broken into by somebody or that, having gained entry into the shop, larceny of the goods was effected and then a breaking out took place, the plaintiffs would have discharged the burden which lay on them. This was not the case.

The case of *Greaves v. Drysdale* (2), was referred to by both counsel in this court. The decision in that case was that the assured having proved that there was a loss within the general language of the policy, the onus was on the defendant

underwriter to establish his defence that the loss was occasioned by members of the assured's staff or household or inmates of the premises and that upon the facts the defendant had discharged that onus.

In that case it was contended on behalf of the defendant that it seemed a great hardship upon an underwriter who could not, by the very nature of the case, get all the details, to have to make an overwhelming case that the theft was concerned with one of the inmates. It was contended that although the onus might have been originally on the defendant, evidence called had shifted the onus back to the plaintiff to show that the claim was not within the exceptions clause. In reply, counsel for the plaintiff in that case submitted that once the plaintiff proved that there was a loss the burden was on the defendant to show not what might have happened, but what did happen. Branson, J., in considering the evidence led by the plaintiff, stated in his judgment as follows:

> "What is said by the defendant is that, when one looks in detail at the facts which are established in relation to this robbery, it becomes clear that it must have been done by some inmate of the house."

The learned judge then considered the possibility that somebody slipped in and committed the theft. Finally he held that two men, who were members of the plaintiffs' staff and who had given evidence, had not told him the truth. He concluded:

> ". . . unless they, or one of them, the other perhaps shielding him, were responsible for this theft . . .
>
> . . . I have found myself, much against my will, satisfied that this theft was, within the words of the policy, 'occasioned by members of the assured's staff'."

It is not clear in *Greaves v. Drysdale* (2) whether or not the defendant gave evidence, but, it is clear from the judgment that the evidence led by the plaintiff was that which destroyed his case and I find it difficult to come to the conclusion that in the present case the learned trial judge erred in rejecting the case of the plaintiffs, having regard to the evidence led by them and the evidence given by Senior Superintendent Irwin for the defendants.

The defendants did not allege fraud against the plaintiffs and the Court did not make a finding of fraud against them. The learned trial judge's decision was based on facts before him, and he, no doubt, considered the credibility of the witnesses, whom he saw and heard. I think that the evidence before the learned trial judge supports his findings. The first ground argued therefore fails.

[The president then dealt with another ground of appeal and concluded:]

I would dismiss this appeal with costs, and grant a certificate for two counsel. As the other members of this Court agree, I order accordingly.

Sir Clement De Lestang JA: The facts out of which this appeal arises, the grounds of the appeal and the arguments of counsel appear sufficiently from the judgment of the learned President, which I had the advantage of reading in advance and it is unnecessary for me to repeat them.

The burden of proving that the loss fell within the risk insured against was on the plaintiffs. To discharge that burden they had to prove that the theft resulted from housebreaking "causing actual visible damage to the premises or part thereof". As I understand the judgment of the court below, the learned judge dismissed the plaintiffs' claim because they had failed to satisfy him that there had been a housebreaking. It was contended for the plaintiffs at the hearing of the appeal that the learned judge rightly held that there was no evidence

of breaking in but erred in rejecting the plaintiffs' contention that a theft and breaking out would come within the policy. In my view, the learned judge did not reject that proposition as being bad in law. This is what he said:

> "Mr. Khanna submits that even though the court finds that there was no breaking in through the casement windows, there was a breaking out as evidenced by the damage to the back doors and the yard doors, that a breaking out is sufficient to establish the offence of housebreaking and satisfied the condition in the Contract of Insurance requiring that 'actual visible damage to the premises or part thereof' be caused. I do not agree with Mr. Khanna. The keys of the shop were accounted for, it is not disputed, indeed it was the plaintiffs' evidence, that it was not possible for anyone to steal the stock-in-trade without breaking in. I have found that I am not satisfied that there was a breaking-in in the course of a housebreaking, and it has not been suggested that there was any other wrongful entry, or that thieves entered the shop in any way which was not a breaking-in. Appearances are not enough. From the windows being found open, the weldmesh to the casement being found cut and pushed up, from the damage found to the back doors and the yard doors, from the findings of the earrings and the watch, there appeared to have been a housebreaking, but from the condition of the dust on the window sills and the cobwebs on the wall under the window, those appearances are not brought to the conclusion that a housebreaking occurred. In my view it is not the law, as Mr. Khanna seems to suggest, that facts must be looked at in isolation, that in establishing a housebreaking 'causing actual visible damage to the premises or part thereof', the criminal law being that breaking out constituting a housebreaking, all that is necessary to establish that a housebreaking occurred is to produce evidence of damage to doors which, looked at alone, appear to have been caused by thieves breaking out.
>
> The plaintiffs having failed to satisfy the court that the loss alleged results from a housebreaking the action must be dismissed."

The first part of the passage, in particular the words "I do not agree with Mr. Khanna", appears at first blush to support the plaintiffs' contention but the passage must be read as a whole and when this is done it seems to me clear that the learned judge realized that although there was the appearance of a breaking out, he was not satisfied on the evidence as a whole that it was a genuine breaking out. In short, he was not satisfied that there was a housebreaking by either a breaking in or a breaking out. That being the case, the sole question in this appeal is whether the evidence reasonably supports his decision. In deciding this question it must be borne in mind that much depends upon the credibility of the witnesses and that the learned judge had the advantage, which this court has not, of seeing and hearing them give their evidence. I am aware that he did not comment on credibility in his judgment but it seems to me that the disbelief of the plaintiffs' evidence is inherent in his findings.

In my view, there was evidence to support his findings. Entry by the back window and through the cut weldmesh being discounted, there was no evidence whatever of a forcible breaking in. From the nature of the damage, it is evident that both the back door of the premises and the door of the compound were broken from inside the premises. It is also fair to infer that the weldmesh was cut and the back window opened from inside the premises. Consequently, if there was an entry at all, it was through the front door by means of a key or skeleton key or the thief must have secreted himself inside the premises before they were locked up. There were two keys to the front door and both were accounted for. There was nothing else in the evidence to suggest that a duplicate or a skeleton key was used. The description of the premises does not support

the suggestion that the thief could have secreted himself inside. Indeed, such theories were never canvassed at the trial. In these circumstances I do not think it was unreasonable for the learned judge not to be satisfied that there was a housebreaking and I would not be prepared to disturb his finding.

Although such a finding tends to suggest fraud on the part of the plaintiffs, I do not think that it necessarily does so. Fraud not being pleaded, the defence merely being that no loss covered by the policy occurred, the learned judge was careful to avoid any mention of fraud in his judgment. He contented himself with saying that he was not satisfied that the plaintiffs established a housebreaking, leaving undecided the question whether the apparent house-breaking was genuine or not. In my view he was entitled to do that in the circumstances of this case. I therefore agree with the order proposed by the learned President.

Law JA: I have had the advantage of reading the draft judgments prepared by the President and de Lestang, J.A., I agree with them, and concur in the order proposed.

Appeal dismissed.

For the appellants:
TO Kellock, QC (of the English Bar) and *DN Khanna*
Khanna & Co, Nairobi;

For the respondent:
RP Cleasby and *PS Talati*
Atkinson, Cleasby & Co, Mombasa

Yowana Sebuzukira v Uganda
[1965] 1 EA 684 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	30 December 1965
Case Number:	146/1965
Before:	Sir Samuel Quashie-Idun P, Sir Clement de Lestang and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Russell, J

[1] Criminal Law – Practice – Joinder of charges – Joinder of charge of arson with charge of murder – Offences charged founded on same facts – Undesirability of joining another charge with charge of murder or manslaughter.

Editor's Summary

The appellant was charged in one information with two offences, one of murder and the other of arson and was convicted on both counts. The two offences charged were founded on the same facts, as the murder charge in count one resulted from the arson charged in count two. The joinder of charges, although objected to unsuccessfully at the trial, was not made a ground of appeal, but the court felt it necessary to make some observations about the joinder of a count for arson with count for murder.

Held –

(i) there should be no departure from the established rule of practice that no other count should be joined to a count of murder or manslaughter except where the additional count is based on precisely the same facts as the more serious charge;

(ii) all the evidence to support the charge of arson was relevant on the murder charge and the joinder of arson charge did not involve the addition of any new matter; accordingly in the circumstances of the case the charges of murder and arson were properly joined and had caused no possible prejudice to the appellant.

Appeal dismissed.

Cases referred to in judgment

(1) *Mohamed Warsama v. R.* (1956), 23 E.A.C.A. 576.

Judgment

Law JA: read the following judgment of the court:

The appellant was charged in one information with two offences as follows:

"*Statement of Offence*

Count I: Murder contrary to s. 183 of the Penal Code.

Particulars of Offence

Yowana Sebuzukira on or about November 11, 1964, at Jema village, Gombolola Musale, Singo county in the Kingdom of Buganda murdered one Nalibashomba.

Statement of Offence

Count II: Arson contrary to s. 307 (*a*) of the Penal Code.

Particulars of Offence

Yowana Sebuzukira on or about November 11, 1964, at Jema Village . . . wilfully and unlawfully set fire to the dwelling-house of Nalibashomba."

The joinder of charges, although objected to unsuccessfully at the trial, was not made a ground of appeal. As it appears to offend against the rule of practice hitherto observed throughout East Africa, that other counts whether for similar or different offences ought not to be joined with a count of murder (*Mohamed Warsama v. R.* (1)), we think it necessary to make some observations about the joinder of a count for arson with a count for murder in the present case. It should be emphasized that the rule is one of practice and not of law; indeed the Criminal Procedure Codes of all the East African territories specifically provide that any offences, whether felonies or misdemeanours, may be charged together in the same information if they are founded on the same facts or form part of a series of offences of the same or a similar character. In this case the two offences charged were founded on the same facts, as the murder charged in count one resulted from the arson charged in count two, and it cannot be said that the trial judge wrongly exercised his discretion in allowing the two charges to be tried together. We can see no objection to a departure from the established rule of practice that no other count should be joined to a count of murder or manslaughter, in a case such as the one now under consideration, although it is not ordinarily desirable that the trial of such grave offences be complicated by the introduction into the proceedings of additional matter to which consideration must necessarily be given by the judge and assessors, and which might distract attention from the main issue. In this case all the evidence to support the charge of arson was relevant on the murder charge, and no possible prejudice could result from the charges being joined. The joinder of the arson charge did not involve the addition of any new matter, and we consider that in the circumstances of this particular case the charges of murder and arson were properly joined. At the same time we consider that the rule of practice, that other counts must not be joined with a count of murder or manslaughter, should not be departed from except in cases, such as the one now under consideration, where the additional charge is based upon precisely the same facts as the more serious charge. Even then the trial judge has a complete discretion to direct that the prisoner should be tried separately on any one or more counts (see, for example, s. 259 (4) Criminal Procedure Code

(Uganda)). When a prisoner is convicted both of murder and on a count for another offence the proper course is to suspend

sentence on that other count. [His Lordship then went on to deal with the facts and concluded:] This appeal fails and is dismissed.

Appeal dismissed.

For the appellant:
C Mboijana
Binaisa, Mboijana & Co, Kampala

For the respondent:
SS Kapoor (*State Attorney*, Uganda)
The Attorney General, Uganda

Ratan Singh v G R Mandavia
[1965] 1 EA 686 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	5 November 1965
Case Number:	1175/1962
Before:	Miles J
Sourced by:	LawAfrica

[1] Advocate – Action for damages against advocate for damages for wrongful detention of documents and return of documents – Whether cause of action in contract or tort – Limitation of actions – Limitation Act, s. 5 *and s.* 8 (*K.*).

[2] Limitation of Actions – Action for damages against advocate – Action for detinue – Whether within Limitation Act, s. 5 (2) *or s.* 8 (*K.*).

Editor's Summary

The plaintiff retained the defendant, an advocate, to act for him in a number of income tax appeals, but later terminated his employment and instructed another firm of advocates. The defendant was later requested many times to return all the account books, reports and documents which had been handed to him but refused to do so. Subsequently under a court order the defendant returned certain of the documents but failed to return others. The plaintiff then filed this action claiming damages for wrongful detention of the documents and the return of certain other papers with damages for their detention. The defendant's defence was that the claim was within s. 5 (2) or s. 8 of the Limitation Act and was time-barred. For the plaintiff it was submitted that the suit was founded on contract and that the claim was within s. 5 (1), ibid., and was not time-barred. The case is reported only on the point of limitation.

Held –

(i) the relationship between the plaintiff and the defendant was contractual and the cause of action was in contract and not in tort; accordingly s. 5 (1) of the Limitation Act was applicable and the action was not time-barred.

(ii) s. 8 of the Limitation Act was not applicable as the suit was not for a penalty, damages or sum of money given to the party aggrieved by any Act, Order in Council or Ordinance.

Judgment for the plaintiff.

Cases referred to in judgment

(1) *Groom v. Crocker*, [1938] 2 All E.R. 394.

(2) *Richards v. Platel* (1841), 10 L.J.N.S. Eq. 375.

(3) *Jarvis v. Moy Davies Smith Vandevell & Co.*, [1936] 1 K.B. 399.

(4) *Bailey v. Bullock*, [1950] 2 All E.R. 1167.

(5) *Keates v. Woodward*, [1902] 1 K.B. 532.

(6) *Bryant v. Herbert* (1878), 3 C.P.D. 389.

(7) *Morris v. C. W. Martin & Sons*, [1965] 2 All E.R. 725.

(8) *F. X. D'Silva v. Abdullah Rahimtulla*, Kenya High Court Civil Case No. 978 of 1964 (unreported).

Judgment

Miles J: The plaintiff in this case claims against the defendant damages for the wrongful detention of certain documents and papers, and the return of certain other papers with damages for their detention.

The plaintiff's case, as pleaded in the plaint, is as follows:

On or about January 29, 1959, he instructed and retained the defendant, who is an advocate of this Court, for the prosecution of a number of Income Tax Appeals. The defendant, with the authority of the plaintiff, briefed Mr. Dingle Foot, Q.C., and a junior counsel, specialising in Income Tax Law, Mr. Peter Rowland, of the English Bar.

In September, 1959, the plaintiff, being dissatisfied with the defendant's conduct, or rather inaction, in connection with these appeals, terminated his employment and engaged Messrs. Sirley & Kean. He requested the defendant to return all the account books, reports and documents which he had previously handed to the defendant for the purpose of these appeals, but the defendant refused to do so.

The plaint alleges that in the course of certain correspondence passing between Messrs. Sirley & Kean and the defendant, to which it will be necessary to refer later, Messrs. Sirley & Kean made numerous requests to the defendant to return the papers in question, but the defendant consistently refused, notwithstanding that Messrs. Sirley & Kean had offered to pay his costs.

In para. 14 of the plaint it is alleged that as a result of the defendant's persistent refusal to return the plaintiff's documents, he obtained an order from this court in Miscellaneous Application No. 106 of 1959, directing the defendant to return all the documents and to deliver a bill of costs.

It is alleged in para. 16 of the plaint that in purported compliance with the order obtained on December 15, 1959, the defendant returned to Messrs. Sirley & Kean certain of the documents but failed to deliver certain other documents which are specified in this paragraph of the plaint. For convenience, I will refer to the first class of documents as "the delayed documents" and the second class as the "omitted papers". The omitted papers have not been returned to this day.

The plaintiff alleges that as a result of the wrongful detention of all these documents and papers it was necessary to obtain an adjournment of the hearing of the Income Tax Appeals, which was granted on certain terms, and the plaintiff claims additional fees and expenses which were incurred by him as a result of this adjournment. He also claims the return of the omitted papers and damages for their detention.

In his defence the defendant raises at the outset two points of law: first, that the claim is barred by limitation under s. 5 (2) and s. 8 of the Limitation Act, Cap. 11, 1948 (K.). Secondly, it is said that the matters in controversy in this suit were res judicata by Miscellaneous Civil Application No. 106 of 1959.

The defendant further states that, so far as the delayed documents were concerned, he was rightfully retaining them because he had not been paid his costs, and he relies upon the fact that when the court made its order on December 15, 1959, for the return of the documents it expressly made this subject to the defendant's lien. So far as the omitted documents were concerned he denies the receipt of them. He further denies that the detention necessitated any adjournment of the hearing of the Income Tax Appeals.

The plea of res judicata was dealt with by Rudd, J., as a preliminary issue and it was decided against the defendant. When the case came on for hearing

on June 21, 1965, before Rudd, J., an application was made for an adjournment on the ground that the defendant was seriously ill in India. This was granted on certain terms, one being that no further adjournment would be given on this ground.

When the case came before me for hearing on October 25, 1965, the defendant was absent and was not represented; and the case proceeded to formal proof. The case involved certain questions of law, on which I heard a careful argument by counsel for the plaintiff, and I accordingly deemed it advisable to deliver a written judgment.

I will deal first with the plea of limitation. The defendant relies on s. 5 (2) of the Limitation Act (Cap. 11), which provides:

> "All suits for damage or injury to persons or property, all suits of assault, battery, wounding or imprisonment, all suits of libel and slander, and all suits of tort, shall and may, unless otherwise specifically provided for in this Ordinance, be commenced and sued within two years next after the cause of such suits and not after."

Counsel for the plaintiff contends that the claim comes within s. 5 (1), which provides:

> "All suits for the recovery of any chattel or movable thing, or the possession thereof, all suits founded upon any simple contract and all personal suits whatsoever shall and may, unless otherwise specifically provided for in this Ordinance, be commenced and sued within six years next after the cause of such suits and not after."

His contention in the first place is that this is a suit founded on contract.

Looking at the plaint it is clear that the claim is framed in contract. Paragraph 18 alleges that it was the duty of the defendant, as the plaintiff's advocate, and it was an implied obligation of the contract between the plaintiff and the defendant, that on termination of his employment as the plaintiff's advocate, the defendant should return all the plaintiff's said documents and papers.

This is, of course, not conclusive on the point and it is necessary to examine the nature of the plaintiff's claim in order to determine what is its actual legal basis. There can be no doubt that the relation between a solicitor and his client is one of contract. See *Groom v. Crocker* (1). This was an action for damages for negligence against a solicitor, and it was held that the cause of action lay in contract and not in tort. Greene, M.R., said ([1938] 2 All E.R. at p. 401):

> "In my opinion, the cause of action is in contract, and not in tort. The duty of the appellants was to conduct the case properly on behalf of the respondent as their client, subject to any proper exercise by the insurers of the right of control conferred upon them by the policy. The relationship of solicitor and client is a contractual one: *Davis v. Lock* and *Bean v. Wade*. It was by virtue of that relationship that the duty arose, and it had no existence apart from that relationship."

Scott, L.J., said (ibid., at p. 413):

> "Mr. Pritt argued, for the respondent, that he had a cause of action in tort for breach of duty. I do not think so. A solicitor, as a professional man, is employed by a client just as much as is a doctor, or an architect, or a stockbroker, and the mutual rights and duties of the two are regulated entirely by the contract of employment."

It is to be noted that in the instant case the defendant justifies the retention of the documents on the ground that he had a lien. Such a lien arises out of contract. See *Richards v. Platel* (2). The same applies to the relation of a client to a stockbroker. See *Jarvis v. Moy Davies Smith Vandervell & Co.* (3). In *Bailey v. Bullock* (4), which was the case of a solicitor, Barry, J., followed *Groom v. Crocker* (1).

So far as the claim for the return of the omitted papers is concerned there is some authority for the proposition that an action of detinue is also founded on contract; (see *Keates v. Woodward* (5)), although in the earlier case of *Bryant v. Herbert* (6) the Court of Appeal were divided as to whether such an action lay in contract or in tort. *Morris v. C. W. Martin & Sons* (7) supports the view that such an action is founded on contract. It may also be said that a claim in detinue is a suit for the recovery of a chattel within the meaning of s. 5 (1) of the Limitation Act. For these reasons I held that the suit is not barred by s. 5 (2).

The defendant also relies upon s. 8 of the Limitation Act, which provides:

> "All suits for penalties, damages or sums of money given to the party aggrieved by any Act. Order in Council or Ordinance shall be commenced and sued within two years after the cause of such suits, but not after, provided that nothing herein contained shall extend to any suit given by any Act, Order in Council or Ordinance, where the time for bringing such suit is or shall be by any such Act, Order in Council or Ordinance specially limited."

The answer to this is that this is not a suit for a penalty, damages or sum of money given to the party aggrieved by any Act, Order in Council or Ordinance. This section would appear to apply to actions of a penal nature. See *F. X. D'Silva v. Abdulla Rahimtulla* (8). For these reasons I hold that the plea of limitation fails. I would add that in my opinion it was not strictly necessary for me to consider this plea since it was not pursued at the trial. The defence of limitation is one that can be waived, and it must be expressly pleaded if it is to be relied upon (vide s. 40 of the Limitation Act). It does not go to jurisdiction. It is true that it has been pleaded in the instant case, but since the defendant did not appear at the trial to argue it, I would have thought that it must be held to be abandoned. Since, however, Mr. Nazareth addressed an argument to me upon this plea I have expressed my views upon it.

Judgment for the plaintiff.

For the plaintiff:
JM Nazareth, QC and *JK Winayak*
JK Winayak & Co, Nairobi

The defendant did not appear and was not represented.

Halal Shipping Co Ltd v Securities Bremer Allegemeine and another
[1965] 1 EA 690 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	19 August 1965
Case Number:	56/1964

Before:	Newbold V-P, Duffus and Law JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Aden – Le Gallais, CJ

[1] Bailment – Carriage of goods – Whether stevedore has possession between ship and shore as bailee.

[2] Contract – Exemption clause – Whether stranger can be protected by express term – Whether stranger entitled to advantage of exemption.

[3] Shipping – Bill of lading – Exemption clause – Whether stevedore entitled to take advantage of exemption when carrying goods from ship to shore.

Editor's Summary

The appellant, a stevedoring company in Aden, was sued on behalf of the consignee for damages for the loss by admitted negligence of certain goods unloaded from a ship, and argued that it was entitled to the protection of clauses in the bill of lading exempting the carrier of the goods and its agents from liability for negligence and also that it had received the goods as a bailee on terms similar to those in the bill of lading.

Held –

(i) the appellant was not a party to the bill of lading and was not therefore entitled to take advantage of any exemption from liability contained therein as against the consignee;

(ii) (Per Newbold, V.-P.): even if (which was doubtful) the appellant had possession of the goods as a bailee, such bailment was not under any implied contract between the appellant and the consignee and contained no exemption;

(iii) (Per Duffus, J.A.): there was no evidence to support the submission that the terms of the bill of lading had been incorporated into the contract of carriage from ship to shore;

(iv) (Per Law, J.A.): even if the appellant was a party to the contract in the bill of lading, that contract (and any exemptions in it) by its terms came to an end when the goods were discharged over the ship's rails.

Appeal dismissed.

Cases referred to in judgment

(1) *Scruttons, Ltd. v. Midland Silicones, Ltd.* [1962] A.C. 464; [1962] 1 All E.R. 1.

(2) *Wilson v. Darling Island Stevedoring Co*., [1956] 1 Lloyd's Rep. 346.

(3) *Krawill Machinery Corpn. v. Herd & Co., Inc*., [1959] 1 Lloyd's Rep. 305.

(4) *Cosgrove v. Horsfall* (1945), 62 T.L.R. 140.

(5) *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd*., [1915] A.C. 847; [1915] All E.R. Rep. 333.

August 19. The following judgments were read:

Judgment

Law JA: This is an appeal from a decision of the Chief Justice in the Supreme Court of Aden. The appellant company was the defendant in a suit brought by an insurance company pursuant to subrogation to recover a sum of

£518 paid by it to an Aden firm in respect of the loss of a crate of engine spare parts consigned to that firm which disappeared whilst in the custody of the appellant company. There is no dispute as to the facts. The missing case was consigned by sea from Bremen to Aden under a bill of lading. The case was discharged from the ship into a lighter belonging to the appellant company, who were stevedores employed by the carriers for the purpose of unloading the ship. The appellant company issued a delivery note to the consignee, but the case could not be found when the consignee came to take delivery. The appellant company conceded that the loss of the case was due to negligence on its part, but relying upon the fact that it was the agent for the ship, claimed to be exempted from liability for its admitted negligence by virtue of r. 31 of the bill of lading which purports to exempt any servant or agent of the carrier from any liability whatsoever to "the merchant" (which expression by r. 1 of the bill of lading is defined as including the consignee) for any loss or damage resulting from any act, neglect or default on the part of such servant or agent. The liability of the carrier is limited by r. 16 of the bill of lading to the period from loading onto until discharge from the ship, and it is not in dispute that the case was discharged from the ship and negligently lost thereafter. Rule 16 (4) provides, however, that goods in the custody of the carrier or his agent after discharge from the ship shall be deemed to be in such custody as agent for and at the sole risk of the shipper. The learned Chief Justice held that this provision could not affect the rights of the consignee because "there was no privity of contract between the defendant (now appellant) and himself, since the contract evidenced by the bill of lading was the contract of carriage between the shipper and the carrier". As regards r. 31, the learned Chief Justice held that it could not avail the appellant company because it only applied to the appellant company as agent for the carrier, and the carrier's interest in the goods ceased once the goods were discharged from the ship, by r. 16 (1) of the bill of lading; and he held that the appellant company was thus liable to the consignee for any loss or damage caused by its own negligence.

From these findings the appellant company appeals on the following grounds:

"1. The learned Chief Justice erred in holding that there was no privity of contract between the plaintiff and the defendant.

2. The learned Chief Justice erred in holding or implying that the contract evidenced by the Bill of Lading was a contract of carriage (solely) between the shipper and the carrier and in implying that the defendant was not a party to that contract.

3. The learned Chief Justice erred in failing to appreciate that, under the Bill of Lading, particularly by r. 31 thereof, the defendant had clearly been made a party to the contract in or evidenced by the Bill of Lading, and that the consignee of the goods had accepted the Bill of Lading and had expressly agreed to all its terms, liberties, conditions and exceptions.

4. The learned Chief Justice erred in holding that r. 31 of the Bill of Lading could not be invoked in the circumstances of the case.

5. The learned Chief Justice erred in holding that 'the goods were not in the custody of the carrier and his agents as such by virtue of the provisions of r. 16 of the Bill of Lading', and in holding that r. 16 (4) could not affect the rights of the consignee, and in failing to appreciate that r. 16 (4) read with r. 31 and the Bill of Lading as a whole applied to the case and operated to exempt the defendant from liability.

6. Even if (contrary to the appellant's submission) the learned Chief Justice was right in holding that there was no privity of contract between the consignee and the defendant, he erred in failing to hold that the defendant received the goods as bailee upon the terms of the Bill of Lading

(under which the defendant was in the circumstances exempted from liability), and that this was no bald bailment with unrestricted liability or tortious handling independent of contract.

7. The learned Chief Justice erred in holding that the consignee had a valid claim for damages in tort against the defendant."

Counsel for the appellant company submitted, with regard to the first five grounds of appeal, that the appellant company was effectively made a party to the contract, as evidenced by the bill of lading. He relied on r. 31 of the bill of lading, which reads as follows:

"31. *Responsibility of carrier's servants or agents.* No servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the merchant for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generally of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading."

Counsel for the appellants submitted that this rule has the effect of validly making all servants and agents of the carrier parties to the contract and thus entitled to the protection thereof as fully as the carrier himself, and he stressed that the authority of the carrier to extend the protection of the contract contained in the bill of lading as agent or trustee on behalf of all his servants or agents is expressly recognized. Counsel further argued that this protection continues even after the goods have been discharged from the ship, because of the provisions of r. 16 (4), which reads:

"16 (4) Goods in the custody of the carrier or its subcontractors or agents . . . after discharge therefrom shall be deemed to be in such custody as agent or agents only for and at the entire risk of the shipper and/or assignee and the carrier and its subcontractors shall not be responsible for any act, neglect or omission on the part of its or their servants or agents in relation to the goods while in such custody."

If counsel's submissions are well founded, they involve the proposition that the carrier can validly assume the power to contract, as a self-appointed agent for and on behalf of his own agents, and thus invest them with the protection and the immunities contained in the bill of lading, not only for the period of the transit of the goods, but also for such period as the goods may be in the custody of the agents, after discharge from the ship, when the carrier's responsibility for such goods has come to an end. If the carrier can contract in this way to confer benefits on his agents, one is entitled to ask whether it is contended that he could also make them liable to penalties and disabilities. In such a case, the agents would immediately and properly object that they had not authorized any such action. I find myself quite unable to accept counsel's

submission. In my opinion the answer is to be found in the majority opinions of the House of Lords in *Midland Silicones, Ltd. v. Scruttons, Ltd*. (1). The principles laid down in that case can be summarized as follows:

(*a*) it is a fundamental principle that a stranger to a contract cannot sue on it, and

(*b*) that a stranger to a contract cannot, in question with either of the contracting parties, take advantage of the provisions of the contract even if they were clearly intended to benefit him.

This decision, which is of the highest persuasive authority, is in harmony with recent decisions to the same effect in Australia (*Wilson v. Darling Island Stevedoring Co*. (2), and in the United States of America (*Krawill Machinery Corpn. v. Herd & Co., Inc*. (3)) in both of which cases it was held that a stevedore is not entitled to the benefit of the Hague rules, although such benefit purports to be conferred upon him in the bill of lading. The reasoning behind these decisions is that the stevedore is not a party to the contract evidenced by the bill of lading, and although the carrier (who is a party) can exempt himself from liability to the extent allowed by the Hague rules for damage resulting from the neglect or default of his servants or agents, or of independent contractors employed by him, this immunity does not extend to the servant, agent or independent contractor if sued in his personal capacity, as was the case here. A similar situation arises in the case of an omnibus company which by the terms on which its tickets are issued purports to exempt itself and its servants from liability for injury, however caused. Such a condition may avail to protect the company, but does not avail to protect the driver if he is sued in his personal capacity, because he was not a party to the contract between the ticket holder and the company (*Cosgrove v. Horsfall* (4)), although the condition was clearly designed to protect the driver as well as the company. In the same way, to quote from the judgment of Fullagar, J., in *Wilson's* case (2):

> "The stevedore is a complete stranger to the contract of carriage, and it is no concern of his whether there is a bill of lading or not, or, if there is, what are its terms. He is engaged by the ship-owner and by nobody else, and the terms on which he handles goods are to be found in his contract with the ship-owner and nowhere else. The ship-owner has no authority whatever to bind the shipper or consignee of cargo by contract with the stevedore, and there is in my opinion no principle of law . . . which compels the inference of any contract between the shipper or consignee and the stevedore. If the stevedore soaks cargo with water and ruins it, I can find neither rule of law or contract to save him from the normal consequences of his tort."

In my opinion the position in this case is the same; there was no contractual relationship between the appellant company and the consignee as cargo-owner; nor is there any principle of law which allows the appellant company, in the circumstances of this case, to rely upon provisions conferring immunity contained in a contract to which it was not a party, so as to escape from the consequences of its tort.

Furthermore, I think that there is merit in the submission made by counsel for the respondents, that even if the appellant company was a party to the contract evidenced in the bill of lading, which is a contract of carriage, that contract came to an end when the carriage was terminated, that is to say when the case was

discharged over the ship's rails as provided in r. 16 (3) of the bill of lading. Any protection which may have been conferred upon the appellant company, as a servant or agent of the carrier, ceased to exist when the case was discharged from the ship and the carriage was completed. Rule 16 (4) to which I referred earlier in this judgment must, I think, be construed, when it speaks of goods in the custody of the carrier's sub-contractors or agents, as meaning in the custody of such sub-contractors or agents in their capacity as agents for the carrier. When the case was discharged from the ship into the appellant company's lighter, it ceased to be in the custody of the carrier as the carriage had come to an end, and r. 16 (4) cannot therefore, in my opinion, be called in aid to protect the appellant company from the results of its negligence thereafter.

For these reasons I consider that the learned Chief Justice came to a correct decision in this case, and I would dismiss this appeal, with costs to the respondent.

Newbold V-P: In February, 1961, goods were shipped from Bremen to Aden under a bill of lading containing provisions exempting the carrier and its agents from liability for negligence to be delivered to the order of the shipper. It is agreed that the person to whom the goods were to be delivered (hereinafter referred to as the consignee) was bound by the terms of the bill of lading. The goods arrived in Aden and were discharged from the ship into a lighter. The appellant company was the agent of the carrier and it is agreed that it performed as such agent, stevedoring duties, which apparently consisted of discharging cargo from the ship into lighters, transporting it to shore, and causing it to be warehoused until delivery to the persons entitled thereto. After the discharge of the goods the appellant company issued to the consignee a delivery order but, on delivery being demanded, the goods could not be found. It is admitted that the goods were lost through the negligence of the appellant company. The goods had been insured with the respondent company which, on payment of the amount for which the insurance was effected, became entitled by reason of subrogation to such rights as the consignee had. The respondent company sued the appellant company claiming damages on the ground, *inter alia*, of negligence. The appellant company relied, *inter alia*, on the defences that it was entitled to the protection of the clauses in the bill of lading exempting the carrier and its agents from liability for negligence, and that it had received the goods as a bailee on terms similar to those in the bill of lading. The Chief Justice held that there was no privity of contract between the appellant company and the consignee entitling the appellant company to rely on the provisions of the bill of lading and he gave judgment in favour of the respondent company. From that judgment the appellant company appeals to this court on two main grounds.

The first main ground was that the Chief Justice erred in holding that there was no privity of contract between the appellant company and the consignee entitling the appellant company to the protection of the exemption clause in the bill of lading. No evidence was led at the trial and the facts were agreed, though precisely what the agreed facts are is by no means clear. It was accepted by both counsel that the activities of the appellant company were stevedoring activities and that its rights and liabilities should be ascertained on that basis. Counsel for the appellants urged that the bill of lading continued to apply after the goods were discharged from the ship by reason of the provisions of cl. 16 (4) which reads as follows:

> "(4) Goods in the custody of the carrier or its sub-contractors or agents before loading on the ship and after discharge therefrom shall be deemed to be in such custody as agent or agents only for and at the entire risk of the shipper and/or assignee and the carrier and its sub-contractors shall not be responsible for any act, neglect or omission on the part of its or their servants or agents in relation to the goods while in such custody."

I shall assume, but without deciding, that the provisions of the bill of lading

continue to apply to the goods after discharge over the ship's side. On that assumption it is, nevertheless, beyond dispute that, subject to certain well-established exceptions, a stranger to a contract cannot take advantage of the provisions of the contract even if it is clear that those provisions were intended to benefit him. (See, for example, the British decisions in *Scruttons, Ltd. v. Midland Silicones, Ltd*. (1) and *Dunlop Pneumatic Tyre Company, Ltd. v. Selfridge and Co., Ltd*. (5); the Australian decision in *Wilson v. Darling Island Stevedoring and Lighterage Co., Ltd*. (2); and the United States decision in *Krawill Machinery Corpn. v. Herd and Co. Inc*. (3).) Exceptions, for example, arise in the case of covenants running with the land, in the case of rights arising under a trust or on assignment of a contract or on subrogation, and in the case of an agent contracting for an undisclosed principal. It is clear, therefore, that the appellant company cannot, merely because it is the agent of the carrier, escape liability on the ground that in a contract to which the consignee and the carrier are parties it is stated that the carrier and its agents are exempt from liability for negligence. I do not understand counsel for the appellants to dispute this. He urged, however, that the appellant company was a party to the bill of lading by reason of the provisions of cl. 31, which, so far as are relevant, read as follows:

> "No servant or agent of the carrier . . . shall . . . be under any liability . . . for any loss . . . arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and . . . every exemption . . . herein contained and every right exemption from liability . . . applicable to the carrier or to which the carrier is entitled hereunder shall also be available . . . to protect every such servant or agent of the carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause, the carrier is or shall be deemed to be acting as agent or trustee on behalf of the and for benefit of all persons who are or might be his servants or agents from time to time . . . and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this bill of lading."

Counsel for the appellants submitted that by the latter part of the clause the carrier has specifically contracted as agent for the appellant company, with the result that the appellant company is a party to the bill of lading. I see great difficulty in accepting this submission. As I have already said, the precise facts are by no means clear. What, for example, is the consideration moving from the appellant company to the consignee which would support any such contract between the appellant company and the consignee? It is true that the appellant company performed services from which the consignee benefited, but those services were performed pursuant to a contract between the carrier and the appellant company. Further, an agent can only contract on behalf of his principal if he has actual or ostensible authority to do so. There is no suggestion, apart from the words of cl. 31, that the carrier had actual authority from the appellant company to enter into a contract on its behalf; and I agree entirely with the view of Fullagar, J., in the *Wilson* case (2) that a carrier has no authority whatever to bind the consignee of cargo by contract with the stevedore. Again, what is the contract which is alleged to exist between the appellant company and the consignee and what are its terms? It is perfectly obvious that all the provisions of the bill of lading cannot apply to any contract between the consignee and the stevedore. Is a court to go through the provisions of the bill of lading and say what provisions do or do not exist in any alleged contract between the stevedore and the consignee? In this case, for example, is cl. 3, which states that the bill of lading shall have effect according to the provisions of German law, to apply? Is cl. 7, which states that all disputes are to be decided exclusively by German courts, to apply? I would find it virtually impossible, merely from the terms of the bill of lading and from the agreed

facts, to come to a conclusion as to what were the terms of any contract between the appellant company and the consignee. If the appellant company seeks to shelter behind the terms of a contract between itself and the consignee, then the onus is on the appellant company to show what that contract is. Finally, I doubt whether, in relation to the activities of its agent, the carrier could enter into a contract with the shipper at one and the same time both as a principal and as an agent. It may be that such a duality of position is possible; but before arriving at a decision in favour of the submissions I should require to hear much fuller argument on the matter. Accordingly, I cannot accept that the appellant company was, in the circumstances of this case, a party to the bill of lading. It follows, therefore, that it is not entitled, being a stranger to that contract, to take advantage of any exemption from liability contained therein.

The second main ground was that the appellant company had received the goods as a bailee under an implied contract between the appellant company and the consignee which incorporated a term exempting the appellant company from liability for negligence on the lines of the similar clause in the bill of lading exempting the carrier and its agents from liability for negligence. I very much doubt whether the appellant company was in possession of the goods as a bailee. It is, of course, clear that the carrier was in possession of the goods as a bailee; but on such facts as appear to have been agreed in this case it seems to me that the possession of the appellant company was a possession as agent for the carrier and not an independent possession as a bailee. Even if, however, the possession of the appellant company falls within one of the classes of bailment, I see no reason whatsoever for assuming that any such bailment was under an implied contract between the consignee and the appellant company. I see even less reason for assuming that such implied contract contained a term exempting the appellant company from any liability which may arise from its acts of negligence. The court has always set its face against implying in favour of any party to a contract a clause exempting that party from liability for negligence. On this appeal not only is this court asked to imply such a term, but it is also asked to imply the contract containing the term, and to imply that such contract was entered into between the consignee and the appellant company. For my part I find myself unable to rise above these successive hurdles and to arrive at the goal to which the arguments of counsel for the appellants have sought to lead the court.

For these reasons I am of the view that the decision of the Chief Justice was correct and I would dismiss this appeal with costs. As to the other members of the court are of the same view, it is so ordered.

Duffus JA: I have had the advantage of reading the judgments of Law, J.A., and Newbold, V.-P.

The defendant/appellant company admits that the goods, the subject of this action, were lost through its negligence but pleads that it is protected from liability for negligence by the express terms of the bill of lading by which the goods were shipped from Bremen to Aden.

No witnesses were called and the facts relied on were those agreed on in the pleadings, those contained in such documents as were put in evidence and the admissions made by counsel at the hearing. I agree with the learned Vice-President that it is by no means clear exactly what was agreed on.

It is, however, clear that the appellant company had possession of the goods for delivery to the consignee and that the goods were lost through its negligence and that the company is accordingly liable to the consignee in damages and admittedly to the respondent as insurers by virtue of subrogation of the

consignee's rights, unless it can prove that it is protected from its negligence by the express terms of an agreement.

Counsel for the appellant company, first submitted that it was entitled as agents for the carriers to the benefit of the exemption clauses contained in the bill of lading. I agree entirely with Law, J.A., and the Vice-President, on the facts here, that the appellant company are strangers to the contract and are not entitled to escape from liability for negligence by virtue of the bill of lading.

Counsel for the appellants then further submitted that the appellant company had received the goods as a bailee on terms which would have incorporated those clauses of the bill of lading which exempted the carrier and its agents from liability for negligence. This again is a question of fact with the onus of proof on the appellants. Counsel for the appellant admitted at the trial, that the carriage of the goods covered by the bill of lading ended when the goods were discharged over the ship's side into the appellant's lighter, and he also admitted that the appellants were then acting as agents for the consignee. He then made a further admission that there was a second agreement when the goods were loaded into the lighter. My first impression of this admission was that it referred to an express agreement between the appellant and the consignee for the carriage of the goods from the ship for delivery to the consignee on shore, but it is also possible that this might have been intended to refer to an agreement between the carrier and the appellants, as stevedores, for the carriage of the goods from ship to shore. I have also not been able to definitely ascertain from the admitted facts who would pay the appellant company for its work, although r. 23 and sub-r. 4 (*b*) of the bill of lading suggest that this would be the consignee's responsibility. On the whole the appellant company have not established the terms and conditions on which it received these goods into its possession and in any event, there is, in my opinion, no evidence to support the submission that the terms of the bill of lading had been incorporated into the contract for the carriage of the goods from the ship's side to the shore.

I agree, therefore, that this appeal should be dismissed with costs.

Appeal dismissed.

For the appellant company:
JM Nazareth, QC and *AE Kazi*

For the respondent:
SN Iyer
SN Iyer, Aden

For the appellant:
AE Kazi, Aden

Serisite Luyombya v Uganda
[1965] 1 EA 698 (CAK)

Division: Court of Appeal at Kampala

Date of judgment: 9 December 1965

Case Number:	147/1965
Before:	Sir Clement de Lestang, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Sir Udo Udoma, CJ

[1] Criminal Law – Appeal – Abandonment of appeal – Application to withdraw notice of abandonment – No provision for application – Appeal deemed to be dismissed when notice given – Jurisdiction of appellate court to hear such application – Criminal Procedure Code (*Cap.* 24), *s.* 328a (3) (*U.*).

Editor's Summary

Section 328A (3) of the Criminal Procedure Code provides that an appellant may abandon his appeal by giving notice in writing, whereupon the appeal shall be deemed to have been dismissed. Such a notice of abandonment of appeal was given by the appellant. Later an application was made for leave to withdraw the notice of abandonment although the Criminal Procedure Code makes no provision for such application. The Chief Justice dismissed the application as incompetent on the ground that the appeal was already deemed to have been dismissed by operation of law under s. 328A (3) and that the court was functus officio. On appeal,

Held –

(i) the appellate courts in Uganda have an important jurisdiction to allow an abandoned appeal to be restored, if it can be shown that the notice of abandonment was given by mistake or fraud such as to involve a possible failure of justice in the event of the appeal not being restored;

(ii) an application to withdraw notice of abandonment is not necessarily an abuse of legal process, because there may be cases in which, although functus officio, an appellate tribunal will use its inherent jurisdiction to declare such a notice a nullity, and allow the appeal to be restored.

Appeal allowed. Matter remitted to the High Court to hear the application on its merits.

Cases referred to in judgment

(1) *R. v. Moore*, [1957] 2 All E.R. 703.

Judgment

Law JA: read the following judgment of the court: This is an appeal from the High Court of Uganda (Sir Udo Udoma, C.J.) against the refusal by the learned Chief Justice to entertain an application by the appellant for leave to withdraw notice of abandonment of an intended appeal. The learned Chief Justice's order was in the following terms:

> "This application is refused as incompetent for under s. 328A (3) the appeal was deemed to have been dismissed in law. I am of the opinion that this application amounts to an abuse of legal process, for the appeal having been dismissed by operation of law, it was not competent for counsel to have sought to revive it. This court is functus officio."

Section 328A (3) of the Criminal Procedure Code provides that an appellant may abandon his appeal by giving notice in writing, whereupon the appeal shall be deemed to have been dismissed. The Code makes no provision for applications

for leave to withdraw a notice of abandonment. Counsel for the appellant argued that a case might arise of a notice of abandonment being given, for instance, in the name of the wrong prisoner, and he submitted that there must be some procedure available whereby the person affected by such a mistake could apply for the notice, wrongly given in his name, to be withdrawn. He has referred us to the proviso to s. 3 (2) of the Code, which states that where the procedure provided by the Code is inapplicable, a court may exercise jurisdiction according to the course and procedure observed by and before the High Court of Justice in England. Counsel for the appellant referred us in this connection to the judgment of Goddard, L.C.J., in *R. v. Moore* (1), which is precisely in point. The Criminal Appeal Act, 1907, of the United Kingdom, like the Criminal Procedure Code in Uganda, is silent about prisoners who have once abandoned their appeals having a right to apply for leave to withdraw the notice of abandonment. Rule 23 of the Criminal Appeal Rules of the United Kingdom, like s. 328A (3) of the Criminal Procedure Code, provides that on notice of abandonment being given the appeal is deemed to be dismissed. Lord Goddard said, in the course of his judgment:

> "No doubt if a case could be made out that a prisoner had in some way or another been fraudulently led or induced to abandon his appeal, the court in the exercise of their inherent jurisdiction would say that the notice was to be regarded as a nullity; but where there has been a deliberate abandonment of an appeal. . . there is no power or right to allow the notice of abandonment to be withdrawn and the appeal reinstated because, the appeal having been dismissed, the court have exercised their powers over the matter and are functus officio."

We agree with those observations, and consider that appellate courts in Uganda have an inherent jurisdiction to allow an abandoned appeal to be restored, if it can be shown that notice of abandonment was given as the result of mistake or fraud such as to involve a possible failure of justice in the event of the appeal not being restored. We do not say that this is such a case, but we respectfully disagree with the learned Chief Justice than an application to withdraw notice of abandonment of an appeal is necessarily an abuse of legal process, because there may be cases in which, although functus officio, an appellate tribunal will use its inherent jurisdiction to declare such a notice a nullity, and allow the appeal to be restored.

We accordingly allow this appeal, set aside the order appealed against, and remit the matter to the High Court so that the appellant's application for leave to withdraw his notice of abandonment of appeal can be heard on its merits in the light of what has been said in this judgment.

Appeal allowed. Matter remitted to the High Court to hear the application on its merits.

For the appellant:
SV Pandit
SV Pandit, Kampala

For the respondent:
AG Deobhakta (*State Attorney*, Uganda)
The Attorney General, Uganda

Vallabhdas Karsandas Raniga v Mansukhlal Jivraj and others
[1965] 1 EA 700 (CAN)

Division:	Court of Appeal at Nairobi
Date of ruling:	11 November 1965
Case Number:	89/1962
Before:	Newbold V-P, Duffus and Spry JJA
Sourced by:	LawAfrica

[1] Practice – Court of Appeal – Slip rule – Error arising from accidental slip or omission – Appeal heard and judgment delivered – Judgment embodied in formal order – Omission of counsel to make particular application – Application for amendment of order – Jurisdiction of Court of Appeal to amend its judgment and order – Appellate Jurisdiction Act, 1962, *s.* 3 (2) (*K.*) – *Eastern African Court of Appeal Rules*, 1954, *r.* 13 (2) – *Civil Procedure Act* (*Cap.* 5), *s.* 99 (*K.*).

[2] Costs – Application – Whether respondent always entitled to costs of application not made at proper time.

Editor's Summary

A decree for possession, arrears of rent and mesne profits was passed against the appellant by the Supreme Court and he appealed against that decree. Before lodging the record of appeal the appellant had successfully applied to the Court of Appeal for a stay of execution pending the hearing of the appeal on terms and under that order made certain payments to the respondents. The appeal was subsequently heard and allowed but counsel for the appellant failed to apply to vacate the order for the stay of execution and for a refund of moneys paid under that order. The judgment was then embodied in a formal order. Subsequently the appellant applied for amendment of the order so as to provide for refund of the moneys paid by him. For the respondent it was submitted that the court has no power to vary its judgments once they have been embodied in formal orders and in any case such power cannot be exercised to make good an omission resulting from the failure of counsel to make an appropriate application.

Held –

(i) the Court of Appeal has, under s. 3 (2) of the Appellate Jurisdiction Act, 1962, the same jurisdiction to amend judgments and orders that the High Court has under s. 99 of the Civil Procedure Act, and this jurisdiction is recognised in r. 13 (2) of the Eastern African Court of Appeal Rules, 1954;

(ii) the words "at any time" in s. 99 of the Civil Procedure Act allow the power of amendment to be exercised after the issue of a formal order;

(iii) "slip orders" may be made to rectify omissions resulting from the failure of counsel to make some particular application;

(iv) a slip order will only be made where the court is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given, or, in the case of a matter which was overlooked, where it is satisfied beyond doubt, as to the order which it would have made had the matter been brought to his attention;

(v) the court was satisfied that if the facts had been before the court when judgment was given on the

appeal, the court would, on application or indeed of its own motion, have made the order for refund sought, which was necessarily consequential on the decision.

Order accordingly.

Cases referred to in ruling:

(1) *Chessum & Sons v. Gordon*, [1901] 1 Q.B. 694.

(2) *Fritz v. Hobson* (1880), 14 Ch.D. 542.

(3) *Re Inchcape*, [1942] Ch. 394.

Ruling

Spry JA: read the following ruling of the court: This application by way of motion arises out of civil proceedings begun in 1960, in which the present respondents sought an order for possession of certain premises and arrears of rent under a lease which had expired and mesne profits as from the expiration of the lease. The present applicant counterclaimed for specific performance of an agreement for the grant of a new lease of the suit premises.

The respondents were successful in the Supreme Court, obtaining a decree for possession, arrears of rent and mesne profits at the rate of Shs. 375/- per month from February 1, 1960, until possession should be given, interest and costs.

The applicant applied for a stay of execution pending appeal, which was opposed by the respondents. The application (Civil Application No. 33 of 1962) was heard by Gould, Ag. V.-P. (as he then was), and a stay was ordered on conditions, which included the following;

> "2. That the applicant duly and punctually pay to the respondents the mesne profits ordered by the Supreme Court at the rate of Shs. 375/- per month with interest as ordered. Payments to be made on the first day of each calendar month in respect of the previous month.
>
> 3. That the applicant file in the Supreme Court within seven days from the date hereof an undertaking
>
> (*a*) that he will pay by way of additional mesne profits as from September 1, 1962 the sum of Shs. 300/- per calendar month unless the Court of Appeal otherwise orders on the appeal;
>
> (*b*) that he will submit to any further or other order of the Court of Appeal relating to mesne profits.
>
> 4. That the applicant pay into the Supreme Court by way of security for the performance of the undertaking in para. 3 (*a*) hereof the sum of Shs. 300/- within fourteen days of the date hereof, the sum Shs. 300/- on or before October 31, 1962, and thereafter the sum of Shs. 300/- per calendar month on or before the last day of each and every calendar month until the hearing of the appeal."

The applicant's appeal was heard by this court and allowed; the decision of the Supreme Court was set aside, the respondents' suit was set aside, with costs, and the counterclaim for specific performance allowed, with costs. There was no mention in the judgments or order of this court of the order made on the application for stay of execution.

In the meanwhile, the applicant had duly paid into court the additional mesne profits in accordance with the order quoted above, and these amounts had been paid out to the respondents. This payment out appears to have been irregular but seems to have been based on a somewhat ambiguous letter written by Mr. Kean, formerly the advocate for the applicant.

The present application was drawn as an application for the refund of Shs. 8,142/71, with interest and costs. Counsel for the respondent took a preliminary objection on the ground that the application was one which this

court was incompetent to allow. He argued that the refund of moneys paid under an interlocutory order was a matter which, under s. 91 of the Civil Procedure Act (Cap. 5), is within the exclusive jurisdiction of the High Court. Counsel, for the applicant, then asked leave to amend his application, so as to make it an application to this court to vary or supplement its judgment on the appeal. This application was opposed by counsel for the respondent on the grounds that it had not been made in proper form and did not specify the rule under which it was made, and that the amendment sought had not been precisely formulated. There is certainly justification for these criticisms, but we were not disposed to disallow the application for amendment on grounds which were essentially technical if the result were to be a possible miscarriage of justice.

Counsel for the respondent also raised on his preliminary objection the ground that this court has no power to vary its judgments once they have been embodied in formal orders. He argued further that even if the court has power to vary a judgment after the issue of the order, it can do so only to correct its own errors and not to make good an omission resulting from the failure of counsel to make the appropriate application.

It appears to us that s. 3 (2) of the Appellate Jurisdiction Act, 1962 (No. 38 of 1962) confers on this court the same jurisdiction to amend judgments, decrees and orders that the High Court has under s. 99 of the Civil Procedure Act, making it unnecessary to look to the inherent powers of the court. This jurisdiction is recognised in r. 13 (2) of the Eastern African Court of Appeal Rules, 1954 (to which I shall refer as "the Rules").

It appears to us further that the words "at any time" in s. 99 clearly allow the power of amendment to be exercised after the issue of a formal order. We are reinforced in that opinion by the decisions of the English courts on the corresponding rule of the Supreme Court of England, r. 11 of Ord. 20 (formerly r. 11 of Ord. 28), notably *Chessum & Sons v. Gordon* (1), in which a "slip order" made after the judgment pronounced at the trial had been drawn up and entered, formalities equivalent to the sealing of an order under r. 81 of the Rules, was approved in the Court of Appeal.

Section 99 was derived from s. 152 of the Indian Code of Civil Procedure, 1908, which itself derives from the English rule, and all these provisions are substantially similar. The English cases, although not binding on us, have therefore a high persuasive value.

There are English authorities also covering the second point of counsel for the respondent and it is clear from *Fritz v. Hobson* (2) and more particularly *Re Inchcape* (3) (to which counsel did not refer) that in England "slip orders" are made to rectify omissions resulting from the failure of counsel to ask for costs and other matters to which their clients are entitled. We are fully satisfied that s. 99 ought to be interpreted in the same way.

For these reasons, we thought it proper to overrule the preliminary objections of counsel for the respondent and allow the amendment of the application.

The first paragraph of the application as so amended reads as follows:

> "1. The Order of the Court of Appeal in Civil Appeal 89 of 1962 be amended so as to provide that the Respondents do refund to the Applicant Shs. 8,142/71 paid by the Applicants as additional mesne profit under an order made by the Vice-President in Civil Application No. 33 of 1962."

Counsel for the applicant explained that at the hearing of the appeal neither he, nor leading counsel, were aware that there had been an application for a

stay of execution or of the order granting a stay on terms. The application for a stay had been made by Mr. Kean, who had subsequently left Kenya. That was why no application had been made at the hearing of the appeal for the refund of the amount now claimed. It may be added, for the sake of clarity, that the application for a stay had been made before the filing of the appeal and consequently, under r. 19 (9) of the Rules, was intituled as a civil application and not intituled in the appeal and was therefore not part of the record before the court.

Counsel for the applicant conceded that the applicant had prior to the hearing of the application for a stay agreed to the unconditional payment out to the respondents of certain moneys deposited in court and representing arrears of rent but submitted that this agreement did not relate to moneys which might thereafter be paid into court in compliance with the terms of the order for stay. He submitted that these moneys had been wrongly paid out to the respondents.

He argued also that he had to come to this court, because if he were to apply to the High Court under s. 91 of the Civil Procedure Act, that court might consider itself inhibited from making any order in the matter, since the order of the learned Acting Vice-President had not been vacated or varied on the hearing of the appeal or otherwise.

As regards the merits of the application, counsel submitted that it was clear from the order of the learned Acting Vice-President that the payments into court of Shs. 300/- each month had been by way of security for the undertaking which the applicant was required to give and was intended to secure the respondents against loss if they succeeded on the appeal and if it were found that the mesne profits ordered by the Supreme Court were less than the current rental value of the suit premises. As the appeal had in fact been allowed, the applicant was not liable for mesne profits at all, but only for the contractual rent. The mesne profits ordered by the Supreme Court and duly paid were equal to the contractual rent and the applicant was therefore entitled to recover all the additional mesne profits ordered by the learned Acting Vice-President.

Questioned by the court regarding the amount of the claim, counsel agreed to limit his claim to Shs. 7,500/-, that is, the aggregate of twenty-five payments of Shs. 300/- each.

Counsel for the respondent submitted that what he had asked for at the hearing of the application for a stay of execution was an unconditional payment of Shs. 300/- per month as the price of a stay and he argued that this was the effect of the order of the learned Acting Vice-President. This would have been his submission had any application for refund been made at the hearing of the appeal. Counsel for the respondent argued that this was not a case of a slip or omission but alleged that the applicant was now trying to recover money to which he was not entitled.

We may say at once that we see no possible justification for interpreting the order of the learned Acting Vice-President in the manner suggested by counsel for the respondent. We have no doubt that if the learned Acting Vice-President had intended an unconditional payment to the respondents, he would so have ordered in express terms. On the contrary, he did not order the applicant to pay the additional mesne profits direct to the respondents, as he did the original mesne profits; his order was a conditional one only, expressed to be payable “unless the Court of Appeal otherwise orders on the appeal”; and he expressly referred to the payment into court of the additional mesne profits as being “by way of security”. We think nothing could be clearer, and the conditions were shown in draft to both counsel and, apart from certain details not now relevant, accepted by both.

A court will, of course, only apply the slip rule where it is fully satisfied

that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention. In the present case, we feel no doubt that if the facts had been before the court when judgment was given on the appeal, the court would, on application or indeed of its own motion, have made the order for refund now sought, which was, in our opinion, necessarily consequential on the decision on the main issues.

As regards costs, counsel for the respondent submitted that it is the "inflexible" rule that where an application is not made at the proper time, the respondent is entitled to costs. We are not aware of any such rule. The matter appears to be governed by r. 75 of the Rules, which gives the court discretion to make such order as may be just. Of course, the fact that an application is not made at the proper time is a factor to be taken into account and one which may weigh heavily in certain circumstances. In the present case, we think a reasonable explanation has been furnished. We take note also of the fact that the application itself was badly framed; that an informal application was made for amendment; and that the amount initially claimed appears to have been excessive. But as against those considerations, there is the fact that in our opinion these proceedings should never have been necessary, as we can see no justification for the refusal of the respondents to refund the additional mesne profits when so requested.

The order of the court is therefore that the judgments of the court in Civil Appeal No. 89 of 1962 and the order consequent thereon be amended to include an order that the respondents do refund to the applicant the sum of seven thousand, five hundred shillings, being the additional mesne profits paid in pursuance of the order made in Civil Application No. 33 of 1962. The applicant will be entitled to three-quarters of the costs of this application, which costs shall include the costs of the preliminary objection.

Order accordingly.

For the applicant/appellant:
SL Chawla
Kean & Kean, Nairobi

For the respondent:
DN Khanna
Khanna & Co, Nairobi

Re Taxation of Costs v Re an Advocate
[1965] 1 EA 705 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of ruling:	6 May 1964
Case Number:	1/1964
Before:	Spry J
Sourced by:	LawAfrica

[1] Costs – Reference – Bill of costs containing omnibus charge – Charge based on oral agreement between client and advocate – Bill taxed as one for instructions fee – Whether agreement valid – Advocates' Remuneration and Taxation of Costs Rules (*T.*) *– Matrimonial Causes Rules* (*T.*) *– Advocates Ordinance, s.* 53 *and s.* 54 (*T.*)

[2] Costs – Reference – Observations on taxing master's powers to hear evidence.

Editor's Summary

A client had consulted an advocate regarding the possible dissolution of her marriage and instructed him to prepare the necessary petition. A fee was orally agreed but later the client changed her mind about instituting proceedings and refused to pay the advocate's bill of costs. The advocate then applied to the Deputy Registrar, as taxing officer, to have the bill of costs taxed and obtained an order for payment under r. 66 of the Matrimonial Causes Rules 1956. The bill of costs filed was not an itemised one but was in an omnibus form stating that it was an agreed fee. The Deputy Registrar held that the sum claimed was not excessive and taxed it as an instruction fee without alluding to the alleged agreement. The client thereupon referred the matter to a judge and the substantial question at issue was whether the oral agreement between advocate and client was enforceable.

Held –

(i) the taxing officer should have rejected the bill of costs as being based on an oral agreement which was unenforceable under the Advocates Ordinance; but

(ii) the taxing officer having taxed the bill not as an omnibus charge but as an instructions fee and the amount awarded on that basis not being so manifestly wrong as to indicate some misdirection, and since an itemized bill including instructions could hardly have been less, the client could not be regarded as aggrieved and there had been no failure of justice.

Obiter: A taxing master has no power to take evidence.

Reference dismissed.

No cases referred to in ruling:

Ruling

Spry J: This is a reference brought under r. 5 of the Advocates' Remuneration and Taxation of Costs Rules, as applied by r. 64 of the Matrimonial Causes Rules, 1956, from a Ruling of the learned Deputy Registrar as taxing officer.

The facts out of which the reference arise are briefly as follows; Mrs. Fernandes (to whom I shall refer as "the Client") consulted Mr. Lockhart-Smith (to whom I shall refer as "the Advocate") regarding the possible dissolution of her marriage. After certain negotiations which it is not necessary to consider in detail, a fee was orally agreed and the Advocate was instructed to proceed with the preparation of a petition that the Client's marriage might be declared null and void. Subsequently, the Client changed her mind and refused to pay the Advocate's bill of costs. The Advocate then applied to have the bill of costs taxed, which was done, and he obtained an order for payment under

r. 66 of the Matrimonial Causes Rules, 1956. Subsequently, the present reference was made by chamber application.

The material part of the bill of costs reads as follows:

Date	*Item No.*	*Particulars*	*Amount Charged*	*Amount Taxes off*
January, 1963 to March, 1963				
		1.To Instructions to file a Petition for the marriage celebrated between the Petitioner and the Respondent to be declared null and void including attendances on the client: drawing a Petition together with a chamber ... Application and an affidavit to be used in support thereof, making drafts of the same and writing letters and perusing letters. Agreed fee ..		2,000/-

This would suggest that the basis of the claim was the agreement between the parties, and this seems to have been assumed in Mr. Lockhart-Smith's argument before the taxing officer, which was mainly in justification of the quantum of the bill. The Client was represented then, as before me, by Mr. Riegels, whose instructions appear to have been limited to denying that all the work alleged to have been done had in fact been done. The taxing officer expressed himself as satisfied that a substantial amount of work had been done and that research into questions of law was necessary: he did not consider the amount of the bill as presented, Shs. 2,000/- to be excessive and he taxed it accordingly. He did not once refer in his ruling to the alleged agreement.

Before me, counsel submitted two arguments, which were, in fact, closely inter-related. In the first place, he submitted that the bill was not in proper form, that all the work alleged to have been done should have been itemised. Only in this way would it be possible for an advocate representing a client to obtain the detailed instructions necessary to challenge a bill on the ground that all the work charged for had not been done.

Secondly, and reinforcing this argument, counsel submitted that r. 66 of the Matrimonial Causes Rules, 1956, which provides for the issue of an order for payment on *ex parte* application, appears to remove the possibility of attacking a bill at the time when it is sought to be enforced. He argued that this made it all the more important that the taxing officer should have an itemized bill before him. At the same time, counsel expressed a doubt whether the taxing officer has jurisdiction to decide issues of fact.

Mr. Lockhart-Smith relied in the main on his agreement with the Client. He submitted that the provisions of the Advocates Ordinance (Cap. 341) do not preclude the making of an oral agreement between advocate and client but that such an agreement would be liable to taxation at the instance of either party. Counsel had earlier in answer to a question I put, expressed substantially the same opinion, but, had added that if the matter went to taxation the provisions of the Advocates' Remuneration and Taxation of Costs Rules should apply.

Counsel observed that the bill as presented apparently amounted to no more than an instruction fee,

and Mr. Lockhart-Smith agreed that this was so.

I think the first question that has to be decided is whether an oral agreement between advocate and client is enforceable. In my view, it is not. Section 49

of the Advocates Ordinance provides for the making of orders prescribing and regulating the remuneration of advocates, and s. 70 saves the Advocates' Remuneration and Taxation of Costs Rules, except so far as they conflict with any provisions of the Ordinance. Sections 53 and 54 of the Ordinance provide for agreements in writing as to remuneration, and they are expressed as enabling such agreements to be made. The reason for this is, I think, clear, that otherwise the making of an agreement for a fixed fee would be contrary to the rules prescribing fees. If that is so, the fact that one method of contracting out of the prescribed fees has been expressly authorized by the legislature precludes any other method being impliedly permitted, according to the principle expressed in the maxim expressio unius est exclusio alterius.

I think, therefore, with respect, that the taxing officer should have rejected the bill of costs, as being based on an unenforceable agreement. Had he done so, the Advocate would clearly have had to amend or redraft the bill so as to make it accord with the Advocates' Remuneration and Taxation of Costs Rules, that is to say, it would have to have been presented as an itemized bill.

In fact, as I have said, the taxing officer appears to have disregarded the words "agreed fee" in the bill and Mr. Lockhart-Smith's references to the agreement and to have treated the bill as one lodged under the Rules. Furthermore, he appears to have treated the bill, not as what counsel called a "lump-sum bill" but as a bill containing a single item, the fee for instructions, although it is true that he does not expressly say so. The material part of his Ruling begins and ends with matters appropriate to an instruction fee and there is no suggestion that he applied his mind to the exact number of attendances or letters written or to the length of the documents drafted.

I do not think the bill was drafted as an itemized bill of one item; clearly it was drafted as an agreed fee covering all the work done. Nor do I think its form is entirely appropriate to such an item; part should, in my opinion, have been omitted or at least differently worded. (I must observe, however, that items relating to instructions contained in the Precedents in Butterworths Costs (2nd Edn.), pp. 927–975, show that in England the "Instructions for Hearing" item is permitted to include interviews, correspondence and other matters.) On the other hand, if I am right in believing that the taxing officer taxed this bill as an instruction fee, I cannot see that the Client can be regarded as aggrieved or that there has been any failure of justice. If the taxing officer was prepared to allow an instruction fee of Shs. 2,000/-, an itemized bill including instructions could hardly have been less.

I would certainly not be prepared to interfere with an instruction fee of Shs. 2,000/-. It has been laid down repeatedly that this court will only interfere in matters of quantum where the amount awarded is so manifestly wrong as itself to indicate some misdirection.

If I believed the taxing officer had dealt with this bill as an omnibus charge, I should have no hesitation in setting his Ruling aside but as I believe he dealt with it as an instruction fee, I think no useful purpose would be served by my so doing and I dismiss this reference.

That being so, it is not necessary for me to decide two questions asked by counsel. The first was whether the taxing officer has power to take evidence of fact. The Advocates' Remuneration and Taxation of Costs Rules are silent on this question, unlike the Rules of the Supreme Court of England which make express provision for it. I will merely observe that in my opinion, in the absence of any express power, the taxing officer has no power to take evidence. The second question is how, if the taxing officer has no power to take evidence, an issue of fact can be raised and decided under the Matrimonial Causes Rules, 1956. On this, my answer would be that if there is no express power, I think

this court would always, on being moved, exercise its inherent powers to prevent any failure of justice. I have expressed opinions on these questions so as to draw attention to them, and in order that consideration may be given to the enactment of express provision.

Reference dismissed.

For the applicant:
MD Riegels
Donaldson & Wood, Dar-es-Salaam

For the respondent:
WJ Lockhart-Smith, Dar-es-Salaam

The respondent appeared in person.

Joseph Maufi and another v Republic
[1965] 1 EA 708 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	6 August 1965
Case Number:	77 and 108/1965
Before:	Bannerman J
Sourced by:	LawAfrica

[1] Criminal law – Corruption by public servant – Money paid to accused as advances or loans – Money to be repaid – Whether promise to repay a lawful consideration – Meaning of "consideration" – Prevention of Corruption Ordinance, s. 6 (*Cap.* 400) (*T.*).

[2] Criminal law – Practice – Corruption – Consent of Deputy Public Prosecutor required for prosecution – Consent typed at bottom of charge – Signature intended to cover both charge sheet and consent – Whether consent given on knowledge of the facts – Whether consent valid – Prevention of Corruption Ordinance, s. 6 (*Cap.* 400) (*T.*).

Editor's Summary

The appellants were convicted by the District Court at Dar-es-Salaam on several counts of the offence of a public servant obtaining or attempting to obtain advantage without lawful consideration contra s. 6 of the Prevention of Corruption Ordinance (Cap. 400). It was common ground that the monies paid to the appellants were all advances or loans and that the appellants promised to pay back the loans and did pay back in some cases. And, further, in cases where they were charged with attempting to obtain sums of

money it was not disputed that the requests for the loans were accompanied by promises to repay the loans if advanced. The trial magistrate held that a mere promise to repay the loan was not sufficient consideration and that if there was any consideration for the money obtained by the appellants from the complainants, it was in the circumstances grossly inadequate and therefore not lawful within the meaning of s. 6, ibid. On appeal, the substantial issue was whether there was consideration. It was argued on behalf of the appellants that the promise to repay the amounts lent constituted consideration and that since the appellants were charged with obtaining or attempting to obtain the various sums without lawful consideration the question whether the consideration was adequate or not did not arise. On the other hand it was contended on behalf of the respondent that a promise to repay the exact amount given as a loan was no consideration in law and that in each case there was no consideration at all. Another ground of appeal was that the consent of the Deputy Public Prosecutor to prosecute was not given as required by s. 14, ibid. The consent was typed at the end of the charge sheet and the Attorney General, then acting for the Deputy Public Prosecutor, appended his signature to the document intending to cover both the charge and the consent.

Held –

(i) "consideration" in s. 6 of the Prevention of Corruption Ordinance should be given its ordinary legal meaning; and there is a distinction between

"no lawful consideration" and "lawful consideration . . . known . . . to be inadequate";

(ii) the promise to repay the money was consideration for the loan;

(iii) therefore, charges based on the absence of lawful consideration (as distinct from inadequacy of lawful consideration) must fail;

(iv) there were sufficient relevant facts before the Attorney-General when he signed the consent to prosecute such as to make it valid, and no special wording is required.

Appeal allowed.

Cases referred to in judgment

(1) *Currie v. Misa* (1875), L.R. 10 Ex. 153.

(2) *Abdul Aziz Suleman v. R.*, [1958] E.A. 31 (C.A.).

Judgment

Bannerman J: The first appellant was at all material times a Superintendent of Police and Regional Police Commander stationed at Songea in the Ruvuma Region and the second appellant was an Assistant Superintendent of Police under him. They were charged and tried before the Senior Resident Magistrate sitting in the District Court of Dar-es-Salaam on several counts of offences of Public Servant obtaining or attempting to obtain advantage without consideration contrary to s. 6 of the Prevention of Corruption Ordinance (Cap. 400) and were convicted on the counts the particulars of which are as follows: [here the judge set out the counts each of which specified "without lawful consideration" and continued:]

The appellants jointly filed a Petition of Appeal against their convictions and sentences on the following grounds:

[The judge then set out the grounds all of which raised the question of consideration except ground 6, which was as follows:]

6. The sanction to prosecute by the Acting Deputy Public Prosecutor was not in accordance with the requirement of s. 14 of the said Ordinance.

[The learned judge then went on:]

Section 6 of the Prevention of Corruption Ordinance (Cap. 400) which is analogous to and almost identical in phraseology to s. 165 of the Indian Penal Code (Act. XLV of 1860) lays down that:

> "Any person, being a public servant, who solicits, accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable interest or thing without lawful consideration or for a lawful consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely or about to be, concerned in any matter or transaction with himself as a public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to or acting for or on behalf of the person so concerned, or having such a connection, shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding five years or to a fine not exceeding five thousand shillings or to both such imprisonment and such fine, and, in addition, the court may order that the amount or value of any valuable interest or thing received by him, or any part thereof, be forfeited."

In Dr. H. S. Gour's The Penal Law of India (2nd Edn.), Vol. 1 at p. 825 the learned author made the following commentary and expository on the principle underlying the offence created by the section thus:

> "1450. Principle – As to this section the authors wrote:
>
> > 'The mere taking of presents by a public functionary, when it cannot be proved that such presents were corruptly taken, we have made penal only in one particular case' that is the one stated in this section. 'We have not made the taking of presents by public functionaries generally penal, because though we think it is a practice which ought to be carefully watched, and often severely punished, we are not satisfied that it is possible to frame any law on the subject which would not be rendered inoperative either by extreme severity or by its extreme laxity.' They then added that the provisions of law must on this subject be supplemented by rules framed by the Executive Government, and which may be enforced by the punishment of censure, degradation or dismissal, as the case may require . . .
>
> 1451. The difference between the acceptance of a bribe made punishable by s. 161 (s. 161 referred to above is analogous to s. 3 of Cap. 400) and this section is this. Under the former section the present is taken as a motive or reward for abuse of office; under this section the question of motive or reward is wholly immaterial, and the acceptance of a present is forbidden, because, though ostensibly taken for no consideration, it is in reality a bid for an official favour, the refusal of which after acceptance of the present may not be always possible."

In order to sustain a conviction under s. 6 of the said Ordinance (Cap. 400) the following ingredients of the offence must be proved:

(*a*) That the accused was a public servant at the time of the commission of the offence:

(*b*) That he accepted or obtained or agreed to accept or attempted to obtain, for himself or for someone else, a valuable interest or thing:

(*c*) Which he obtained, etc., from a person whom he knows to have been or to be or to be likely or about to be concerned in any matter or transaction with himself as a public servant, etc.

(*d*) That he gave for it either (1) no lawful consideration or (2) lawful consideration which was known to him to be inadequate.

As regards (*d*) the prosecution must allege in the charge one or other alternative averment on which they rely to prove the offence and must prove that particular averment. In this case the particulars of the counts on which the appellants were convicted as set out above stated that in each offence alleged to have been committed there was no lawful consideration for the sum which was obtained or attempted to be obtained as the case may be, and it was incumbent therefore on the prosecution to prove not merely that there was no adequate consideration, involving a question of fact, but that no lawful consideration existed at all, a question of law, in my opinion.

The learned Senior Resident Magistrate in his judgment, after reviewing all the facts, made findings in the following passages:

> ". . . From the facts in this case and from the documentary exhibits there can be no question whatever that these sums of money were either demanded or received from the various complainants while both accused were actively engaged in matters relating to the complainants which they

> had to deal with by virtue of their offices as public servants. The relevant files tendered and particular correspondents referred to and the dates so eloquently bore out the prosecution case on this point.
>
> It is common ground that none of these complainants was a money lender. No interest was raised in respect of any of the loans. It could not be said that these people, who were all traders and needed money for their businesses were happy parting with their moneys in the circumstances they did.
>
> It is not doubted that these were all loans in a sense and that the accused persons promised in some cases to pay back and indeed, did pay back in certain cases. The question is nevertheless whether in the circumstances the promise to pay back at the time of the loan was a sufficient consideration moving from the accused persons. I would say that a mere promise to repay the loan though quite adequate in the ordinary law of contract was not sufficient in the present cases. I would rather regard the complainants as victims who when giving the money were induced by fear of the position held by the accused and the possible repercussions to their various businesses should they refrain from giving the loans. Section 6 of the Prevention of Corruption Ordinance under which the accused persons stand charged is a very wide section. It talks of sufficiency of consideration which in simple law of contract is never the case. The courts have never enquired into the adequacy of consideration but are concerned with it being real. I hold in the present case that if at all there was any consideration for the money obtained by the accused persons from the complainants, the consideration was in the circumstances grossly inadequate and therefore not lawful, within the meaning of s. 6 of the Ordinance. From the evidence before me, I am satisfied that the circumstances of this case fall within the provisions of s. 6 of the Prevention of Corruption Ordinance. . . .”

All the grounds of appeal (except ground 6) deal with the question of consideration. The main arguments advanced by the advocates for the appellants were that the promise to repay the amounts lent to the appellants by the complainants constituted lawful consideration and that since the appellants were charged with obtaining or attempting to obtain the various sums without lawful consideration the question whether the consideration was adequate or not did not arise and the appellants were entitled to be acquitted, a necessary ingredient or averment in each of the counts not having been proved. As against this it was urged by the Senior State Attorney appearing for the Republic that a promise to repay the exact amount given as a loan is no consideration in law and that in each case there was no consideration at all and not merely that there was no adequate consideration as would be the case if the appellants had promised to pay back something more than the amount paid to them by way of interest however small an amount of interest was promised.

As was the position before the learned Senior Resident Magistrate, it was common ground that the monies paid to the appellants were all advances or loans and that the appellants promised to pay back the loans and did pay back in some cases. In the cases where the appellants were charged with attempting to obtain sums of money it was not disputed that the requests for the loans were accompanied by promises to repay the loans if advanced. The definition of “consideration” as contained in s. 2 of the Ordinance (Cap. 400) is obviously intended to apply to s. 3 and, in my opinion, does not make sense if applied to s. 6 of the said Ordinance. Consideration is defined in the case of *Currie v. Misa* (1) ((1875) L.R. 10 Ex. 153 at p. 162) as:

> “Some right, interest, profit or benefit accruing to one party or some

> forbearance, detriment, loss or responsibility, given suffered or undertaken by the other."

It is beyond argument, in my opinion, that the giving of money as a loan in return for a promise to repay constitutes a valid and enforceable contract, the promise to repay being consideration in the sense that it creates a right to sue which is a chose in action (regarded as a thing in law) in return for the executed consideration of the money lent.

In Leake on Contracts (7th Edn.) at pp. 30 and 31 the learned author makes the following pertinent proposition of law:

> "The consideration upon which a contract is made may be executed or executory. In the former case the consideration is executed by one party in return for the promise of the other and nothing remains to be done but to perform the promise according to its terms . . . A contract with an executed consideration appears either in the form of a request to perform the consideration, followed by the performing of the consideration according to the request, or in the form of an offer of the consideration followed by accepting the consideration offered. In either case there is no contract until the consideration is executed, and so long as the consideration remains executory it is voluntary and may be withheld; it differs in this respect from a contract with executory considerations or mutual promises in which the contract is complete upon the mere interchange of promises, and the consideration on either side, though executory is obligatory. But the executed consideration is not a past consideration in the sense of having been executed before the making of the promise, the execution of the consideration and the making of the promise being concurrent acts; . . .
>
> Although an executed consideration will not support a promise unless the consideration was moved by a previous request, a previous request is implied in law, though non-existent in fact, from the acceptance of a consideration offered. The import of the principle thus stated seems to be that in all cases the consideration must be intended on both sides as not gratuitous or voluntary but executed in respect of a promise express or implied. Upon the above principles, in the ordinary cases of goods sold and delivered, money lent, work and labour performed or services rendered a promise to pay for the executed consideration is presumptively inferred either from a previous request to execute it, or from a sufficient acceptance of it as executed."

With respect, the learned Senior Resident Magistrate misdirected himself when he stated in his judgment that "a mere promise to repay the loan though quite adequate in the ordinary law of contract was not sufficient in the present cases". The question whether the complainants were victims induced by fear of the appellants' position to give the loans or not was irrelevant to the determination of the legal question whether there was lawful consideration. Further, the learned Senior Resident Magistrate seems to have confused two distinct ingredients which could form the basis of a charge under s. 6, for there can be no circumstances in law in which it can be said that consideration was so grossly inadequate as to be no consideration, as was stated in the judgment. Section 6 itself distinguishes between total absence of lawful consideration and lawful consideration which is inadequate to the knowledge of the person charged and I can find nothing in the section which makes it necessary or desirable to give the word "consideration" any meaning other than its ordinary legal one. There is no doubt that it is morally wrong for a public officer to abuse his position in such a way as to obtain accommodation or advantage which he would not otherwise get. But, however reprehensible the conduct of the

appellants may have been and however desirable that such conduct should be exposed and punished in a developing society such as ours so as to serve as a deterrent to other public servants, a criminal court can only convict a person of an offence proved to have been committed in accordance with the law creating the offence and on evidence supporting all the ingredients constituting the offence as set out in the charge.

I have no doubt that on the facts the appellants as public servants were guilty of misconduct and may suitably be dealt with under existing executive regulations but I am satisfied that the learned Senior Resident Magistrate erred in finding that the prosecution made out a case sufficiently to entitle him to convict each appellant on the counts set out above since there was lawful consideration in each of the transactions on which the counts were based.

As regards ground 6, I am satisfied that the consent of the Director of Public Prosecutions was probably given and that the essential facts were known to him before he gave the consent required under s. 14 of Cap. 400. I do not agree that any special words must be used in the wording of the consent before it can be said that the person giving the consent was aware of the facts of the case. In this case the consent was typed out at the end of the charge sheet and it appears from the record of proceedings that the signature of the Attorney-General, then acting as Director of Public Prosecutions, was intended to cover both the charge and the consent, he having power to sign both. The consent not only set out the statement of offence of the counts but also referred to the particulars of the charges “as set out above”. I am satisfied that before signing he necessarily must have been aware of at least the essential facts or particulars set out in the counts and that was sufficient to make the consent valid.

In the case of *Abdul Aziz Suleman v. R.* (2) ([1958] E.A. at p. 40) the Court of Appeal for Eastern Africa considered the validity and sufficiency of a consent to prosecute in which the relevant facts set out as having been relied on to give the sanction were no more than, and almost identical with, the particulars of offence in the charge on which the proceedings were instituted in court and it was held that sufficient facts had been given to make the consent valid and “it would be quite unreasonable to require them to be set out with any greater particularity”. I am satisfied that in the instant case there were sufficient relevant facts before the Attorney-General when he signed the consent to prosecute such as to make it valid. I find no merit in this ground.

In the result this appeal must be allowed and the convictions and sentences set aside.

Appeal allowed.

For the first appellant:
TC Kanabar
TC Kanabar, Dar-es-Salaam

For the second appellant:
B Versi
B Versi, Dar-es-Salaam

For the respondent:
UV Campbell (Senior State Attorney), Tanzania
The Attorney General, Tanzania

Mohamed Bin Mohamed Bashanfer and another v J P King and another

[1965] 1 EA 714 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	16 September 1965
Case Number:	62/1964
Before:	Newbold V-P, Crabbe and Law JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Aden – Goudie, J

[1] Landlord and Tenant – Unregistered monthly lease in writing – Whether required to be registered – Transfer of Property Ordinance (*Cap.* 154) *s.* 104 (2) (*A.*) *– Documents Registration Ordinance* (*Cap.* 49) *s.* 9 *and s.* 10 (*A.*).

[2] Rent Restriction – Monthly lease in writing not registered under Transfer of Property Ordinance (*Cap.* 154) *s.* 104 (2) (*A.*) *– Whether lessee entitled to protection of Rent Restriction Ordinance* (*Cap.* 136) (*A.*).

Editor's Summary

Premises in Aden were let at a monthly rent of Shs. 1,000/- by a written lease which was not registered, but under which the lessee went into possession and paid rent. The lessor gave notice to quit and subsequently filed proceedings for possession claiming (amongst other things) that the lease was invalid because, being written, it should have been registered and therefore the lessee could not become entitled to protection under the Rent Restriction Ordinance, not being a lawful tenant.

Held – s. 104 (2) of the Transfer of Property Ordinance of Aden is permissive and is not exhaustive of the ways in which a lease may be made, so that the mere fact that a lease is in writing does not necessitate its registration in order to give it validity. Therefore this lease, being a monthly one, created a valid tenancy without registration.

Appeal dismissed.

Cases referred to in judgment

(1) *Nasiban v. Sayed* (1936), A.I.R. Nag. 174.

(2) *Bains v. Chogley* (1949), 16 E.A.C.A. 27.

(3) *Rama Sahu v. Gowro Ratho* (1921), 44 Mad. 53.

September 16. The following judgments were read:

Judgment

Newbold V-P: This is an appeal by two appellants against a judgment and decree of the Supreme Court of Aden dismissing a claim for possession of shop premises against the two respondents. At the hearing of the appeal there was no appearance of either the second appellant or the first respondent, and an application was made to transform the second appellant into a third respondent on the ground that he had, subsequent to the filing of the suit but prior to the hearing before the Supreme Court, transferred his interest in the shop premises to his brother, the first appellant. We rejected this application as we did not think it proper, in the absence of the second appellant and with no evidence of any form of consent from him, that the application should be granted. The first respondent, who had been served by substituted service with the plaint, had not appeared at the hearing before the Supreme Court and the

claims of the appellants against him, both in respect of possession and for rent and mesne profits, had been dismissed. The memorandum of appeal included a prayer that judgment be entered against the first respondent (hereinafter referred to as King) both for possession and for mesne profits, but this prayer was not pressed in argument and for all practical purposes the appeal developed into one in which the respective parties were the first appellant (hereinafter referred to as the plaintiff) and the second respondent (hereinafter referred to as the defendant).

The facts, so far as they are relevant to the issues argued on the appeal, may briefly be stated as follows. The plaintiff and his brother owned shop premises in Maalla. By an unregistered lease, dated January 21, 1961, made between the plaintiff as lessor and the Citizen Trading Company (hereinafter referred to as the Company) as lessee, these premises were purportedly demised at a monthly rent of Shs. 1,000/- payable on the last day of each month. The lease contained a provision prohibiting the lessee from making alterations to the premises without the previous consent in writing of the lessor. It also contained a provision entitling the lessor to re-enter without notice if the rent was in arrears for a period of fifteen days or if there was a breach by the lessee of any of the covenants contained in the lease. The proprietor of the Company was the defendant but the lease had been signed by King who held a power of attorney from the defendant. The lessee went into possession of the premises and paid rent for the months of January, February and March, 1961. Thereafter, proceedings were taken by the lessee before the rent tribunal with a view to determining the standard rent. For various reasons no finality was achieved in relation to the fixing of the standard rent with the result that rent for these premises was not paid from April, 1961 up to the date of judgment in the Supreme Court. Although a claim for rent is not an issue on the appeal, it was one of the claims made in the plaint and judgment was given against the defendant for the rent due on these premises from April 1, 1961, to May 11, 1964, the date of the judgment. On March 5, 1962 a notice to quit was served on the lessee requiring possession of the premises at the end of April, 1962. In June, 1962, the plaintiff and his brother filed a plaint against the defendant and King seeking, *inter alia*, a decree against them for possession of the premises. It was averred in the plaint that King had represented himself to be the proprietor of the Company and that the lease had been granted to the Company in the belief that that representation was true. In the plaint it was claimed that the lease was invalid and that neither King nor the defendant was the lawful tenant, by reason first, that the lease was unregistered; secondly, that King had falsely represented himself to be the proprietor of the Company and the defendant had obtained possession of the premises by virtue of the false representation; and, thirdly, that King had not disclosed that he was acting for the defendant. It was also claimed that as neither King nor the defendant was a tenant neither was entitled to the protection of the Rent Restriction Ordinance (Cap. 136). In the alternative it was claimed that the defendant had defaulted in the payment of rent and had made unauthorised alterations to the premises and that any tenancy had been terminated by the notice of March 5, 1962, and that an order for possession of the premises was reasonable in the circumstances. The defence filed by the second defendant denied the various averments in the plaint and averred that the plaintiff knew that the defendant was the proprietor of the Company. The defendant claimed that he was the lawful tenant of the premises and that, following the notice to quit, he had become the statutory tenant of the premises and that any alterations made to the premises had been made with the written authority of the plaintiff and that the rent had not been paid subsequent to March, 1961, because proceedings had been taken before the rent tribunal with a view to fixing the standard rent. At the hearing before

the trial judge the only witnesses were the plaintiff and his son and the defendant. During the trial the plaintiff put in what purported to be the counterpart original of the lease of other premises from the plaintiff to the Company and signed by King in which the description of the Company as "a registered British firm" was deleted; and he stated in evidence that King had falsely represented that he was the agent of a British firm.

In his judgment the trial judge held that King, whatever part he had played in the transaction, had played the part of an agent and that therefore he could not have been the tenant of the premises. The trial judge also rejected as inadmissible the document relating to the lease of the other premises, apparently on the ground that it was unregistered and that the authenticity of the first page with the deletion was doubtful. The trial judge was not impressed with the credibility of either the plaintiff or the defendant; nor, though he was suspicious of the part played by King, was he satisfied that any false representation, either as averred in the plaint or as stated in evidence, had been made by King to the plaintiff or that any alterations to the premises were not covered by the written authority. The trial judge held that though the defendant was not a tenant under the lease, as it had not been registered, nevertheless he was a tenant, apparently by reason of the provisions of s. 54 of the Transfer of Property Ordinance (Cap. 154), and on the termination of his contractual tenancy he became a statutory tenant entitled to the protection of the Rent Restriction Ordinance. The trial judge also held that in the circumstances of the case the failure to pay the rent due after April 1, 1961, was not so unreasonable as to ground any order for possession and, accordingly, he dismissed the claim in so far as it related to an order for possession of the premises and directed that each party should bear his own costs.

From that judgment and the decree consequent thereon the plaintiff and his brother appealed. The issues argued on the appeal were, first, that as the lease was unregistered no tenancy had ever existed and therefore the trial judge had erred in holding that the defendant was a statutory tenant entitled to the protection of the Rent Restriction Ordinance; secondly, that the defendant held the premises as a licensee under the terms of the contract and the trial judge should have made an order for possession as the defendant had broken the terms of the contract in failing to pay rent and in making unauthorised alterations; and thirdly, that the trial judge had erred in failing to hold that the lease had been obtained by fraud and was thus voidable and had in fact been avoided by the appellant.

On the first issue counsel for the appellant, submitted that as the lease was in writing but unregistered the defendant never held a tenancy of the shop premises and thus he never became a statutory tenant under the Rent Restriction Ordinance. The steps in his argument were as follows: First, under s. 104 (2) of the Transfer of Property Ordinance (Cap. 154 and hereinafter referred to as the Ordinance) a lease of the premises "may be made either by a registered instrument or by oral agreement accompanied by delivery of possession". On the authority of *Nasiban v. Sayed* (1), he submitted that a valid lease could be made in no other way and as this lease was in writing it had to be registered. Secondly, as the lease was required to be registered but was not in fact registered, the result was that under s. 37 of the Documents Registration Ordinance (Cap. 49) the lease was invalid and did not create any interest in the shop premises. Thirdly, that while the lease created no interest in the premises in the form of a tenancy, nevertheless under s. 54 of the Ordinance, as the lease had been signed by the appellant and the defendant had gone into possession under it, the defendant was entitled to remain on the premises as a licensee under the terms of the contract contained in the lease until the appellant became entitled to possession in accordance with the terms of the contract. Fourthly, that the

only interest of the defendant in the premises was that of a licensee under s. 54 of the Ordinance and that the entry into possession and the payment and acceptance of rent under an invalid lease did not create a monthly tenancy in accordance with the principle of *Bains v. Chogley* (2) which, he submitted, had been decided per incuriam. Fifthly, that the defendant had broken the terms of the contract contained in the lease by not paying rent and by making unauthorised alterations, and that in accordance with the contract the appellant had terminated the licence and was entitled to possession of the premises. Sixthly and finally, that as the defendant was never a tenant of the premises, when his licence to occupy the premises had been terminated he did not thereupon become a statutory tenant of the premises entitled to the protection of the Rent Restriction Ordinance.

The whole edifice of the argument of counsel for the first appellant rests upon the first step; unless that is sound the whole structure collapses even if individual subsequent steps are sound. The first step is that a lease, even if it be only for a monthly tenancy, must, if it be reduced to writing, be registered, In support of this he referred to s. 104 (2) of the Ordinance. This sub-section cannot be considered in isolation away from sub-s. (1), to which it obviously relates and from relevant sections in the Documents Registration Ordinance, to which, by s. 4 (2) of the Ordinance, s. 104 is supplemental. Sub-sections (1) and (2) of s. 104 of the Ordinance are as follows:

> "104 (1) A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.
>
> (2) All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession."

The argument of counsel for the first appellant is that sub-s. (2) creates a dichotomy of valid leases: a registered lease and an oral agreement accompanied by delivery of possession. In no other way, he submitted, could a valid lease be created. This somewhat startling proposition would seem to fly in the face of a number of East African and Indian decisions in which tenancies have been held to have been created in other ways, for example, holding over coupled with acceptance of rent, entry into possession under an unregistered document and what has been described as tenancy by estoppel. But, submits counsel for the first appellant, however novel may be the submission it is in accordance with s. 104 (2) and *Nasiban's* case (1), which is based on *Rama Sahu v. Gowro Ratho* (3). It may well be that such is a possible construction of that sub-section taken alone; but is it the correct construction when that sub-section is considered in conjunction with the other statutory provisions relevant to this matter? Section 104 (1) is framed in positive and exclusive language, but it does not say that a lease for any period contained in a written document can be made only by registered instrument. Indeed, the very strong implication is to the contrary; and sub-s. (2) is merely a complement to sub-s. (1). Turning now to the Documents Registration Ordinance, s. 9 (1) states:

> "The following documents shall be registered. . . namely:
>
> . . .
>
> (*e*) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent."

The moment a lease is reduced to writing it becomes a document. If that document had to be registered irrespective of the period of the lease I fail to understand why the section only requires documents which are leases for more than a year to be registered. That there is no necessity to register a document

which is a lease for a period less than a year is made clear by the comparison between s. 9, which specifies the documents of which registration is compulsory, and s. 10, which specifies the documents of which registration is optional. Section 10 states:

> "Any of the following documents may be registered under this Ordinance, namely:
>
> . . .
>
> (*c*) leases of immovable property for any term not exceeding one year."

Counsel for the first appellant submitted, however, that s. 37 of the Documents Registration Ordinance refers to the requirement for registration both under s. 9 of that Ordinance and under the Ordinance, a requirement which, he submitted, resulted in s. 104 (2) making all written leases compulsorily registerable. As I have said, I accept that such is a possible construction of s. 104 (2), but such a construction would lead to most inconvenient results, as was pointed out in *Rama Sahu's* case (3). In my view the result of considering s. 104 (2) of the Ordinance in the light of sub-s. (1) of the same section and ss. 9 and 10 of the Documents Registration Ordinance satisfies me that s. 104 (2) is permissive and is not exhaustive of the ways in which a lease may be made. I may add that this view is reinforced by the use of the phrase "may be made" in s. 104 (2) as opposed to the phrases "can be made only" in sub-s. (1) and "shall be executed" in sub-s. (3) of the same section. This being so the mere fact that the lease is in writing does not necessitate its registration in order to give it validity. The necessity for registration is determined by the period of the lease. It is true that *Nasiban's* case (1) is to the contrary; but the judge in that case, though stating that the full bench of the Madras High Court in *Rama Sahu's* case (3), was in agreement with his view, went considerably further than the view expressed by Wallis, C.J. when giving the opinion of the court. The precise reasons for the decision of the full bench are by no means clear; but what is clear is that the court held that an unregistered lease for six months was admissible in evidence. With respect to the learned judge in *Nasiban's* case (1) I am unable to accept that his view is the correct view of the law of Aden. It is not, I think, really in dispute that this lease, which reserves rent monthly and which may be terminated in certain circumstances without notice, is a monthly lease, and thus is not required to be registered under s. 104 (1) of the Ordinance. For the reasons I have given I do not consider that, because it is in writing, it is required to be registered under s. 104 (2) of the Ordinance. It follows that the lease created a valid tenancy and that, as the first step in the argument of counsel for the first appellant is unsound, the whole edifice collapses and it is unnecessary to consider the other steps.

The second issue, which related to the findings of the judge if the defendant held the premises by virtue of the contract under s. 54 of the Ordinance, no longer arises having regard to my view on the first issue. I should, however, state that I see no reason to interfere with the judge's finding of fact on the question of the alterations.

The third issue, which challenges the judge's finding on the question of the lease having been obtained by a false representation, still remains for consideration. On this issue it is urged that the judge was wrong in holding that the counterpart original of the lease of the other premises was inadmissible. The precise circumstances relating to this lease are not very clear. As it was the plaintiff who sought to put in the document it was for him to lay the necessary foundation for its admissibility. I shall accept, however, that the document might well have provided relevant evidence on the question of the nature of the Company and would, for that purpose, normally be admissible. Even if the document was authentic, a matter on which the judge was doubtful, I do

not see how its admission in evidence would have supported the case for the plaintiff in relation to the lease the subject of this appeal. It may well be that in relation to the other lease the plaintiff may, at some stage have been under the impression that the Company was a registered British firm. But the deletion of the words show that such impression was removed before the other lease was signed, since I do not understand it to be suggested that the deletion was improperly made after signature. As I understand that the other lease was earlier than the lease the subject of this appeal, it would seem that the admission of the document would have supported the case of the defendant rather than that of the plaintiff. In my view, therefore, even if the judge erred in refusing to consider the document as admissible evidence nevertheless the plaintiff was nor thereby prejudiced. At the hearing we did not call upon counsel for the defendant, on the finding of the judge that the lease had not been obtained by any false representation. I see no ground for interfering with the judge's finding of fact on the question of the false representation, even if the difference between the false representation pleaded and that given in evidence is disregarded. It is thus unnecessary to consider what would have been the effect on this lease if it had been obtained by false representation.

For these reasons I am of the opinion that the decision of the judge was correct and I would dismiss the appeal with costs. As the other members of the court agree it is so ordered.

Crabbe JA: I agree.

Law JA: I also agree.

Appeal dismissed.

For the first appellant:
PK Sanghani
PK Sanghani, Aden

For the second respondent:
JM Nazareth, QC and *TK Patel*
Bhailal Patel, Nairobi

The second appellant did not appear and was not represented.

The first respondent also did not appear and was not represented.

Qat Importing Company Ltd v Shaher Ahmed Mukbil
[1965] 1 EA 719 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	13 August 1965
Case Number:	58/1964
Before:	Newbold V-P, Sir Clement de Lestang and Law JJA

Sourced by: LawAfrica

Appeal from: Supreme Court of Aden – Goudie, J

[1] Contract – Duration – Whether determinable by reasonable notice – Appellant appointed sole wholesaler under statute – Respondent also a licensed retailer under statute – Contract to make daily supplies – Whether appellant has right to contract out of statutory provisions and determine contract.

[2] Court of Appeal – Practice – Consent judgment – Limitation – Damages for loss of profits for two periods – Both plaints heard – Damages awarded for one period only – Application for review to increase damages to cover period in second plaint – No objection by other party – By consent damages increased and judgment given on subsequent date – Whether latter judgment a consent judgment so as to bar an appeal therefrom.

Editor's Summary

The appellant was appointed the sole licensee under s. 3 of the Qat (Control) Ordinance, 1961 and therefore had the monopoly in Aden of importing qat and distributing it to retailers licensed under s. 4, ibid., for sale to consumers. The respondent was one of such retailers and had completed an order form in which the type and quantity of qat required daily was stated, and by cl. 6

of which it was stipulated that the appellant was not necessarily responsible to fulfil the order in full. The appellant supplied the respondent with daily deliveries of qat against which payment was made until one day the appellant by letter required the respondent within twenty-four hours to complete a new order form, failing which it threatened to stop the supply of qat immediately. The new form included an additional provision whereby, irrespective of the quantity and the quality of qat ordered, the respondent was required to bind himself to accept the delivery of any quantity and any quality or qualities supplied. The respondent refused to accept this condition whereupon the appellant ceased to supply. The respondent thereupon brought an action for loss of profits which was dismissed on the grounds that the respondent had failed to establish a contract. On appeal to the Supreme Court, counsel for the appellant admitted the contract but submitted that it was subject to an implied term that it could be terminated by reasonable notice. The appeal was allowed and it was held, *inter alia*, that in the circumstances of the case no such implied term should be read into the contract. On further appeal, it was argued, *inter alia*, on behalf of the appellant (*a*) that there was no concluded contract between the parties, (*b*) that an admission that a contract existed made on any erroneous appreciation of the law did not bind the appellant, and (*c*) that the order form completed by the respondent was no more than a standing order.

The respondent had originally instituted two suits in the Court of Small Causes for damages in respect of loss of profits, claiming in the first suit loss of profits from April 1, 1962 to April 15, 1962, and in the second from April 1 to 30, 1962. The respondent won on appeal and was awarded damages for fifteen days and a formal decree bearing the date of February 12, 1964 was drawn up. The respondent later applied for a review of the judgment praying for damages for thirty days as claimed in the second plaint. The application was not opposed and it was ordered by consent that the damages be increased, but instead of amending the original judgment, the judge signed on May 30, 1964 a new judgment and subsequently a new decree was drawn up. The appellant lodged a further appeal on September 23, 1964 and at the hearing counsel for the respondent raised two preliminary objections, namely, (*a*) that if the appeal was from the decree of May 30, 1964, that decree was based on the consent of the parties and therefore the appeal was incompetent by virtue of the proviso to s. 6 of the Appeals to the Court of Appeal Ordinance, and (*b*) that if the appeal was from the decree of February 12, 1964 as amended by the decree of May 30, 1964, then the appeal was more than three months out of time and therefore time-barred.

Held –

(i) so long as the appellant was the only licensed wholesaler, it was under a statutory duty to supply the respondent with his reasonable requirements as a licensed retailer, and no question arose as to the appellant ever having the right to contract out of this statutory obligation and to terminate the contract;

(ii) the standing order was not an offer to buy a daily quantity of qat if the appellant chose to supply it but envisaged a continuous supply which the appellant was bound to supply daily unless cl. 6 (*supra*) applied;

(iii) the decree of May 30, 1964 was not expressed to be a consent decree, nor was it in fact a decree based on consent, except to the extent that the amount of damages was agreed; there was no consent as to the respondent's right to recover damages from the appellant;

(iv) the appeal was not time-barred since it was clearly the intention of the parties and of the judge that the original judgment and decree should be replaced by the judgment and decree of May 30, 1964

and not that the original judgment and decree should be amended.

Preliminary objections overruled. Appeal dismissed.

Cases referred to in judgment

(1) *Hamilton v. Bryant* (1914), 30 T.L.R. 408.

(2) *Crediton Gas Co., Ltd. v. Crediton U.D.C.*, [1928] Ch. 447.

(3) *Martin Baker Aircraft Co., Ltd. v. Canada Flight Equipment, Ltd.*, [1955] 2 Q.B. 556; [1955] 2 All E.R. 722.

(4) *Llanelly Rail & Dock Co., Ltd. v. London & North-Western Railway* (1875), L.R. 7 H.L. 550.

(5) *Great Northern Railway Co. v. Witham* (1873), L.R. 9 C.P. 16.

(6) *Vadilal v. Fulchand* (1906), Bom. 56.

(7) *Abdurahiman v. Imbichuny* (1932), 55 Mad. 871.

August 13. The following judgments were read:

Judgment

Law JA: This is a second appeal, with leave, from Aden, in a suit originally instituted by the respondent in the Court of Small Causes. Two plaints seem to have been filed; the first claiming damages for loss of profits consequent upon the appellant's alleged failure to deliver qat for the period April 1, 1962, to April 15, 1962, in civil suit No. 320 of 1962; and the second claiming damages for loss of profits for the period April 1 to 30, 1962. Although this second plaint was presumably later in date (I say presumably, as the copies on the record are undated), it was given the earlier number of civil suit No. 319 of 1962. This second plaint covers the claim contained in the first plaint, but nothing seems to have been done to regularize the position by striking out the first plaint or otherwise disposing of it. I think it can be ignored, although it appears on the record. The written statement of defence was filed in answer to the second plaint, which alleged that the appellant, in breach of a written agreement dated January 24, 1962, had failed to supply the respondent with four bundles of qat daily during the month of April, 1962, and claimed the consequent loss of profits stated to be Shs. 1,800/-. The appellant, by its written statement of defence, denied the existence of any agreement, and pleaded that it was justified in ceasing to supply the respondent with qat because he, the respondent, had refused to sign an order form replacing the original order form, which would have obliged the respondent to accept such quantity or quality of qat as the appellant might choose to supply, irrespective of the quantity and quality ordered by him. In his rejoinder the respondent pleaded that he had the right to refuse to sign the new order form. The suits came for hearing before the magistrate in the Court of Small Causes. The respondent, who was unrepresented, relied as evidence of the contract between himself and the appellant, on a receipt for Shs. 1,200/- deposited by him with the appellant (Ex. 1) which is expressed to be "a deposit for 4 bundles for Harari Qat". The trial magistrate dismissed the suits, on the grounds that "the plaintiff has not established an agreement or contract on which he can rely". The respondent appealed to the Supreme Court of Aden. On this occasion, he had the benefit of legal representation. In the course of argument, Mr. Mansoor who then appeared for the present appellant, admitted the existence of a contract between the parties, but submitted that it was subject to an implied term that it could be terminated by reasonable notice, and he relied upon a letter sent by the appellant to the respondent (Ex. 7) as constituting such notice. This was a

demand that the respondent should, within twenty-four hours, sign the new requisition form, failing which his supply of qat would be stopped immediately. The learned judge allowed the appeal. He held that the respondent, who had relied in his plaint on a receipt as the sole evidence of his contract, should not as a litigant in person

have been held to be bound by his pleading, but that the magistrate should have looked at all the evidence to ascertain whether or not a contract had been established. The judge had no difficulty in holding that the existence of a contract had in fact been established. As to whether an implied term should be read into the contract giving the appellant a right to terminate on reasonable notice, the judge considered the appropriate leading cases on the subject, and decided that in the circumstances of this case no such implied term should be read into the contract. He accordingly found for the plaintiff (now respondent) and awarded him damages of Shs. 675/-, being the loss of profit on four bundles a day for fifteen days. This was on February 12, 1964, and a formal decree, bearing the same date, was later drawn up. It was then realized that damages had been awarded for fifteen days loss of profits, as claimed in the first plaint, and not for thirty days loss of profits, as claimed in the second plaint. Accordingly an application for review of the judgment was presented to the court by the respondent, praying that the damages be increased in accordance with the claim in the second plaint. This application was not opposed by the present appellant, and it was ordered by consent that the damages of Shs. 675/- be increased to Shs. 1,350/-. Instead of merely amending his original judgment, the judge signed, on May 30, 1964, a new judgment which was in precisely the same terms as that of February 12, save that it incorporated the alterations agreed on the application for review, and a new decree was drawn up accordingly. This appeal was lodged on September 23, 1964. When it came on for hearing, counsel for the respondent raised two preliminary objections. He submitted, firstly, that if the appeal was from the decree of May 30, 1964, that decree was based on the consent of the parties and the appeal was therefore incompetent, as by the proviso to s. 6 of the Appeals to the Court of Appeal Ordinance (Aden Cap. 7) no appeal lies from a decree passed by the Supreme Court with the consent of the parties. Secondly, counsel for the respondent submitted that if the appeal was from the decree of February 12, 1964, as amended by the decree of May 30, then the appeal was more than three months out of time and could not be entertained, no application for an extension of time having been made. We overruled these objections, reserving the reasons. In my opinion, there was no merit in either submission. The decree of May 30, 1964, is not expressed to be a consent decree, nor was it in fact a decree based on consent, except to the extent that the amount of damages was agreed. There was no consent as to the respondent's right to recover damages from the appellant. The amount of the damages was merely incidental to this right. As regards limitation, it was clearly the intention of the parties and of the judge that the original judgment and decree should be replaced by the judgment and decree of May 30, 1964, and not that the original judgment and decree should be amended. That is why a judgment, dated May 30, was signed, and a fresh decree of the same date issued. I am satisfied that this appeal is competent, and that it has been lodged in time.

Before dealing with this appeal on its merits, it is I think necessary to consider the background to this litigation. Qat is a shrub whose twigs and leaves, if chewed, are believed by many people to possess stimulating properties. So popular is it amongst the inhabitants of Aden that its importation and sale are regulated by a statute, the Qat (Control) Ordinance, 1961. The qat consumed in Aden is, at present, imported from Harar in Ethiopia. By s. 3 of the Ordinance, no person shall import qat into Aden or sell it wholesale except under licence, and it is common ground that the appellant is the sole licensee under this section and has, therefore, the monopoly in Aden of importing qat and distributing it to retailers for sale to consumers. By s. 4 no person shall retail qat except under licence. The respondent is a retailer licensed under this section, and the evidence indicates that there are 900 to 1,000 licensed retailers in the Colony

which gives some idea of the extent of the trade. When the Ordinance came into force in January, 1962, the appellant prepared an order form (Ex. 8) which all licensed retailers (including the respondent) were required to complete and did in fact complete. In this document the retailer specified the type and quantity of qat required by him daily, and by para. 6 he recognized that the appellant was "not necessarily responsible to fulfil the order in full", a reasonable condition as the appellant could not be sure that his daily requirements as wholesaler would be supplied in full by the supplying company in Ethiopia. Having completed and signed this order form, which was for four bundles of "Qurti" Qat daily, the respondent handed it to the appellant, who then required a deposit of Shs. 1,200/- which the respondent paid and for which he was given a receipt (Ex. 1). This sum represented the value of three day's supply of qat, and was probably levied in case the respondent should at any time give notice terminating his order, which notice by para. 1 of the order form was fixed at three days. These formalities having been completed, the appellant then supplied the respondent with daily deliveries of qat in accordance with his order, beginning on January 27, 1962, for which the respondent paid daily on taking delivery of each lot of four bundles. This arrangement continued until March 28, 1962, when the appellant by his letter (Ex. 7) required the respondent, within twenty-four hours, to complete a new order form, failing which his supply of qat would be stopped immediately. This new form is set out as Exhibit 9; it is substantially in the same form as the original order form except for the addition to para. 6 of the following words:

> "Irrespective of the quantity and the quality of the qat ordered by me, I agree to accept the delivery of the quantity and the quality or qualities made available to me."

The respondent refused to accept this condition, which the judge described, rightly in my opinion, as unreasonable, and the appellant ceased to supply him with any qat at all after April 1, 1962. The respondent protested, by his letters dated April 1 and 10, 1962, (Ex. 4 and 6) but to no avail, and so the proceedings out of which this appeal arises were instituted. The memorandum of appeal contains a number of grounds, which I will consider in the order in which they were argued by counsel for the appellant.

The first ground is that, assuming that a contract had been established (which counsel for the appellant did not concede) then that contract was subject to an implied term that it was determinable by reasonable notice on the part of the appellant. If not, then the position was that the respondent was able, under para. 1 of the order form, to give three days' notice of termination, whereas the appellant's obligations were perpetual. This, counsel for the appellant submitted, was an intolerable situation, and he relied on the three cases referred to by the judge in the court below, that is to say *Hamilton v. Bryant* (1), *Crediton Gas Co., Ltd. v. Crediton U.D.C.* (2), and *Martin Baker Aircraft Co., Ltd. v. Canada Flight Equipment, Ltd.* (3), in all of which cases it was held that in contracts of a commercial nature, a term conferring the right to give reasonable notice of termination should be read into a contract which is silent on the subject of notice, unless it appeared by necessary implication that the contract was intended to be permanent. The learned judge correctly directed himself that it was for the party alleging that the contract was not permanent to prove that such a term should be implied (*Llanelly Rail and Dock Co., Ltd. v. London and North-Western Railway* (4)) and he held that in the circumstances of this case no term should be implied enabling the appellant to give notice terminating the contract:

(*a*) because the contract was specifically made determinable by the respondent, and was silent as to determination by the appellant, which in the learned

judge's view created at least a slight presumption against implying such a term in the appellant's favour, and

(*b*) because by s. 8 of the Qat (Control) Ordinance, 1961, the appellant was under a statutory duty, subject to availability of supplies, to supply the respondent with qat in reasonable quantities so long as the latter was prepared to buy at the prescribed minimum price with a tender of immediate payment.

In my opinion the learned judge came to a correct decision on this point. The respondent was under no duty to buy qat, and that is why the contract provided that he should give three days' notice if he wished to discontinue his daily purchases, so that the appellant would have reasonable time to adjust his orders from the exporters in Ethiopia. On the other hand, it was never contemplated that the appellant should have the right to determine the contract. So long as it was the only licensed wholesaler in Aden, it was under a statutory duty to supply the respondent with his reasonable requirements as a licensed retailer, and no question arose as to the appellant ever having the right to contract out of this statutory obligation. In my view, the first ground of appeal fails.

The next ground of appeal argued by counsel for the appellant was that the judge erred in not upholding the trial magistrate in holding that the respondent was bound by his pleading, merely on the ground that the appellant was not legally represented at the hearing. The respondent's plaint and rejoinder, read together, make it clear that he relied solely on the receipt for the Shs. 1,200/- deposited by him as evidence of the contract. Counsel for the appellant submits that the respondent was bound by this pleading and that there is no difference in principle between a represented litigant and a party who appears in person in this respect. This latter submission is no doubt correct; nevertheless I am of opinion that this ground of appeal also fails. The receipt was not the only document put in evidence, all the material from which a contract could be established was before the magistrate. It would have been open to the magistrate, or for that matter the judge on appeal, to have allowed the plaint to be amended so as to plead the contract properly, and the same result would have been reached. So far as the judge was concerned, no amendment was necessary because the appellant's advocate conceded that a contract in fact existed between the parties.

This leads to the main grounds of appeal, set out in paras. 4, 5 and 6, to the effect the judge erred in holding that there was a concluded contract between the parties. Counsel for the appellant submitted, in my view correctly, that even if the conduct of the parties indicated that they considered a contract to exist, and notwithstanding Mr. Mansoor's admission that a contract existed, such conduct and admission do not bind the appellant if based on erroneous appreciation of the law. Counsel for the appellant submitted that there was, in law, no contract between the parties. He argued that the order form (Ex. 8) was no more than a standing order, which resulted in a series of daily contracts each constituted by delivery against payment under the standing order. Counsel for the appellant submitted that the standing order was analogous to a tender, and that each daily delivery made by the appellant created a separate contract, and he relied in support of this proposition on *Great Northern Railway Co. v. Witham* (5). An examination of the documents and evidence in this appeal does not in my opinion support this contention. The standing order (Ex. 8) was not an offer to buy a daily quantity of qat if the appellant chose to supply it. It envisaged a continuous supply, which the appellant was bound to supply daily unless cl. 6 applied. This clause reads as follows:

> "6. The Company shall not be necessarily responsible to fulfil the order in full."

This means in my opinion that the appellant was bound to supply daily the whole order, or as much as could be supplied out of stocks arriving from Ethiopia, but does not mean, having regard to the statutory duty imposed on the appellant, that the appellant could discontinue the daily supply at will. Clause 3 makes it clear that a continuous daily supply was contemplated by the parties, and not a series of separate daily contracts. It reads as follows:

> "3. If I fail to settle the cost of the daily supply of Qat, my order shall be considered as automatically cancelled and I shall, therefore, be liable to submission of a new order."

It is not in dispute that the respondent did not default in his daily payments. Quite clearly, in my opinion, the judge was right in finding that the respondent's offer to buy a daily quantity of qat was accepted by the appellant when it required a deposit of Shs. 1,200/-, issued a receipt for that amount, and proceeded to provide a daily supply of qat for which the respondent paid each time on taking delivery. That the parties intended to contract to this effect is indicated by the appellant's action in purporting to terminate the arrangement by notice, see Exs. 5 and 7. In my view, grounds 4, 5 and 6 of the appeal also fail.

This leaves only the question of damages, ground 7 in the memorandum of appeal. Counsel for the appellant submitted that the respondent was entitled to no damages, or at the most to three days' loss of profits, because he had failed to mitigate the damages. Counsel for the appellant suggested that, when the appellant indicated that it would discontinue supplies on the respondent's refusal to sign the new order form, all the respondent had to do was to present himself to the appellant's place of business daily, and on tender of the prescribed price, insist on being supplied with his reasonable daily requirements in accordance with his statutory rights. In my opinion the respondent was under no such obligation. It would have been futile for him to do so, in view of the appellant's unequivocal statement, in Ex. 7, to this effect:

> "Please be advised failing to attend to sign requisition Form, your supply of Qat will be stopped immediately."

The respondent replied, in Exs. 2, 4 and 6, that stopping his daily supplies would involve a failure by the appellant to fulfill its legal obligations. The appellant took no notice of this, and so far as I am aware has not, up to the present, given any indication that it is willing to comply with its statutory duty towards the respondent as the sole licensed wholesale supplier of qat in Aden. This appeal concerns only the respondent's claim to one month's loss of profits, which in my opinion has been made out. Whether or not the respondent is entitled to damages for a longer period, and if so what period, does not fall to be decided in these proceedings, but in my view the appellant only has itself to blame for its present predicament. In my opinion this appeal fails on all grounds, and should be dismissed with costs. I would order that the respondent do pay to the appellant the costs attributable to the unsuccessful preliminary objection made at the beginning of the hearing of this appeal.

Newbold V-P: The facts relating to this appeal are set out in the judgment of Law, J.A., which I have had the advantage of reading in draft, and I consider it unnecessary to restate them save in respect of certain particular matters. I agree with the conclusion of Law, J.A., but there are certain aspects of the appeal which make it desirable that I should set out my views in my own words.

Counsel for the respondent raised a preliminary objection to the competency

of the appeal on the ground that the appeal was either from a consent order or it was out of time. At the hearing we dismissed the preliminary objection and stated that we would give our reasons for so doing in our judgments. The facts upon which the preliminary objection was based were that the plaintiff instituted in the Court of Small Causes two suits, No. 319 of 1962, which claimed damages in respect of the period April 1, 1962 to April 30, 1962, and No. 320 of 1962, which claimed damages in respect of the period April 1, 1962 to April 15, 1962. These suits were either heard together or consolidated, and one judgment was given in that court in respect of both suits. An appeal was lodged in the Supreme Court against the decision in both suits, but the judgment of the judge delivered on February 12, 1964, allowed damages only in respect of the period specified in suit No. 320 of 1962. Following the judgment a formal order, also dated February 12, 1964, was extracted. An application for review of the judgment was then made on the ground that the judge on appeal had dealt only with suit No. 320 of 1962. On May 30, 1964 it appears that this application was by consent granted and a formal order was drawn up setting out that the judgment of February 12, 1964, was to be amended in a number of respects. These amendments in effect only increased the amount of damages by relating them to the longer period claimed in suit No. 319 of 1962. The judgment and decree of February 12, 1964 were amended accordingly and were redated May 30, 1964. Thereafter a notice of appeal was given and the appeal to this court was lodged on September 23, 1964.

Counsel for the respondent submits that if the appeal is against the judgment and decree of May 30, 1964, then that judgment and decree was obtained by consent and under s. 6 (2) of the Appeals to the Court of Appeal Ordinance (Cap. 7) no appeal lies from a decree passed with the consent of the parties. If, on the other hand, the appeal was against the judgment and decree of February 12, 1964, then the appeal is out of time.

The fact that the plaintiff consented to the application for review and to the original judgment and decree being amended so as to relate the decree to the period in respect of which damages were claimed in suit No. 319 of 1962 does not make the decree of May 30, 1964, passed after the review, a consent decree. On the face of the original judgment it dealt only with one suit though the appeal was in respect of both. The consent merely went to the rectification of an error apparent on the face of the record. The consent no more gave rise to a consent decree within the meaning of s. 6 than agreement at the trial as to the quantum of damages would have given rise to a consent decree.

On the question of which judgment and decree is the subject of this appeal, it is clear beyond any possibility of doubt that when an application for the review of a judgment and decree has been granted then there is, at least in theory, a rehearing of the case; and whether or not there is on such rehearing any variation of the original judgment and decree, both the original judgment and decree cease to exist and are superseded by the new judgment and decree. (See *Vadilal v. Fulchand* (6), and *Abdurahiman v. Imbichuny* (7).) Although the procedure adopted by the Supreme Court for the rehearing of the matter appears to have been somewhat vague I have no doubt that the only judgment and decree now existing in this matter are those of May 30, 1964. It follows that the appeal was lodged within time. It was for these reasons that I joined with the other members of the court in dismissing the preliminary objection.

Turning now to the appeal, it is urged that there was no contract between the parties; that if there was such a contract it included an implied term permitting the contract to be terminated on reasonable notice and that reasonable notice of termination was given; and that in any event no damages could be given for a period in excess of three days.

On the issue of whether there was a contract, it is also urged that the contract found by the judge was not the contract pleaded. I accept that the pleadings are by no means satisfactory – they seldom are – but in my view sufficient facts were pleaded to enable the judge to hold that a contract existed. If the supplier of a commodity invites a potential customer to state how much of the commodity will be required daily and sets out the terms, which include the period of notice which must be given by the customer in order to terminate the arrangement, on which the commodity will be supplied and then, on the customer placing his order, accepts it by obtaining from the customer a deposit equivalent to the cost of at least three days' supply of the commodity, I find it impossible to come to any conclusion other than that a contract exists between the parties.

On the issue of whether there is to be implied in the contract a term giving to the appellant power to terminate it on reasonable notice, I consider that it is only in exceptional circumstances that such a term should not be implied in a contract which contains the element of indefinite continuation. It would, I think, be wrong to assume that in normal conditions the parties to such a contract intended to create an immutable position with immutable obligations. But the circumstances of this case are exceptional. The immutable position and the immutable obligations are created by statute consequent upon the unilateral act of the appellant in taking out an exclusive licence. By so doing the appellant of its own volition adopted a status which, so long as it continued, carried with it the obligation to supply and to continue to supply the commodity to persons, of when the respondent was one, in the circumstances set out in the statute. The contract entered into by the appellant and the plaintiff, taken in conjunction with all the similar contracts which were designed to enable the appellant to ascertain the normal daily requirements of the trade, merely quantified the nature of the obligation. A termination of the contract would not have removed the obligation to supply; it would merely have made it that much more difficult for the appellant to ascertain the extent of the obligation which continued to be on it by virtue of its status. It is thus completely unnecessary to imply into the contract any term giving to the appellant a right to terminate it. It is, I think, not insignificant that the express terms of the contract contained in the order form were those determined by the appellant, but it did not see fit to reserve to itself the right to determine the contract. In my view, therefore, no term should be implied in the contract enabling the appellant to terminate it. It is thus unnecessary to consider whether in fact reasonable notice was given, but as the point has been raised I think I should state that in my view reasonable notice of termination was not given.

On the issue of damages, I accept that the plaintiff is under a duty to mitigate his damage but I fail to see what action he could have taken in this case to reduce such damages as he suffered. He had taken out a licence to sell qat retail and according to the evidence accepted by the judge he thereby made a certain daily profit. The appellant wrongfully deprived him of his supply of qat and thus of his daily profit. He was unable to obtain the qat except from the appellant, which had not only stopped his supply of qat but had also stated that no more would be supplied. The means of altering the position created by the appellant lay exclusively in the hands of the appellant. I am not very happy about the position but it seems to me that so long as the appellant and the plaintiff continued to hold their respective licences the wrongful act of the appellant had deprived the plaintiff of the profit which he would have made, with the consequence that the appellant must compensate the plaintiff for such loss. We are in this appeal concerned only with the period of thirty days during which the parties held their respective licences and there is no evidence that in respect of any day the appellant did not have sufficient qat to meet the

plaintiff's order. I agree that the appeal should be dismissed. There will be an order in the terms proposed by Law, J.A.

Sir Clement De Lestang JA: On the preliminary objection to the competence of the appeal I agree with what my Lord, the Vice-President, has said and I have nothing to add.

On the merits of the appeal I also agree, though I confess to having had greater difficulty than my brothers in arriving at a decision on the question of the duration of the contract. My difficulty was that I could see nothing in the contract itself which was inconsistent with its being revocable on the part of the appellant, at least on reasonable notice, it being clearly revocable by the respondent on three days' notice. The contract itself is a simple one for the supply of goods on a standing order and were it not for the Ordinance no one could reasonably suggest that it was not determinable by the appellant at least on reasonable notice. The contract being an informal one I do not think that it is right to infer an intention on the part of the appellant to be bound by it permanently, from the mere existence of a right of determination by the respondent and the absence of an express right of termination by the appellant. Moreover it being a commercial contract, as was pointed out by McNair, J. in *Martin-Baker Aircraft Co., Ltd. v. Canada Flight Equipment, Ltd*. (3) and Russell, J. in *Crediton Gas Co., Ltd. v. Crediton U.D.C.* (2), the doctrine of irrevocability does not as a rule apply. Consequently were it not for the Ordinance I would favour the view that the contract was revocable. Is it possible, however, to ignore the Ordinance in construing the contract? I have come to the conclusion that it is not. The Ordinance confers a status on the appellant which carries with it obligations as well as rights. Two such obligations are (1) to import sufficient qat for the needs of the community and (2) to supply it on demand to all licensees on tender of payment, subject always to availability. The purpose of the contract is not so much to bind the licensee as to assist the appellant in ordering the right quantity, qat being a perishable commodity which must be consumed fresh. It adds very little, if anything, to the statutory obligations of the appellant since it is common ground that the obligation to supply under the contract is also subject to availability. In these circumstances to permit the appellant to terminate the contract at will or on a maximum of three days' notice, as contended by counsel for the appellant, would result in sanctioning a breach of its statutory obligation. I say this because by ordering only such quantities as it has contracted to supply, there would never be any qat available for the licensee without a contract.

There can, I think, be no doubt that the parties must have had the Ordinance in mind when they entered into the contract and having regard to the duties already referred to imposed by the Ordinance on the appellant there was no necessity in order to give business efficacy to the transaction that there should be implied a right in the appellant to terminate the contract. I agree with the order proposed.

Prelimary objections overruled. Appeal dismissed.

For the appellant:
JM Nazareth, QC and *MH Mansoor*
MH Mansoor, Aden

For the respondent:
EP Nowrojee
RK Shah, Nairobi

Dhaneshwar Bhimji Mehta v A A E Sequeira and another
[1965] 1 EA 729 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 20 December 1965

Case Number: 136/1965

Before: Harris J

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[1] Mortgage – Statutory power of sale – Exercise of power without intervention of court – Property sold by public auction – Property purchased by agent of mortgagee – Validity of such sale – Indian Transfer of Property Act, 1882 *s.* 69 (1) *and s.* 69*B* (2).

Editor's Summary

The plaintiff charged his property to the first defendant to secure a sum of Shs. 50,000/- lent to him by the first defendant. The charge contained a statutory power of sale under s. 69 (1) of the Indian Transfer of Property Act, 1882. The plaintiff being in default as to payment of principal and interest, the property was sold by public auction under the statutory power of sale without the intervention of the court on the instructions of the second defendant acting as agent of the first defendant, and was bought by the second defendant who purported to buy on his own behalf. The property was transferred into the name of the second defendant and the transfer was registered. The first defendant was a student residing in the United Kingdom and his affairs relating to the charge were at all material times since the execution of the charge conducted on his behalf by the second defendant, who was his father. The plaintiff filed an action for a declaration that the sale was unlawful and void on the ground that the transaction constituted in effect a sale by a mortgagee exercising his statutory power of sale to himself as purchaser.

Held –

(i) when a mortgagee exercises his statutory power of sale under s. 69 (1) of the Indian Transfer of Property Act, 1882 he cannot effectively buy in the property on his own behalf, although he may buy it in as a means of ensuring that it is not sold at an under-value, but if he does so he buys it in as mortgagee and continues to hold it in that capacity and may, as mortgagee, re-sell it;

(ii) in such a case, so long as the mortgagee acts in a reasonable and bona fide manner he will not be personally liable for any loss, but the proceeds yielded by a re-sale must be applied in discharge of his mortgage demand and subject thereto will enure to the benefit of the other encumbrancers (if any) and the mortgagor;

(iii) despite the provisions of s. 69B (2) of the Indian Transfer of Property Act, 1882, the inability to become purchaser which attached to the first defendant selling as mortgagee attached equally to the second defendant acting as agent for the first defendant, and the purported purchase by the second defendant on his own behalf of the property of which as such agent he was conducting the

sale was void and unlawful.

Declaration as prayed. Direction to Registrar of Titles to cancel the registration in favour of the second defendant.

Cases referred to in judgment

(1) *D'Souza v. Patel and others*, Kenya Supreme Court Civil Case No. 1906 of 1961 (unreported).

(2) *Downes v. Grazebrook* (1817), 3 Mer 200; 36 E.R. 77.

(3) *National Bank of Australasia v. United Hand-in-Hand and Band of Hope Co.* (1879), App. Cas. 391.

(4) *Warner v. Jacob* (1882), 20 Ch.D. 220.

(5) *Martinson v. Clowes* (1882), 21 Ch.D. 857.

(6) *Farrar v. Farrars, Ltd.* (1889), 40 Ch.D. 395.

(7) *Broughton v. Broughton* (1855), 5 De G.M. & G. 160; 43 E.R. 831.

Judgment

Harris J: This is a claim for a declaration that a sale by public auction of certain premises in the city of Nairobi, the land reference number of which is 209/2759/12, effected by the first defendant in purported exercise of his statutory powers as chargee of the lands, was unlawful, and that the plaintiff is entitled as charger to retain possession of the premises subject to the charge. There is also a claim for damages.

By an instrument of charge dated July 16, 1960, and duly registered in the Registry of Titles at Nairobi on the 19th of that month, the plaintiff, who at that time was the registered proprietor of the premises as lessee from the Crown for the term of fifty-nine years from October 1, 1952, charged his interest as beneficial owner in favour of the first defendant to secure a sum of Shs. 50,000/- lent by him to the plaintiff. The charge provided that the date for repayment of the loan was September 30, 1960, and that the loan carried interest at the rate of ten per centum per annum as from June 30, 1960. There is endorsed upon the charge a certificate as required by s. 69 (1) of the Transfer of Property Act, 1882, of India, as applied in Kenya.

The first defendant is a student residing in the United Kingdom and his affairs relating to this matter were at all material times since the execution of the charge conducted on his behalf by his father, who is the second defendant, under a power of attorney.

No evidence was given at the hearing by the first defendant but the plaintiff agreed that at the date of the sale he was in default with regard to payment both of principal and of interest.

Under these circumstances the first defendant, relying upon his statutory powers under ss. 69 (1) and 100A of the Act of 1882, and acting through the second defendant, caused the premises to be put up for sale by public auction through a firm of auctioneers and land agents in Nairobi, at which sale the second defendant became the purchaser. The sale yielded only a net sum of Shs. 29,988/75 after payment of commission and auction charges, and the formal instrument of transfer of the premises to the second defendant, freed and discharged from the charge of July 16, 1960, was registered on December 31, 1964. Notice of intention to exercise the power of sale was given to the plaintiff by a letter dated November 26, 1963, from the second defendant's former advocates, and counsel for both defendants concedes that the auction sale was carried out on the instructions of the second defendant acting as agent for the first defendant and that the second defendant bought, or purported to buy, the property on his own behalf.

The plaintiff has at all material times disputed the right of the defendants to act as they have done, maintaining that the sale was not sufficiently advertized and was effected at a gross under-value, and has declined to give up possession of the premises. He has now been threatened by the second defendant with eviction proceedings and he brings this action for a determination of his rights. In para. 5 of the plaint he pleads that the first defendant, in purporting so to exercise his power of sale, acted "collusively and without legal justification", an allegation which counsel for the plaintiff says is intended to constitute an

allegation of fraud. I am not satisfied that this allegation of fraud has been

substantiated except possibly in the limited sense of the purported exercise by the first defendant of his statutory power of sale constituting technically a fraud upon that power.

The defendants in their defence deny that there was any collusion on their part and seek to justify the sale by reliance upon the first defendant's statutory powers arising, they say, by virtue of the plaintiff's default in the payment of interest. In addition, the first defendant counterclaims for a sum of Shs. 26,632/30, being the difference between the principal sum of Shs. 50,000/- secured by the charge and the net proceeds of the sale, together with interest. Default in the payment of interest alone does not confer upon a mortgagee the statutory power of sale but since there had also been a default in repayment of the principal I am prepared to treat the action of the defendants as having been based upon that default.

Counsel for the plaintiff, in his argument, submitted that although the first defendant was the chargee and was selling as such, and, on paper, the second defendant was the buyer and was acting independently, in substance they were the same person, the second defendant being the agent of the first defendant throughout, and that the transaction therefore constituted in effect a sale by a mortgagee under statutory powers at which he purported to buy in the property for himself and was therefore void. He relied upon certain of the principal English authorities usually regarded as establishing the proposition that a mortgagee cannot, in the exercise of his statutory power of sale, sell to himself as purchaser on his own behalf, and also upon the unreported but well-known ruling of Rudd, J., in this Court in *D'Souza v. Patel and others* (1), which is to the same effect.

Counsel for the defendants challenged the fundamental correctness of that proposition, contending that such of those decisions as are of recent date (including the ruling of Rudd, J.) fail to give due weight to the provisions of the statute law, commencing with Lord Cranworth's Act, 1860, enacted for the express purpose of regulating the position of mortgagees in their dealings with mortgaged property. The reported cases to which I was referred do not perhaps in themselves provide an entirely clear answer to this contention, and in justice to the careful argument of counsel for the defendant I shall endeavour to deal with the matter as best I can.

At one time it would seem that a mortgagee holding under a legal mortgage containing a trust for sale was regarded as standing to a limited extent in a fiduciary position towards the mortgagor and as being precluded from buying in the property without his agreement. In so stating the position in 1817, Lord Eldon, in *Downes v. Grazebrook* (2), did not regard himself as enunciating a new doctrine but rather as indicating the effect of already established authorities. In *National Bank of Australasia v. United Hand-in-Hand and Band of Hope Co.* (3), the Privy Council, on an appeal from the Supreme Court of Victoria, accepted as correct the view that where a mortgagee, acting under a power of sale in the mortgage, puts the property up for sale, he cannot effectively sell to himself. No reference is made to any principle of law applying only in Victoria, and, since all the judicial decisions referred to in the course of the hearing were decisions of the English or Irish Courts, it would seem that the view accepted was regarded as correctly representing the law of England.

Kay, J., in *Warner v. Jacob* (4), referring to Lord Eldon's view expressed in *Downes v. Grazebrook* (2), said ((1817), 3 Mer. at p. 224) that a mortgagee under a deed of mortgage containing a power of sale in the usual form is not, strictly speaking, a trustee of that power but is invested with it for his own benefit to enable him the better to realise his debt, and that a bona fide exercise by him of the power will not, in the absence of fraud, corruption, or collusion with the purchaser, be interfered with. In that case, however, no question arose

as to a sale by a mortgagee to himself. *Warner v. Jacob* (4) was expressly approved and followed in *Martinson v. Clowes* (5), where North, J. said that it was quite clear that a mortgagee exercising his power of sale cannot purchase the property on his own account and that an agent acting for him in the matter could not do so either, and he set aside a sale by a building society, acting under a power of sale in a mortgage, the purchaser being the secretary of the society.

What would appear to have been an extension of this principle is to be found in *Farrar v. Farrars*, Ltd. (6) (40 Ch.D. at p. 404) where Chitty, J., said that:

> "A mortgagee cannot sell to himself, nor can two mortgagees sell to one of themselves, nor to one of themselves and another."

Again in the Court of Appeal, Lindley, L.J., in the same case, in delivering the judgment of a strong court consisting of Cotton and Bowen, L.JJ., and himself, said (40 Ch.D. at p. 409):

> "It is perfectly well settled that a mortgagee with a power of sale cannot sell to himself either alone or with others, nor to a trustee for himself: *Downes v. Grazebrook*; *Robertson v. Norris*; nor to any one employed by him to conduct the sale: *Whitcomb v. Minchin*; *Martinson v. Clowes*. A sale by a person to himself is no sale at all, and a power of sale does not authorize the done of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property. Such a transaction is not an exercise of the power, and the interposition of a trustee, although it gets over the difficulty so far as form is concerned, does not affect the substance of the transaction."

These decisions have since been consistently followed and applied by the courts in England.

Turning now to the statutory provisions which counsel for the defendants suggests have not been accorded their due weight, we start with s. 11 of Lord Cranworth's Act, by which it was provided that, subject as therein, in the case of a legal mortgage of hereditaments of any tenure, the person to whom for the time being the money secured was payable should have, *inter alia* and to the same extent as if it had been in terms expressed by the mortgagor, a power "to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property, from time to time, in like manner". The power to "buy in and re-sell the property" as so expressed suggests a single power relating to the double operation rather than a power to buy in coupled with an independent power to re-sell, and this view is fortified by reference to the succeeding words "from time to time", which, qualifying, as they do, the words "and re-sell", would be quite inappropriate if the mortgagee were to have a right to buy in on his own behalf once and for all. Further support for this view could be had if regard were paid to the punctuation.

The Conveyancing Act, 1881, in s. 19 (1) somewhat enlarges this power which it expresses as being one "to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby". This is perhaps slightly less clear than the provision in the earlier statute for there has been a transposition of the reference to rescission, but if the words "or to rescind any contract for sale" are treated as having been placed within a bracket instead of within a pair of commas, which entails no great violence to the language used, substantially the same literal position is arrived at as under Lord Cranworth's Act. That this course is justifiable can be supported by a comparison between the respective long titles of the two Acts and by having regard to the preambles of the Act of 1860.

Construing these provisions in the manner that I have suggested leaves no room for thinking that the decisions mentioned are in any way inconsistent with them for none of those decisions is to the effect that a mortgagee as such cannot "buy in and re-sell" the property. On the contrary their effect is that such a proceeding is fully within his rights provided that each operation is carried out by him as mortgagee but that he is not entitled to exercise his power of sale by buying in and then either retaining or re-selling the property for his own personal benefit. Indeed such a situation, if permitted, would in many cases immediately create for the mortgagee a direct conflict of duty and of interest, for his duty, when exercising his power of sale, is to ensure that all proper steps are taken to enable a fair price to be obtained, while his interest as an intending purchaser on his own behalf would be to secure the property at the lowest possible price. As Lord Cranworth said in *Broughton v. Broughton* (7), no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty, and although the question there before him related to the administration of a trust, he makes it quite clear that the principle is not confined to cases of trustees.

That this construction of the provisions of the Acts of 1860 and 1881 is correct in English law is supported by the fact that s. 101 (1) (i) of the Law of Property Act, 1925 (of the United Kingdom), re-enacts s. 19 (1) (i) of the Act of 1881 without amendment, notwithstanding that the legislature must have been aware of the interpretation consistently placed by the courts on the earlier section during the intervening forty-four years.

In Kenya, although it might have been thought that, as with the Vendor and Purchaser Act, 1874, the material provisions of the Acts of 1860 and 1881 would have had application by virtue of the terms of the East African Orders in Council of 1897 and 1911 and the Kenya Colony Order in Council, 1921, so as to confer upon mortgagees the statutory power of sale contained in those provisions, the practice among conveyancers was not to rely upon the Acts but, where a power of sale was required, to insert it expressly in the mortgage deed. This position obtained until, in 1959, the legislature, upon the recommendation of the Law Society of Kenya, by s. 13 of the Indian Transfer of Property Act (Amendment) Ordinance of that year, inserted in that Act, as applied to this country, the new s. 69 (1) upon which the defendants rely and which declares that a mortgagee or any person acting on his behalf, where the mortgage is, as in the present case, an "English mortgage" to which the section applies, shall, by virtue of the Act and without the intervention of the court, have power when the mortgage money has become due to exercise a power of sale, defined in exactly similar terms to those contained in the Acts of 1881 and 1925, including, as in those Acts, a power "to buy in at an auction, or to rescind any contract for sale, and to re-sell". In the case of sales under the Act there would therefore appear in principle to be no more room in Kenya than in England for contending that a mortgagee, in exercising his statutory power of sale, can buy in the property on his own behalf. He may buy in the property as a means of ensuring that it is not sold at an under-value, but if he does so he buys it in as mortgagee and continues to hold it in that capacity and may, as mortgagee, re-sell it. So long as he acts in a reasonable and bona fide manner he will be protected by the section from being personally answerable for any loss occasioned by his action, but the entire of the net proceeds yielded by the re-sale must be applied, so far as may be, in the discharge of his mortgage demand and, subject thereto, will enure for the benefit of the other encumbrances (if any) and the mortgagor.

Although the ruling of Rudd, J., in *D'Souza v. Patel and others* (1), upon which counsel for the plaintiff relied, was made on an application by a mortgagee, selling under his statutory power, to bid and buy in on his own behalf at the

sale, the principle there enunciated appears to me to be similar to that which I have endeavoured to express and I cannot accept as well-founded the criticism of that ruling put forward by counsel for the defendant.

The second defendant sought to rely also upon the provisions of s. 69B (2) of the Act of 1882 which declares, in the first place, that where a transfer is made "in exercise of the mortgagee's statutory power of sale" the title of the purchaser shall not be impeachable on the ground, among others, that the power was improperly or irregularly exercised and, secondly, that a purchaser is not concerned to see or enquire as to the propriety or regularity of the exercise of the power. The first limb of this provision is taken from s. 21 (2) of the Conveyancing Act, 1881, which is indeed somewhat wider in its terms than s. 69 B (2) inasmuch as it is expressed to apply to conveyances made "in professed exercise" of the power of sale conferred by the Act. Where a purchaser is a person independent of the mortgagee he may well, in proper circumstances, seek the protection of this provision, but here the second defendant was not independent of the mortgagee and was, in fact, his agent. It is clear from the decisions in *Martinson v. Clowes* (5) and *Farrar v. Farrars, Ltd.* (6), that the inability of a mortgagee, selling the mortgaged property, to purchase it on his own behalf extends to his agent acting for him, and in the present case it is agreed that the first defendant in selling the property did so through the medium of the second defendant as his agent. It follows that, despite the provisions of s. 69B (2), the inability to become the purchaser, which attached to the first defendant selling as mortgagee, attached equally to the second defendant through whom the sale was effected and that the purported purchase by the latter on his own behalf of the property of which as such agent he was conducting the sale cannot be allowed to stand.

The plaintiff is therefore entitled to a declaration that the purported sale to the second defendant is void and to such further relief as may be necessary to give effect to this declaration and, so far as may be, to restore the status quo ante. The prayer to the plaint omitted, no doubt through oversight, a claim for such further relief and I shall amend the prayer accordingly. I will direct the Registrar of Titles, pursuant to the provisions of s. 64 of the Registration of Titles Act, to cancel the registration effected on December 31, 1964, in the register maintained by him under the Act of the transfer of the premises to the second defendant and of all entries relating thereto and to restore to full force and operation with effect from the said 31st day of December, 1964, the registration of the charge in favour of the first defendant registered on the 19th day of July, 1960.

From the plaint it is not clear whether the claim for damages is additional or alternative to the other relief sought but no damage was proved and I do not propose to make any award under this head.

The plaintiff shall have his taxed general costs of the action (other than the counterclaim) as against the defendants jointly and severally and shall have his taxed costs of the counterclaim as against the second defendant. The first defendant shall be at liberty to set off all such costs as may be due by him here-under to the plaintiff against such moneys (if any) as may be due to him by the plaintiff for principle and interest under the said charge.

Each party will have liberty to apply to the court for such directions, if any, as may be necessary for the purpose of working out this judgment.

Declaration as prayed. Direction to Registrar of Titles to cancel the registration in favour of the second defendant.

For the plaintiff:

BD Bhatt
BD Bhatt, Nairobi

For the defendant:
WS Deverell
Kaplan & Stratton, Nairobi

Ernest Kinyanjui Kimani v Muiru Gikanga and another
[1965] 1 EA 735 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	18 November 1965
Case Number:	17/1965
Before:	Newbold V-P, Crabbe and Duffus JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya at Nairobi – Miles, J

[1] Native Law and Custom – Gift of land inter vivos in Kikuyu area – Customary law not established – Meaning of "Muhoi", "Muramati" and "Mbari".

[2] Assessors – Functions where customary law involved – Civil Procedure Act, s. 87 (*K.*) *– Evidence Act,* 1963, *s.* 13, *s.* 15, *s.* 89 *and s.* 60 (*K.*).

[3] Practice – Customary law – Onus of establishing it on the party relying on it.

[4] Evidence – Judicial notice of customary law – Onus of establishing customary law on the party relying on it – Civil Procedure Act, s. 87 *– Evidence Act,* 1963, *s.* 13, *s.* 51, *s.* 59 *and s.* 60 (*K.*).

Editor's Summary

Gikanga, the father of both the respondents and the appellant's uncle, was absolute owner in possession of 100 acres of land until his death in 1942. In 1958, and while the appellant was in detention, the respondents were registered in the course of land consolidation as the owners of a block of land substituted for that left by Gikanga. The appellant sued for a declaration that the respondents held thirty acres of the consolidated land as trustees, such land representing land given to him by Gikanga in 1927 in return for labour, money, livestock and assistance in land disputes. The respondents challenged the validity according to African custom of Gikanga's alleged gift of the land in 1927 despite the appellant's possession of the thirty acres till 1958. The plaintiff's claims had failed in the previous proceedings.

Held – (per Newbold, V.-P., and Duffus, J.A., Crabbe, J.A. dissenting)

(i) where African customary law is neither notorious nor documented it must be established for the court's guidance by the party intending to rely on it, and this the appellant had failed to do;

(ii) as a matter of practice and convenience in civil cases the relevant customary law, if it is incapable

of being judicially noticed, should be proved by evidence or expert opinions adduced by the parties; s. 87 (1) of the Civil Procedure Act and s. 13, s. 51 and s. 60 of the Evidence Act, 1963, did not cast the burden of establishing the customary law on the court through assessors, to do so would deprive the parties of an opportunity to test the assessors' views by cross-examination or further evidence.

Appeal dismissed.

Cases referred to in judgment

(1) *R. v. Ndembera* (1947), 14 E.A.C.A. 85.

(2) *R. v. Kiswaga* (1948), 15 E.A.C.A. 50.

(3) *Baldwin & Francis, Ltd. v. Patents Appeal Tribunal*, [1959] A.C. 663; [1959] 2 All E.R. 433.

(4) *Esso Petroleum Co., Ltd. v. Southport Corporation*, [1956] A.C. 218; [1955] 3 All E.R. 864.

(5) *Angu v. Attah* (P.C. 1874–1928, 43).

(6) *Commonwealth Shipping Representative v. P. & O. Branch Service*, [1923] A.C. 191.

(7) *McQuaker v. Goddard*, [1940] 1 All E.R. 471.

November 18. The following judgments were read:

Judgment

Duffus JA: This is an action involving questions as to title of and other rights in land in Kenya. The case was first started in the Supreme Court but was transferred to the resident magistrate's court for trial. On the matter coming before the resident magistrate, he dismissed the case holding that he had no jurisdiction, no doubt influenced by s. 12 of the African Courts Act, Cap. 11. The matter went on appeal to the Supreme Court where the appeal was allowed, the order for dismissal set aside and the case remitted to the resident magistrate to hear arguments on the question of jurisdiction and to proceed accordingly. The case came back to the resident magistrate, where the parties now agreed that the court had jurisdiction and the trial proceeded. No question as to jurisdiction was raised on this appeal: it is agreed that the title of the land, the subject of the action, is registered under the Registered Land Act, 1963, so that the resident magistrate's court would have jurisdiction by virtue of s. 159 of that Act.

The resident magistrate, Nairobi, after a lengthy trial, gave judgment for the respondents. The appellant then appealed to the Supreme Court, where Miles, J. dismissed the appeal and affirmed the resident magistrate's decision, and then this appeal followed.

The facts in the case are fairly simple. It is agreed that Gikanga, the father of both the respondents, and the appellant's uncle, purchased about 100 acres of land many years ago and had possession of this land as absolute owner. Gikanga died about 1942 leaving six sons alive including the two respondents. It is also agreed that the respondents became registered as the proprietors of land which under land consolidation replaced the land left by Gikanga and that this registration was originally carried out under the Native Land Tenure Rules, 1956. The first respondent was registered as the proprietor of two plots Nos. 858A and 858B totalling 68.73 acres while second respondent was registered as proprietor of plots No. 1039 and 1040 comprising sixteen acres of land.

The plaintiff's case is that on Gikanga's invitation he went to join him on the land in 1922 and there proceeded to cultivate the land and assisted to oust the Mbari ya Kiratu which was then unlawfully on the land. He claims that he contributed labour, money, live stock and helped to cultivate the land and to settle the disputes with the Mbari ya Kiratu and that in consideration of these contributions and of promises to assist in future land disputes, Gikanga, in 1927, in accordance with Native Law and Custom, transferred thirty acres of land to the appellant and put him into possession as owner and that after this he, the appellant, remained in possession of the thirty acres until his possession was disturbed by the change of boundaries in the course of the land consolidation in 1958. The plaintiff also claims that after Gikanga's death, he acted as Muramati or leader of the family of Gikanga.

It does appear from the plaint that the appellant's case is that 30 acres of land was definitely taken out of Gikanga's land and transferred to the appellant who then entered into possession of this land as owner and remained in occupation from 1927 to 1958. The appellant does not claim in his plaint that he was given any share or undivided interest in Gikanga's land nor does he claim as a member of Gikanga's family. In the course of the trial mention was made of

his claim as a member of Gikanga's family but still his claim is really based on the alleged gift or transfer of thirty acres in 1927.

The appellant then further avers that whilst he was in detention in 1958 that, the two respondents wrongfully got themselves registered as owners under the Native Land Tenure Rules, 1956, of 84.73 acres and that this 84.73 acres was obtained in exchange for the land originally held by Gikanga including the appellant's thirty acres. The appellant is not now seeking to challenge the validity of the registration, nor does he still claim his original thirty acres which is now no doubt occupied and claimed by some third person, but instead he is claiming that as the respondents fraudulently used his land as part consideration for the land they obtained that the respondents now hold thirty acres of this land in trust for him.

The appellant claimed in his plaint, *inter alia*,

> "(*a*) That a declaration be made against defendants No. 1 and 2 that they hold as trustees for the plaintiff thirty acres of land out of Lands Nos. 858A, 858B held by defendant No. 1 and land No. 1039 held by defendant No. 2.
>
> (*b*) That the defendants furnish account of income received from the said three pieces of land and of land No. 1040 before its sale by defendant No. 2 and pay the plaintiff a part of it proportionate to his thirty acres to the plaintiff.
>
> (*c*) That the partition of the said three pieces of land or any two or one of them as to this honourable court may seem fit be ordered to enable transfer to him of the plaintiff's share of thirty acres."

The respondents agree that they were registered as proprietors of the land owned by their father Gikanga, the first respondent being registered as proprietor of the two plots totalling 68.73 acres and he states he holds this on behalf of himself and his four other brothers, while the second respondent was registered in respect of sixteen acres in his own right. It is not in dispute that all the land owned by Gikanga including the area claimed by the appellant was used by the respondents for the purpose of effecting their registration as proprietors of the 84.73 acres but the respondents' defence was twofold – first they denied the appellant's claim and averred that he had no right, title or interest in any of Gikanga's land, and, secondly they claimed that as registered proprietors on first registration of the lands under the Native Land Registration Ordinance 27 of 1959, that their titles are unimpeachable.

[After dealing with the issue of registration the learned judge continued:

I agree that this trial has not been altogether satisfactory especially with regard to the question as to the customary law applicable to this case, but after consideration I have come to the conclusion that this was caused by the appellant not calling sufficient evidence to prove his case.

Customary law is a part of the law of Kenya. In this respect I would refer to the Kenya (Jurisdiction of Courts and Pending Proceedings) Regulations, 1963. Regulation 3 reads:

> "3. The jurisdiction of the Supreme Court and of subordinate courts shall be exercised in conformity with the Order in Council, the existing laws and any written law for the time being in force in Kenya, and, subject thereto and so far as the same shall not extend or apply, in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on 12th August, 1897, and with the powers vested in and according to the procedure and practice observed by and before Courts of Justice and Justices of the Peace in England according to their respective jurisdiction of their authorities at that date:

> Provided that the said common law, doctrines of equity and statutes of general application shall be in force in Kenya so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as local circumstances render necessary."

and reg. 4 states:

> "4. In all cases civil and criminal to which Africans are parties every Court:
>
> (*a*) shall be guided by African customary law so far as it is applicable and is not repugnant to justice and morality or inconsistent with the Order in Council or any written law; and
>
> (*b*) shall decide all such cases according to substantial justice without undue regard to technicalities or procedure and without undue delay."

Section 60 of the Evidence Act, 1963, provides, *inter alia*:

> "60 (1) The courts shall take judicial notice of the following facts:
>
> (*a*) all written laws, and all laws, rules and principles, written or unwritten, having the force of law, whether in force or having such force as aforesaid before, at or after the commencement of this Ordinance, in any part of Kenya;
>
> (2) In all cases within sub-s. (1) of this section, and also on all matters of public history, literature, science or art, the court may resort for its aid to appropriate books or documents of reference.
>
> (3) If the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it considers necessary to enable it to do so."

The parties in this case are Africans and therefore the court will take judicial notice of such African customary laws as may be applicable but subject to the provisions of reg. 4 as set out above. The difficulty remains how are these customary laws to be established as facts before the courts? In some cases the court will be able to take judicial notice of these customs without further proof as for instance in cases where the particular customary law has been the subject of a previous judicial decision or where the customary law is set out in a book or document of reference as provided in sub-s. (2) above, but usually in the High Court or in a magistrate's court, the relevant customary law will, as a matter of practice and of convenience, have to be provided by witnesses called by the party relying on that particular customary law in support of his case.

The appellant also claimed that the court should have called in the aid of assessors as provided for by s. 87 (1) of the Civil Procedure Code which reads as follows:

> "87. (1) Any court may, in any cause or matter pending before it in which questions may arise as to the laws or customs of any tribe, caste, or community summon to its assistance one or more competent assessors, and such assessors shall attend and assist accordingly."

This is a discretionary power of the court and whilst it may be of great value and assistance to the court in cases dealing with customary law, yet this does not cast the burden of proof in establishing the customary law on the court and not on the litigant himself. In this respect I would refer to ss. 13 and 51 of the Evidence Act which read:

> "13. Where the existence of any right or custom is in question, the following facts are relevant:

(*a*) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence;

(*b*) particular instances in which the right or custom was claimed, recognised or exercised, or in which its exercise was disputed, asserted or departed from.

51.(1) When the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know its existence if it existed are admissible.

(2) For the purposes of sub-s. (1) of this section the expression 'general custom or right' includes customs or rights common to any considerable class of persons."

In my opinion custom as referred to in these sections would include African customary laws and these two sections together with sub-s. (3) of s. 60 (above) would support my view that the onus of proof to establish a particular customary law rests on the party who relies on that law in support of his case. This court has, in several cases dealing with customary law in criminal cases, decided that where the prosecution relies on a local custom then that local custom must be proved by witnesses called by the prosecution, and that it would not be correct for the judge to act only on the opinions of the assessors. I would refer in particular to the judgment of this court in the cases of *R. v. Ndembra* (1) and *R. v. Kiswaga* (2). The point was stressed that while witnesses as to the local custom could have their evidence tested by cross-examination and the defence would also have the opportunity of calling evidence to controvert their opinion that opinions given by assessors would, in the normal course, be given at the end of the case when the parties would have no opportunity to test their opinions by cross-examination, or be able to call evidence to contradict these opinions. The same position would arise in a civil case and it would, in my view, be wrong to rely only on the opinions of assessors given at the conclusion of the trial in order to establish what is the customary law applicable to the particular case. To summarise the position, this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially, of the present apparent lack in Kenya of authoritative text books on the subject, or of any relevant case law, this would in practice, usually mean that the party propounding the customary law would have to call evidence to prove that customary law, as he would prove the relevant facts of his case.

In this case it is common ground that the root of title vested in Gikanga, and appellant's case is based on the transfer of thirty acres of land in 1927 in accordance with Native Law and Custom, but the plaintiff called no evidence to show how the transfer was effected nor has he called any evidence to establish the customary law in the area so as to show that this was a valid transfer. In my view the magistrate was justified in commenting on this fact in arriving at his conclusion that the appellant's grant had been made to him as a 'Muhoi' or tenant at will. The onus here was on the appellant to prove a transfer or gift of the land and then to prove that this was valid according to African customary law.

It was established that the appellant had been on the original land, but in this case especially in view of the fact that the respondents had been recently registered as absolute owners and were also in possession of the substituted land when the

action was brought and the trial took place, the onus was still on the appellant as plaintiff to prove that their possession of the original land had been such as to give them some right or interest in the substituted land. There was an issue as to the amount of land granted to the appellant but the main issue was whether or not the appellant was on the original land as owner or as a 'Muhoi'. The appellant also claimed to be the 'Muramati mbari ya Gikanga', but his claim to a share of land was not as Muramati but rather in his own right as owner. There was evidence before the magistrate to show that 'Muramati' means a keeper of the land or in other words, the head of the family in charge of the land; 'Mbari' means the family descended from the original owner of land and 'Muhoi' means, as the learned magistrate found, a species of tenant at will, that is a person on the land with permission of the owners, but obtaining no right or interest in the land.

It is a fact that the statement of defence did not set out that the appellant was once on the original land as a 'Muhoi', but rather denied that the appellant had any right or interest in the substituted land, though at this stage, the appellant was in fact no longer on the land. It would also appear that the claim that the appellant was a 'Muhoi' did not take the appellant by surprise, as it had apparently been raised in the earlier proceedings. In any event no objection was taken to the defendant's leading evidence to show that the appellant was on the original land as a 'Muhoi' and no application was made to call any evidence in rebuttal. There was ample evidence to support the magistrate's finding that the appellant's previous occupation of the original land was as a 'Muhoi' and that he acquired no right or interest in that land.

After careful consideration I am of the view that the learned judge on appeal and the resident magistrate of the court of first instance acted correctly in the consideration of the African customary law applicable to this case, In the final result this appeal rests on a question of fact, on which an appeal does not lie to this Court, and in any event there was evidence to support the findings and decisions of the resident magistrate.

I would therefore dismiss this appeal with costs.

Crabbe JA: (after dealing with the evidence and findings below, continued):–

The decision in a case must be based upon the legal evidence adduced or upon fact of which the court can take judicial notice. In my view, that part of the learned resident magistrate's judgment that a ceremony would appear to be necessary in creating a valid customary gift of land was based neither on positive proved facts nor has it been shown that it is a fact of which the court could take judicial notice.

In coming to the conclusion that the plaintiff was a "muhoi" the learned resident magistrate felt fortified by the fact that the plaintiff remained silent during the enquiries as to existing rights and made no claims. This observation by the resident magistrate which was confirmed by the learned judge appears, with respect, to be contrary to the evidence. The land in dispute was the only land that was left undivided by the Consolidation Committee, and it was the wish of the plaintiff and defendants that this land should be left undivided pending the result of litigation with neighbours about the land. In these circumstances there was no need for the plaintiff to make any claim.

I agree with the learned Vice-President to the extent that the circumstances in which the plaintiff had been the owner of land according to Kikuyu customary law was a question of fact. But the inferences that were to be drawn from the evidence of the circumstances were not findings of fact; they were findings of law. It is the duty of the court to decide the customary law upon the facts and to apply it to the case before it. This application of the law to the facts, or a

misdirection on the law, is a question of law. In this case the appellant has complained before the first appellate court and this court that the learned resident magistrate misdirected himself in holding that it would be consistent for a "muhoi" (*a*) to act as "muramati", (*b*) to give money and livestock in land cases, and (*c*) that in the case of gift a ceremony was essential. The appellant also complained that the learned resident magistrate failed to make specific findings on certain important issues, and that in two important matters (the nature of a gift of land, and failure of the appellant to make a claim during enquiries concerning the land) his findings were not supported by the evidence on record. The learned judge of the court below at least accepted the appellant's contention as to the nature of gift of land and services rendered to Gikanga. In my opinion, two questions which require our consideration are whether both the learned resident magistrate and the appellate judge made a proper assessment of the evidence, and also whether there was any satisfactory evidence to support the findings of the learned resident magistrate. These, in my judgment, are questions of law, and I respectfully dissent from the view that this appeal raises no questions of law. When counsel for the appellant conceded that there was evidence on record to support the resident magistrate's finding that the appellant was a "muhoi", I understood him to mean that that would be the case only when the evidence for the defence was considered in isolation. Counsel of course submitted, and rightly in my view, that having rejected the contention that the appellant was given merely two acres of land, the learned resident magistrate was wrong in holding that the appellant was a mere "muhoi".

The customary law is part of the laws of Kenya, and under s. 59 of the Evidence Act, 1963, the court is bound to take judicial notice of it, and therefore the person relying on it need not prove it, except, I think, when the custom relied upon is a peculiar one. The legislature, having recognised the existence of African customary law, enjoins that in all cases, civil and criminal, to which Africans are parties, every court should be guided by the relevant customary law, unless it is "repugnant to justice and morality" or inconsistent with any written law. To enable the courts to give effect to this provision the legislature has again, in its wisdom, provided for the assistance of assessors.

The function of the assessors is to assist the court in forming an opinion of the customary law which is applicable to the case before it, and which the court is required to take judicial notice of. As Lord Denning pointed out in *Baldwin & Francis Ltd. v. Patents Appeal Tribunal* (3) when considering the appointment of assessors under s. 98 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925 ([1959] A.C. at p. 691):

> "If the subject-matter is too difficult to be resolved by such means, the court can always call in aid an assessor specially qualified to explain it, see s. 98 of the Judicature Act, 1925, and this has been done from time to time, see, for instance, *Mercer v. Denne* and *Esso Petroleum Co., Ltd. v. Southport Corporation* . . . the court must possess itself of whatever information is necessary for the purpose. Some judges may have it already because of their previous experience. Others may have to acquire it for the first time. But in either case the information they glean is not evidence strictly so called. When an assessor explains the technicalities, he does not do it on oath, nor can he be cross-examined. And no one ever calls the author of a dictionary to give evidence. All that happens is that the court is equipping itself for its task by taking judicial notice of all such things as it ought to know in order to do its work properly."

In *Esso Petroleum Co., Ltd. v. Southport Corporation* (4) Devlin, J. appointed an assessor to advise him after the hearing, and stated that in future he would, if necessary, adjourn the trial so that an assessor might be present during the

hearing. Section 98 (1) of the Supreme Court of Judicature (Consolidation) Act serves the same purpose as s. 87 (1) of the Civil Procedure Act of Kenya, and I think that when the courts of this country are called upon to apply the customary law they must consider it their duty to call in aid an assessor in order to inform themselves of what the customary law is, except where the particular native law and custom are such that the court may without further ado take judicial notice of it. This, in my view, will prevent any speculation, and will ensure a sound and systematic development of the customary law.

Before concluding this judgment I should like to express my own views on the general observations made by brother Duffus, J.A., that in civil claims native law and custom must be proved in a magistrate's court or in the High court. The rule that the customary law must be proved was stated by the Privy Council in the Ghana case of *Angu v. Attah* (5) as follows.:

> "As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with native customs until the particular customs have by frequent proof in the courts, become so notorious that the courts take judicial notice of them."

Proof of a particular customary law in one previous decision only was not considered to be "frequent proof in the courts" so that the courts could take judicial notice of the alleged customary law rule. But this rule which was applied only in the "British Courts" originated from the fact that most of the early judges in the British Colonial territories in West Africa were Europeans, who were unacquainted with the various rules of the customary law. The courts therefore insisted on the proof of rules of the customary law. The rule was not however always followed, for in deciding questions of native law and custom, the existence or content of any rule of customary law was in some cases determined by reference to any book or manuscript recognised as a legal authority, and the court could also call to its assistance chiefs or other persons whom the court considered to have special knowledge of native law and custom. The rule in itself is fast becoming out-of-date, and I think it is too late in the day to extend its application to East Africa. It may be a convenient rule in the present circumstances in Kenya, but I do not think that ss. 59 and 60 (1) (*a*) and (2) justify a rigid adherence to the rule in *Angu v. Attah* (5). The position in Kenya, it seems to me, is well-explained in Stephen's Digest of the Law of Evidence (12th Edn.), art. 62, as follows:

> "No evidence of any fact of which the court will take judicial notice need be given by the party alleging its existence; but the judge, upon being called upon to take judicial notice thereof, may, if he is unacquainted with such fact, refer to any person or to any document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such document or book of reference."

(See also Woodroffe on Evidence (9th Edn.), p. 487, citing Markby, Evidence, p. 40).

I am satisfied that if it were the intention of the Kenya Parliament that the customary law should be proved several times before the courts could take judicial notice of it it would have said so in plain language. In my view the fact that Parliament has made provisions, such as the summoning of assessors and resorting to appropriate books or documents of reference for the purpose of ascertaining the customary law militates against an inference that the customary law must necessarily be proved. No evidence need be given of facts, which according to ss. 59 and 60 (1), judicial notice is taken, for when a court takes judicial notice of a fact it declares that that fact exists, even though the existence

of the fact has not been established by evidence. In *Commonwealth Shipping Representative v. P. & O. Branch Service* (6) Lord Sumner, distinguishing evidence in the ordinary sense from information on which judicial notice is based, said ([1923] A.C. at p. 212):

> "Judicial notice refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer."

When a judge hears evidence on matters which attract s. 59, he is not taking evidence in the strict sense; the witnesses are simply assisting him to form a view of matters of which he is supposed to have complete knowledge: see *McQuaker v. Goddard* (7) (Clauson, L.J., [1940] 1 K.B. at p. 700).

If the decision in this appeal rests with me alone, I would allow this appeal with costs, and would set aside the judgment of the courts below and would remit the case to the court of first instance for a retrial with the aid of assessors.

Newbold V-P: The case for the appellant rests ultimately on the question whether he had been given land in circumstances in which, under the Kikuyu African customary law, he had become the owner of the land. Both the circumstances in which the land was given and the existence of the relevant African customary law are questions of fact which had to be proved by the appellant. When it is alleged that by any particular African customary law a result follows different from that which would follow under the ordinary law of Kenya, then the existence of that African customary law has, unless it has become of such general notoriety that judicial notice may be taken of it under s. 60 of the Evidence Act, 1963, to be proved by the person invoking it in precisely the same way that a person invoking customary rights has to prove the custom. In proving such African customary law opinion evidence is admissible under s. 51 of the Evidence Act, 1963, and, in accordance with s. 60 (2) of that Act, it may also be proved by the production of a book or document. Once proved, the courts must be guided by it in accordance with Reg. 4 of the Kenya (Jurisdiction of Courts and Pending Proceedings) Regulations, 1963.

Like Miles, J. and Duffus, J.A., I cannot see that there is any real point of law invoked in this appeal, and under ss. 72 and 73 of the Civil Procedure Act a second appeal lies only on a question of law. For these reasons I agree with Duffus, J.A. that this appeal should be dismissed with costs and it is so ordered.

Appeal dismissed.

For the appellant:

CW Salter, QC and *DV Kapila*
DV Kapila, Nairobi

For the respondents:
SM Akram
Akram & Esmail, Nairobi

Ellis v R
[1965] 1 EA 744 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	8 August 1965
Case Number:	48/1965
Before:	Sir Samuel Quashie-Idun P, Sir Clement de Lestang and Duffus JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Aden – Blandford, J

[1] Criminal Law – Murder – Trial by jury – Accused an epileptic – Conflicting opinion that at the time of the offence accused understood nature and quality of his act and what he was doing was wrong – Rejection by jury of plea of insanity.

[2] Criminal Law – Practice – Murder – Evidence that accused an epileptic – Verdict by jury of culpable homicide not amounting to murder – Whether jury entitled to bring in verdict of lesser offence.

[3] Criminal Law – Practice – Juries – Criticism, if any, should be made in Court of Appeal.

Editor's Summary

The appellant was charged with the murder of an Arab by striking him on the head with a pipe. While he was having drinks with other soldiers at the NAAFI in Aden news was received that one of the Army vehicles had been blown up. The appellant later left the party for about an hour and subsequently told one Woodhouse that he had killed a "Wog", meaning an Arab. The appellant appeared quiet and normal and Woodhouse thought that he was joking until the soldiers were called for a parade and informed that somebody had been severely injured. The appellant was advised to give himself up which he did and in answer to the question "Did you hit him?" said "Yes, Sir". At the trial the appellant relied on the defence of insanity. Evidence was led to show that after his parents had died he had an unsettled life, A neuro-psychiatrist, who performed a series of tests on the appellant, gave evidence that he was at the material time undergoing an epileptic attack and that that condition could impair his capacity to understand the nature of his act and whether it was right or wrong. Another medical witness gave evidence that the appellant was an epileptic but he could not say with certainty that any fit he may have had would have partially or totally impaired his appreciation that his conduct was wrong. The issue of fact before the trial judge and jury was whether at the time the appellant struck the deceased with the pipe, he was suffering from such a condition of the mind, brought about by epilepsy. The jury returned a unanimous verdict that the appellant was not guilty of murder but guilty of culpable homicide not amounting to murder. On appeal the substantial ground of appeal was that if the jury were not satisfied that the requisite mental ingredients of the offence of murder had been established, it was not open to them to convict of culpable homicide not amounting to murder. Furthermore, if the jury were satisfied that the appellant was, in spite of unsoundness of mind, capable of knowing the nature of his act and that what he did was wrong, the ingredients of murder could be inferred from the evidence so as to make a verdict of a lesser offence inappropriate. On the evidence the verdict of the jury should have been one of "Guilty of murder, but insane". The Crown contended that on the evidence the jury were entitled to return a verdict of guilty of a lesser offence by virtue of s. 177 (2) of the Criminal Procedure Ordinance. The record showed that the jury's verdict was criticised by both defence counsel and the trial judge.

Held –

(i) there was no fault with the directions given to the jury by the trial judge on the evidence before him;

(ii) on the directions given by the trial judge the jury were entitled to come to the conclusion that although the appellant was an epileptic he was not insane at the time he did the act; that while he knew what he was doing and that it was wrong, he did not, by reason of his illness appreciate the full consequence of his act, viz. that the blow would most probably cause the death of, or such grievous bodily harm to, the deceased as was likely to cause his death;

(iii) as the jury were properly directed on the evidence and on the alternative verdicts they could return for lesser offences, the court was unable to come to the conclusion that they were wrong in rejecting the appellant's defence of insanity or that the verdict was unreasonable;

(iv) the issue as to whether or not the appellant was suffering from a disease of the mind at the time he committed the offence was a question of fact for the jury: *R. v. Rivett*, 34 Cr. App. 87 applied;

(v) should the jury's verdict be perverse or unreasonable criticism should be left for the Court of Appeal so as not to impair the jury's duty to take an independent view of the evidence.

Appeal dismissed.

Cases referred to in judgment

(1) *R. v. Barkatulla* (1887), P.R. 65.

(2) *R. v. Govinda* (1876), 1 Bom. 342.

(3) *R. v. Rivett* (1950), 34 Cr. App. R. 87.

(4) *R. v. Hollingberry*, 107 E.R. 1081.

(5) *R. v. Hunt*, 170 E.R. 1260.

Judgment

Sir Samuel Quashie-Idun P: read the following judgment of the court.

The appellant was tried by Blandford, J., sitting with a jury at the High Court, Aden, on a charge of the murder of Adbo Rabo by striking him on the head with a metal pipe.

The brief facts of the case were as follows:

The appellant was sapper of the Royal Engineers and was at the material time stationed with the British Army in Aden. On November 28, 1964, the appellant joined other soldiers at the NAAFI at 7.15 p.m. and all had drinks together. While there news was received that one of the vehicles belonging to the Army had been blown up. The party discussed the news for a short time and decided that there was no truth in it. Later, the appellant left the party at about 9.15 p.m. (according to the evidence of Sapper Woodhouse the 3rd P.W.) and returned to the NAAFI at about 10 p.m. He told the third P.W. that he had killed a "Wog" which was a slang expression for an Arab. The appellant appeared quiet and normal and the third P.W. thought that the appellant was joking. He, however, offered the appellant a drink which he accepted.

Later the men were called for a parade and at the parade it was reported that somebody had been severely injured. Third P.W. then realised that the appellant had not been joking when he said he had killed a "Wog". He then advised the appellant to give himself up. The appellant asked the third P.W. to

accompany him, and the two men then went to Captain Wilkinson to whom the appellant gave himself up, saying, “about what happened tonight, I did it.” Captain Wilkinson asked the appellant, “what do you mean? Did you hit him ?” and the

appellant replied “Yes Sir.” The appellant was put under arrest and subsequently charged. Another witness, Buckley, the fifth P.W., also stated that the appellant told him that he had bashed a “Wog” over the head with a pipe or iron bar. When the witness asked him why he had done so, the appellant said that someone had come to the NAAFI and said that two landrovers which had left on patrol have been blown up in Aden. The appellant added that the landrovers had left with some of his friends and so he just went out and bashed the “Wog”. Other evidence was led by the prosecution and, it was not denied at the trial, neither has it been contested in this court that it was not the appellant who inflicted the fatal injury on the deceased as a result of which he died.

In his evidence the appellant stated that on the night in question he went to the NAAFI and there a Signals Sergeant had come and said “watch lads – there’s been two vehicles blown up in Aden” or words to that effect. Appellant said he thought they might have been Army vehicles, and he was getting upset. He added:

> “The more I thought about it the more I became enraged to think it may have happened. I just could not get it off my mind. So I left the NAAFI to try and cool off. I cannot say how long that was after I heard the news as my mind was blank – that was, I was thinking about this and was not worrying about the time. I walked around outside the NAAFI for a few minutes. Then I went to one of the rooms where a film show was going on. I stayed there, I should say, two minutes. By this time my rage became worse in thinking about what might have happened. I lost complete control of my senses and feelings. I decided I was going to hit an Arab. I was near the M.I. room . . . As far as I can remember I just picked up the piece of pipe outside the M.I. room. The next thing I found myself doing was hitting an Arab over the head . . . I had not seen that Arab before. In fact I do not know what he looked like. He had not caused me any hurt or harm. After I hit the Arab I heard someone shouting at me from behind. I turned round and went to go for him. From the sound of his voice I knew he was an Arab so I just went for him. If I had got near him, I should probably have hit him. I did have a piece of pipe in my hand then. I did not hit the other Arab. He ran away. I went back to the NAAFI. I went straight to Sapper Woodhouse (third P.W.). To the best of my knowledge I think I said ‘Dave, I think I have killed a “Wog”.’ ”

Earlier in his evidence the appellant stated that after his parents had died he and his brother went to an orphanage for three or four years. He left the orphanage when he was fourteen years old. He mentioned one occasion when he fainted in church at the orphanage. He lived with an uncle and his wife whose daughter suffered from epilepsy. He had a little trouble in remembering things. He joined the Army in 1961. In 1964 while stationed in Rochester, he forged the Post Office Savings book of a fellow soldier and drew £30 just because the soldier had upset him by bragging a lot about the amount of money he possessed. The appellant said he forged the Savings book and drew the money to teach his friend a lesson. Criminal proceedings followed and he pleaded guilty and was dealt with.

On another occasion, he was burnt with a cigarette end and he suspected that a young boy had done it. He got angry and wanted to hit the boy but changed his mind and tripped the boy, who fell on his back. The appellant then took the boy’s penis out and played with it. For this, the appellant was prosecuted and fined £20. The appellant also referred to an occasion in Norway when an officer smashed a bottle of whisky which he had been given as a birthday present and how he had wanted to have things out with the officer, and then later ransacked his office.

Under cross-examination, the appellant said that when he picked up the pipe it was his intention to go and hit any Arab and he did not think whether or not, if he hit the Arab with the pipe, he would kill or injure him seriously. He added: "I realise now, seeing the pipe in court, that to hit a man with that could cause serious injury or death."

William Douglas Stewart Hepburn, a senior specialist in neuro-psychiatry, who did a series of tests on the appellant gave evidence and also submitted a medical report on the appellant. The opinion of the witness was based, as he said, on what the appellant told him and on the result of the test he did on the appellant.

The witness stated in his evidence that if the jury accepted his views that at the material time, the accused was undergoing an epileptic attack, witness could say that that condition could impair the accused's capacity of knowing the nature of his act; and it would have seriously interfered with is capacity for knowing whether it was right or wrong.

Under cross-examination, the witness stated as follows:

> "If a man is undergoing an epileptic attack and then performs a violent act, it would not be possible for him while in that state to know that what he was doing was wrong. It would be possible for him to know what he was doing. No one knows for certain that Ellis was suffering from epileptic attack between 9 and 10 p.m. on November 28, It is a professional certainty with me that he was."

Later the witness stated that in minor epilepsy, a man may be aware of performing an act in a purely mechanical way but not registering the meaning or quality of his actions.

Another witness, Napier Malcolm, a physician, also gave evidence for the appellant and stated that there was no serious doubt in his mind that the appellant was epileptic. The witness, however, stated under cross-examination as follows:

> "I cannot say with absolute certainty that any fit he may have had would have partially or totally impaired his knowledge of what he was doing or his appreciation that it was wrong".

The appellant having admitted that it was he who inflicted the fatal injury on the deceased, the issue before the learned trial judge and the jury was whether at the time the appellant struck the deceased with the pipe, the appellant was suffering from a condition of the mind brought about by epilepsy as not to know that what he was doing, was wrong.

After an exhaustive summing-up to the jury by the learned trial judge, the jury returned a unanimous verdict that the appellant was not guilty of morder under s. 300 of the Penal Code, but guilty of culpable homicide not amounting to murder. We shall deal later with what transpired in the court between the verdict and the time the learned judge imposed a sentence of ten years on the appellant.

Against the decision, the appellant has appealed on the following grounds.

> "1. In his further direction, the learned judge ought to have directed the jury, that none of the exceptions to s. 300 of the Penal Code being applicable, then (and notwithstanding the question of insanity), if the jury were not satisfied that the requisite mental ingredients of the offence of murder had been established, it was not open to the jury to convict of culpable homicide not amounting to murder; and furthermore, that if the jury were satisfied, with reference to s. 84 of the Penal Code, that the appellant was not, by reason of unsoundness of mind, incapable of knowing the nature of his

act or that what he did was wrong or contrary to the law, the mental ingredients of the offence of murder could be inferred from the evidence such as to make a verdict of guilty of a lesser offence inadmissible and inappropriate.

2. Having regard to the unchallenged evidence of Wing Commander Hepburn as to the distorted and parchy memory of epileptics, the learned judge wrongly attached disproportionate "importance" to the testimony of the appellant under cross-examination and ought more specifically with reference to that evidence to have warned the jury, more emphatically in regard thereto.

3. The verdict is wrong in law, inconsistent with, and against the weight of, the evidence; and, moreover, the jury failed properly to perform their functions in that they did not consider, sufficiently, if at all, the evidence upon the issue of insanity."

Counsel who appeared for the appellant argued the grounds of appeal together and submitted that on the evidence, the verdict of the jury should have been one of "guilty of murder, but insane".

Although the memorandum of appeal filed criticises the learned trial judge's summing-up, in arguing the appeal the learned counsel was unable to substantiate that the criticism was justified. Indeed, we can find nothing in the learned trial judge's summing-up to show that he failed to impress upon the jury the fact indicated by the evidence that the appellant was epileptic. On the question as to whether or not, the appellant suffered from a disease of the mind at the time he inflicted the fatal blow on the deceased, the following is what the learned trial judge told the jury:

"Apart from the conduct connected with the specific criminal offences the Troop Commander considered that in general he took a disproportionate view of things.

As I say you can judge for yourself from the evidence you have heard how well founded is the view of the two doctors, derived from the information they obtained as to the accused's background, for the conclusions they reached. Wing Commander Hepburn had other material as well of his own knowledge such as his observation of his patient over a period exceeding three months; his reaction to the treatment given and such things as a tendency before successful treatment commenced, and despite his predicament, to be belligerent towards Arab bearers who had to be kept away from him for their safety.

There is one last point I want to make before leaving the subject of the doctors' opinions. I have said that you may study Wing Commander Hepburn's written report in order to refresh your memories if you wish. If you do you may notice that the very last paragraph of the report contains what is expressed as a "submission" that at the time of the offence the accused was in a state of mind, due to temporal lobe epilepsy such that he did not understand the nature and quality of his act or that what he was doing was wrong. That is no doubt his opinion. He did state it elsewhere in his evidence, but what you have to remember is that he is not the jury, you are. You have to make the decision having regard to all the evidence you have heard on the subject, especially the evidence of the accused himself as to the material moments of time, but, bearing in mind that if you regard the expert witnesses as honest and competent and their opinions as founded upon established facts then you should have special regard to what they say. But in the final event the verdict is yours and you will reach it on all the evidence you have heard."

With respect, we are unable to find any fault with the directions given to the jury by the learned trial judge on the evidence before him.

We would refer to another portion of the summing-up of the learned trial judge which, in our view, clearly shows that he properly directed the jury on the defence put up by the appellant.

This is what he said:

> "Now I turn to the defence which in legal terms is that he committed no offence because at the time he struck the deceased he was by reason of unsoundness of mind incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to the law. The burden of proving this rests with the accused because a man is presumed to be sane and accountable for his actions until the contrary is shown. While this burden rests with him it is not such a heavy one as rests on the prosecution as you have been told before and as I shall remind you later. If after you consider his evidence and that of his witnesses and some parts of the evidence of the prosecution which are consistent with his story and you find that, on balance of probabilities, it seems preferable to decide that due to his mental disease he did not know what he was doing at the material time so that he could not have formed the intent to kill and so on which I mentioned before or that it was morally wrong or unlawful – if he did not know any one of these things – you must acquit him, but add to your verdict a statement as to your finding as whether he committed the act alleged or not."

It appears from the record of the proceedings that after the jury had retired to consider their verdict, they returned about two hours later and the foreman stated that the jury wanted to know whether the charge was murder or culpable homicide not amounting to murder.

The following notes appear on the record of proceedings:

> "Court – In view of your question I think it will be necessary for me to instruct you in the law relating to the alternative verdicts open to you. As this possibility had not been mentioned in this trial, I shall need to reflect upon the manner in which the defence of insanity will require to be taken into account and will adjourn for a few minutes to decide what further direction to give."

When the court resumed, the learned trial judge repeated the portion of his summing-up relating to the duty which always rests on the Prosecution and in this particular case, that the accused struck the head of the deceased with a metal pipe with the intention of causing his death or causing him such bodily injury as he knew to be likely to cause death or sufficient in the ordinary course of nature to cause death.

The learned trial judge continued:

> "If, gentlemen, you consider that one of the mental elements I have stated is not established having regard to the evidence you have heard as to the nature of the weapon the extent of the wound and so on, it is open to you to decide that the accused committed an act which in a normal person would amount to one of the lesser offences I have mentioned. Even as to such an offence however you would still have to consider the defence of insanity and the alternatives before you would be able to find the prisoner guilty or not guilty – that is completely innocent or not guilty but having committed the act though you consider it amounted to a lesser offence. The practical difference in punishment only arises if you find the prisoner guilty. If you find him not guilty but that he committed the act the practical

> result from the prisoner's point of view will be the same whether you think he would have been guilty of a more or less serious offence had he not established his unsoundness of mind.
>
> The alternative convictions which I think are open to you in the circumstances of this case are culpable homicide not amounting to murder contrary to s. 299 of the Penal Code."

The learned trial judge also enumerated other alternative and lesser offences for which the jury might return a verdict, e.g. voluntarily causing grievous hurt. He also read the relevant sections of the Penal Code and explained them to the jury. In doing so the learned trial judge purported to act under s. 179 (2) of the Criminal Procedure Ordinance which reads:

> "(2) When a person is charged with an offence and facts are proved which reduce it to a lesser offence he may be convicted of the lesser offence although he is not charged with it."

In answer to the submission made by learned counsel for the appellant, senior Crown counsel submitted that on the evidence the jury were entitled to return a verdict of guilty of a lesser offence. He referred to the trial judge's further summing-up and submitted that the jury might have entertained a doubt on the evidence that the act of the appellant was culpable homicide amounting to murder and therefore returned the verdict now complained of. It is our view that on the directions given by the learned trial judge in his summing-up to the jury, with which we respectfully agree in substance, the jury were entitled to come to the conclusion that although the appellant was an epileptic he was not insane at the time he did the act; that while he knew what he was doing and that it was wrong, he did not, by reason of his illness appreciate the full consequence of his act, viz.: that the blow would most probably cause the death of, or such grievous harm to the deceased as was likely to cause his death.

Senior Crown counsel referred to the Law of Crimes by Ratanlal and Thakore (12th Edn.), p. 707, in which the learned authors dealt with the distinction between culpable homicide and murder and quoted the dictum of Plowden, J. in *R. v. Barkatulla* (1), viz.:

> "Putting it shortly, all acts of killing done with the intention to kill or to inflict bodily injury likely to cause death or with the knowledge that death must be the most probable result are *prima facie* murder, while those committed with the knowledge that death will be a likely result are culpable homicide not amounting to murder. . . . the difference between culpable homicide and murder is merely a question of different degree of probability that death will ensue. It is culpable homicide where death must have been known to be a probable result. It is murder, where it must have been known to be the most probable result."

In returning the verdict that the appellant was guilty of culpable homicide, not amounting to murder, the jury must have come to the conclusion that in his condition of mind, the appellant struck the blow not with the knowledge that death must be the most probable result.

In the case of *R. v. Govinda* (2) (1876), the appellant knocked down his wife, put a knee on her chest and struck her violent blows in the face with the closed fist producing bleeding of the brain in consequence of which she died. It was held on appeal that the offence committed by the appellant was not murder but culpable homicide not amounting to murder.

Although the facts in that case are not the same as those in the present case, the principle of law applicable to both cases are the same. We also appreciate

that the line of distinction between the offence of murder and culpable homicide not amounting to murder is very thin.

As we think that the jury were properly directed on the evidence led by the accused in his efforts to establish that he was suffering from a disease of the mind, and on the alternative verdicts they could return for lesser offences, we are unable to come to the conclusion that they were wrong in rejecting the appellant's defence of insanity or that the verdict is unreasonable. The issue as to whether or not the appellant was suffering from a disease of the mind at the time he committed the offence was a question of fact for the jury; and we would refer to the case of *R. v. Rivett* (3), in which it was held that the issue of insanity is one to be determined by a jury. In that case the Lord Chief Justice stated in his judgment as follows:

> "It is for the jury and not for the medical men of whatever eminence to determine the issue. . . . the court will not usurp the functions of the jury, though, it may by virtue of the Criminal Appeal Act set aside a verdict if satisfied that no reasonable jury would have found a verdict of Guilty in a particular case. The jury, no doubt, had the opinion of medical men of undoubted integrity and whose qualification none could question. But they had also the facts and the undisputed facts of all the surrounding circumstances . . . This is not a case where a scientific witness can say with certainty, as in the case of a bodily disease from specific symptoms such as a rash, a coma or other physical signs that a disease exists. The jury have heard the indications that have led the medical witnesses to their conclusions. They have also heard all the other facts relating to the man and the crime, that he knew he had done wrong is evidenced by the fact that he not only told his friend what he had done and indicated the consequence that would follow to himself, but gave himself up to the police for having committed murder. Let it be assumed that he killed the girl on a sudden impulse; a jury of his country are satisfied that he was responsible, and it is not for this court to say that he was not."

We think that the above quotation answers the submission of learned counsel that on the evidence, the only verdict which the jury could have returned was "Guilty but insane". We think that the absence of any evidence that at the time when the appellant struck the fatal blow he was suffering from an attack of epilepsy justifies the jury in taking the view as they appear to have done, that even though the appellant was epileptic he did not at the time of the attack on the deceased suffer from much disease of the mind as would prevent him from knowing that his act was likely to cause death, although he did not realise that death would be the most probable result. The evidence given by the appellant himself which clearly showed that he remembered every act done by him amply negatived the defence of insanity.

In Halsbury's Laws (3rd Edn.), Vol. 10, p. 428., para. 791, the following passage appears:

> "A jury cannot at common law convict a defendant of an offence of an entirely different character from that named in the indictment; for example, if the charge is one of felony, they cannot at common law find the defendant guilty of a misdemeanour, . . . They may, however, at common law, convict of a cognate offence of the same character but of a less aggravated nature, if the words of the indictment are wide enough to cover such an offence."

See *R. v. Hollingberry* (4) and *R. v. Hunt* (5).

We have, in this judgment, referred to s. 179 (1) of the Criminal Procedure

Ordinance which we think confers rights similar to those conferred by the Common Law of England on the jury.

Before concluding this judgment we would like to call attention to an irregularity which occurred after the jury had returned their verdict. Learned counsel for the accused is recorded in the proceedings as having stated the following:

> "Surprised at the result of trial, as to the verdict reached. There has been evidence of the man's mentality and it can hardly be ignored unless jury perverse."

The learned trial judge also stated that he had been taken by surprise by the jury's verdict. He then adjourned the proceedings for conviction and sentence. When the proceedings were resumed, he read a lengthy ruling which contained severe criticisms of the jury's verdict. We think it was improper for learned counsel to have made the remarks attributed to him and that the procedure adopted by the learned trial judge which was novel was also improper. We think that a jury performing a public duty should not be criticised whether in their presence or absence in the manner in which they were in this case. It is essential and desirable that the jury should continue to express their independent mind on the evidence before them and that nothing should be done to impair the exercise of that sacred right vested in them. One of the criticisms was that the jury did not take the report of the witness Wing Commander Hepburn, the psychiatric specialist called by the defence, into the jury room when they retired. This document was read and fully explained by the witness in his evidence, and it was a matter entirely for the jury to decide whether they desired to further examine this document before arriving at their verdict. We consider the learned trial judge's comments on this matter unfortunate and quite unjustified.

Section 221 of the Criminal Procedure Ordinance clearly lays down the duty of the trial judge after a unanimous verdict has been returned by the jury. If the verdict is perverse, unwarranted or unreasonable, it is at the Court of Appeal where criticisms can be levelled. There are instances when the Court of Appeal has asked for a report or the views of the trial judge on the jury's verdict. It would have been better if the learned trial judge had reserved his criticisms until asked for by this court. We are of the opinion, however, that the irregularity has not occasioned any miscarriage of justice and for the reason stated in this judgment, we dismiss the appeal.

Appeal dismissed.

For the appellant:
G Horrocks
Horrocks & Williams, Aden

For the respondent:
IC Rangel (Senior Crown Counsel, Aden)
The Attorney General, Aden

Joginder Singh Nandhra and others v Munshi Ram & Co Ltd
[1965] 1 EA 753 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment:	4 October 1965
Case Number:	65/1963
Before:	Newbold V-P, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya at Nairobi – Gillespie, S.R.M

[1] Bankruptcy – Bankruptcy notice – Validity – Error in form – Whether costs of execution should be included.

[2] Bankruptcy – Bankruptcy notice – Security – Whether attachment of moneys still in court is security.

[3] Bankruptcy – Bankruptcy notice – Whether costs of abortive execution are part of amount due on a judgment.

Editor's Summary

The respondent company served a bankruptcy notice on the appellant and two others for the balance due on a final judgment. The appellant gave notice disputing the amount due and alleged that moneys in court, already attached by the respondent, sufficiently secured the balance of the judgment debt. These grounds were rejected by the resident magistrate exercising delegated jurisdiction. On appeal it was argued for the appellant that the bankruptcy notice was invalid because it included the costs of abortive attempts at execution; that the attachment by the respondent of moneys in court created a security; that the existence of the attachment precluded the issue of a bankruptcy notice; that the bankruptcy notice was invalid because it was misleading and should be strictly construed there being an error in the prescribed form of words.

Held –

(i) the costs of an abortive execution are not part of the amount due on a judgment for the purposes of a bankruptcy notice; here however there was no evidence to show that they had been included in the bankruptcy notice;

(ii) an unsatisfied attachment of moneys in court does not operate as a stay of execution of a final judgment if the amount due is certain, and consequently this bankruptcy notice was not barred;

(iii) it was not clear on the wording of the bankruptcy notice whether the necessary security had to be to the satisfaction of the respondent or of the court: in this case the error in following the prescribed form neither misled nor caused an injustice and would be disregarded under the Bankruptcy Act, s. 133 and the Bankruptcy Rules, r. 315.

Appeal dismissed.

Cases referred to in judgment

(1) *Karter Singh Nanak Singh Ramgharia v. Naumann Gepp* (*East Africa*), *Ltd*., [1960] E.A. 442 (C.A.).

(2) *Re a Debtor*, [1957] 2 All E.R. 216.

(3) *Re Miller, ex parte Miller* (1893), 10 Mor. 183.

(4) *Jan Mohammed v. T. B. Lobo* (1935), 2 E.A. C.A. 100.

(5) *Re Woodall, ex parte Woodall* (1884), 13 Q.B.D. 479.

(6) *Re Follows, ex parte Follows* (1895), 2 Q.B. 521.

(7) *Re Ford, ex parte Ford* (1886), 18 Q.B.D. 369.

(8) *Re Phillips, ex parte Phillips* (1888), 5 Mor. 40.

(9) *Re a Debtor, ex parte Smith*, [1902] 2 K.B. 260.

(10) *Re Bond, ex parte Capital and Counties Bank, Ltd*., [1911] 2 K.B. 988.

(11) *Re a Debtor*, [1908] 2 K.B. 684.

(12) *Re a Debtor*, [1950] 2 All E.R. 1129.

(13) *Re a Debtor*, [1952] 1 All E.R. 107.

October 4. The following judgments were read:

Judgment

Spry JA: The respondent company caused to be served on the appellant, Joginder Singh Nandra, a bankruptcy notice requiring him and two other persons (all of whom are incorrectly named as appellants in the title to the appeal) to pay a sum of Shs. 13,950/15, alleged to be the balance due on a final judgment. The appellant then gave notice to the advocates for the respondent company under para. (ii) of the proviso to s. 4 of the Bankruptcy Act (Cap. 53) that he disputed the amount due. He also filed an affidavit which is a little difficult to understand. It begins with a statement that the amount claimed was in excess of that due but it does not state what amount was admitted to be due on the judgment. The substantial part of the affidavit appears to be an allegation that there were moneys in court, in connection with other proceedings, belonging to the judgment debtors sufficient to satisfy the judgment debt and which had been attached by the respondent company and that the judgment debt was therefore sufficiently secured. The affidavit concluded with an assertion that the bankruptcy notice should be dismissed with costs. An affidavit in reply was filed on behalf of the respondent company by Peter John Smithson Hewett, a partner in the firm of Daly and Figgis, the advocates for the respondent company. In this, it was asserted that the attachment of the moneys referred to in the appellant's affidavit had been unsuccessful owing to the existence of prior attachments and the deponent expressed the belief that the respondent company had no security for the amount due to it.

The matter came before the court on May 11, 1962, when it was adjourned by consent to June 1, 1962. On the latter date, the proceedings were again adjourned by consent until the priorities of the claimants to the moneys in court should have been determined. Eventually, a further affidavit was filed on behalf of the respondent company, stating that the priorities had been determined and the moneys paid out, and that the respondent company had received nothing. The hearing finally took place on February 1, 1963.

It would seem that at the hearing the issues were never determined, nor indeed was there any agreement as to the very nature of the proceedings. Counsel, who appeared for the respondent company, appears to have regarded the appellant's affidavit as an attempt to establish a set-off or counterclaim. I fail to see how this could have been so, although there may be some justification for counsel for the respondent's attitude in the fact that the affidavit appears to have been treated as an application, which he assumed had been done under r. 101 of the Bankruptcy Rules.

Counsel for the appellant made only one submission, however, which was that there had been compliance with the bankruptcy notice. This was, as counsel for the respondent submitted, not a matter which could be raised on an affidavit operating as an application under r. 101 (see *Karter Singh Nanak Singh Ramgharia v. Naumann Gepp* (*East Africa*), *Ltd*. (1)). It was an issue which would normally be argued on the hearing of the creditor's petition (and no petition had apparently been filed), although it could be raised by way of motion under r. 15 of the Bankruptcy Rules (*Re a Debtor* (2)). The irregularity

is not now material, as it did not go to jurisdiction, but it did contribute to the confusion. Counsel for the appellant did not attempt to argue, nor did he so much as suggest, that the bankruptcy notice was invalid.

The learned resident magistrate gave his ruling on February 11, 1963. He began by saying:

> "The question to be decided is whether the debtor complied with the bankruptcy notice or not."

After considering the meaning of the word "security", he held as follows:

> For the attachment of money in court to have been security I consider it was for the debtor to satisfy the court that the sum in court equalled or exceeded the sum claimed in the bankruptcy notice, and that the creditor could obtain that sum against all others. This the debtor has failed to do.
>
> I find that the attachment on the moneys in court was not security. The debtor did not secure the sum due to the creditor. Consequently, the debtor has committed an act of bankruptcy."

It is against that decision that this appeal had been brought.

The memorandum of appeal contains three grounds but in substance it is merely a submission that the learned resident magistrate erred in holding that the moneys in court attached by the respondent company did not constitute security. At the first hearing of the appeal, however, counsel for the appellant asked leave to argue five other grounds. We gave leave in respect of two, which were not opposed; the other three appeared *prima facie* to be grounds of law but we were not certain that all relevant facts had been before the trial court and we therefore granted leave in respect of them only de bene esse, which leave I would now confirm. At the resumed hearing, counsel for the appellant asked leave to adduce further evidence. This application we refused with costs, as we were satisfied that the additional evidence was evidence which could without any difficulty have been produced in the court below.

The first point that counsel for the appellant argued on the appeal was that the amount claimed in the bankruptcy notice was in excess of that due on the judgment debt, and he relied on *Re Miller, ex parte Miller* (3), as authority for saying that this vitiated the notice. This was a point which was not taken in the lower court; indeed it may be argued that counsel for the appellant tacitly admitted the correctness of the amount. Counsel for the respondent had said:

> "Amount stated on the bankruptcy notice is correct. It was only disputed on basis of the moneys lying in court. No other ground of misstatement."

This was not challenged by counsel for the appellant, whose sole argument was that there had been compliance with the notice. That would not matter if the evidence clearly showed that the notice was void ab initio, but it does not. The burden of proof was on the appellant to show that the amount claimed in the bankruptcy notice was incorrect (see *Jan Mohammed v. T. B. Lobo* (4)). Counsel for the appellant argued that the record raises an irresistible inference that the amount claimed was excessive, first, on the ground that the differences between the amounts claimed in three applications for execution as appearing in counsel for the respondent's affidavit, can only be explained on the basis that costs of abortive attempts at execution had been included, and, secondly, because according to counsel for the respondent's affidavit, interest had been included up to a day six days after the date of the bankruptcy notice. It seems to me, however, with respect, that these facts do no more than show that the calculations were incorrectly made. It may well be that the amount claimed was excessive but we cannot be certain of that without knowing what was the actual amount due, and that does not appear anywhere on the record. Furthermore, I do not think this court should, save in the most exceptional circumstances, be asked to infer facts which could easily have been proved by evidence in the lower court.

Counsel for the respondent did seek to argue that there was nothing improper in including the costs of abortive execution proceedings in the amount claimed in a bankruptcy notice. With respect, I cannot accept that submission. In my view, the costs of execution proceedings are clearly not part of the amount due on the judgment.

Counsel for the appellant's second submission was that the learned resident magistrate erred in holding that the attachment of the moneys in court did not create a security. He relied particularly on Indian authorities for the proposition that the attachment of the moneys in court created a charge in favour of the respondent company and he argued that if the respondent company had a charge, that must amount to a security. I do not propose to examine those authorities because I do not think they are relevant to the issues before us. Counsel for the appellant's argument in the lower court was that this alleged "security" constituted compliance with the bankruptcy notice. With respect, I think that is an argument that cannot be sustained. The bankruptcy notice called on the appellant to pay the amount due or to secure or compound for it to the satisfaction of the respondent company or the court. He certainly did not pay the amount and equally certainly he did not secure it or compound for it. In fact, he did nothing during the statutory seven days and I can see no possible justification for holding that an order of the court made at the instance of the respondent company prior to the issue of the bankruptcy notice is to be regarded as compliance by the appellant with that notice, whatever its effect may otherwise be.

I pass then to counsel for the appellant's third argument, that the existence of the attachment precluded the issue of a bankruptcy notice, observing, in passing, that that argument is in no way dependent on the proposition that the attachment created a charge. This argument depends on the fact that, under s. 3 (1) (*g*) of the Bankruptcy Act, a bankruptcy notice can only be issued at the instance of a creditor who has obtained a final decree, if execution thereon has not been stayed. Those words were interpreted, in *Re Woodall, ex parte Woodall* (5), as indicating that the creditor must be in a position to issue execution. That decision has been followed in numerous cases, including *Re Follows, ex parte Follows* (6), one of several cases cited by counsel for the appellant. In that case, Vaughan Williams, J. (as he then was), referred to the old rule at common law that a second writ of fi. fa. could only issue if a return to the first writ had already been made. It no return had been made to the writ, the judgment creditor was not in a position to issue execution for the whole amount of the judgment debt and consequently was not in a position to cause a bankruptcy notice to issue.

That was a case like *Re Ford, ex parte Ford* (7), and *Re Phillips, ex parte Phillips* (8), where an interpleader summons had been issued, which operated as an implied stay and it was part of counsel for the appellant's argument that the existence of the prior attachments on the money in court was analogous to the subsequent taking out of an interpleader summons.

Reverting to *Re Follows* (6), it is perhaps worthy of note that Wright, J. (as he then was) in a brief concurring judgment, remarked:

> "I give no opinion on the question whether a bankruptcy notice can issue where execution has been levied, but has not been perfected by a return."

I would also refer to *Re a Debtor, ex parte Smith* (9), which is authority for saying that the rule relating to the issue of a second fi. fa. only applies where there has been an actual seizure of goods of the debtor.

The rule was further considered in *Re Bond, ex parte Capital and Counties Bank, Ltd*. (10), by Phillimore, J., who said:

> "On behalf of the appellant it is said that the pendency of a writ of fi. fa. where execution has been issued in the ordinary way amounts to a stay of execution because while the writ is pending a second writ of fi. fa. cannot be issued, and that therefore a creditor who has issued execution by means of a writ of fi. fa. cannot serve a bankruptcy notice, because he is in the position of a creditor with a judgment upon which execution has been stayed. That is a purely technical rule which only applies where the same conditions exist or where there is a writ of fi. fa. which is still effective. . . . I think that the technical rule with regard to the writ of fi. fa. is based upon the principle that a creditor must not seize a debtor's goods in execution, and thereby prevent him paying the debt, and at the same time serve him with a bankruptcy notice for the purpose of making him a bankrupt."

Clearly the technical English rule does not apply in Kenya but, under the normal rules of interpretation, the Bankruptcy Act having been derived from the English Acts, the expression "execution thereon not having been stayed" in s. 3 (1) (*g*) ought, in the absence of any indication to the contrary, to be interpreted in accordance with the principles that have been adopted in England. There are two principles applicable to the position in England that I would extract from the cases to which I have referred: the first is, that a second or subsequent application for execution cannot be made where there is any doubt as to the amount, if any, that has been realised under a previous order for attachment and sale, because in such a case the amount actually due on the judgment debt will be uncertain, and, consequently, that a bankruptcy notice cannot be issued in those circumstances; and, secondly, that a bankruptcy notice cannot be issued where an existing, incomplete, order for execution precludes the debtor from realising his assets and paying his debts.

Applying those principles, in so far as they relate to a bankruptcy notice, to Kenya, I have, after some hesitation, reached the conclusion that neither is relevant to the present case. It was abundantly clear that, at the time when the bankruptcy notice was issued, the respondent company had received nothing as a result of the first and second applications for execution referred to in counsel for the respondent's affidavit and the proceeds of the third had been brought into account. Secondly, the attachment of the moneys in court did not operate to prevent the appellant using them to pay his debts, because the prior attachment of those moneys by other creditors had already taken them out of the control of the judgment debtors, and placed them in the custody of the court.

Counsel for the appellant's fourth argument was that the bankruptcy notice was invalid, as not complying with s. 4 of the Act or the prescribed form. The notice should have read "or you must secure or compound for the said sum to its satisfaction or to the satisfaction of the court"; in fact, through negligence, it read "or you must secure or compound for the said sum to its satisfaction of the court". Counsel for the appellant argued that the statute contains an alternative, that the security or compounding may be to the satisfaction of the creditor or that of the court, and that the error in the notice did not offer the judgment debtors this alternative. He conceded that this issue had not been raised in the lower court, but submitted that it was a matter of law on which there was no question of additional evidence being required.

Counsel for the appellant relied particularly on three cases, *Re a Debtor* (11), *Re a Debtor* (12) and *Re a Debtor* (13), for two propositions: first, that because bankruptcy has a quasi-penal aspect, procedural matters have to be viewed strictly and, secondly, that where there is any question of a notice misleading,

the issue is whether a debtor might have been misled, not whether the particular debtor was in fact misled, I accept both these propositions. The difficulty, however, does not lie in expressing the law but in applying it. Every case has to be regarded on its individual merits and I am not aware of any authority in East Africa or in England exactly similar to the present case. After careful consideration, I have reached the conclusion that the mistake was not one that was likely to mislead or cause substantial injustice. The appellant was given notice that he was required to pay the judgment debt or secure or compound for it or advance a counterclaim, set-off or cross-demand: it is true that the notice is not clear whether a security or compounding had to be to the satisfaction of the respondent company or the court but the fact that the phrase in question does not, grammatically, make sense would in the appropriate circumstances put a debtor on enquiry. It would have been very different if the phrase had made sense but that sense were misleading. I think the mistake can and should be regarded as a purely formal one and should be disregarded under the powers given by s. 133 of the Bankruptcy Act, and r. 315 of the Bankruptcy Rules.

For the reasons that I have given, I think this appeal must fail and I would dismiss it with costs which will include the costs of the application to amend the Memorandum of Appeal by adding further grounds of appeal.

Newbold V-P: I have had the advantage of reading in draft the judgment of Spry, J.A., and I agree with his conclusion and with his reasoning. There will be an order in the terms proposed by him.

Law JA: I also agree.

Appeal dismissed.

For the appellant:
JM Nazareth, QC and *BS Parikh*
Bali Sharma & Co, Nairobi

For the respondent:
AE Hunter
Daly & Figgis, Nairobi

Public Trustee v City Council of Nairobi
[1965] 1 EA 758 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	10 December 1965
Case Number:	384/1965
Before:	Dalton J
Sourced by:	LawAfrica

[1] Negligence – Dangerous machinery – Rotary grass-cutting machine – Piece of metal thrown up causing fatal injury – Whether danger foreseeable.

[2] Fatal Accident – Damages – African child – Father earning Shs. 300*/- per month.*

[3] Negligence – Res ipsa loquitur – grass-cutting machine – person killed by flying piece of metal – Whether principle applies.

Editor's Summary

The Public Trustee as administrator of the estate of one Otopi, an infant (herein called "the deceased"), sued the City Council of Nairobi for damages under the Fatal Accidents Act and the Law Reform Act. It was alleged that owing to the negligence of a servant of the defendant in using a rotary grass-cutting machine, a part of the cutting plate came off and struck the deceased on the head causing injuries from which he died; in the alternative, it was alleged that a piece of metal was thrown up by the cutter. It was admitted that when the cutter was being operated a piece of metal was thrown from it in the direction of the deceased and hit him. A maintenance engineer employed by the defendant

gave evidence that this piece of iron was not part of the machine. His explanation was that there was a pothole "and the machine jerked up and the blade at that moment hit the piece of iron perched up on mown grass, a thousand to one chance". There was also evidence from the operator that the machine did throw up small stones and the turn boy was sent in front to remove them. Counsel for the plaintiff argued that the piece of metal was flung by the machine and hit the child and that the doctrine of res ipsa loquitur applied putting the onus of proof on the defendant. On behalf of the defendant it was submitted that the machine was not dangerous in itself, nor was the process of grass-cutting dangerous and negligence was denied. The deceased was not quite three years old and died two weeks after the accident. The deceased's father was a welder and hoped that his son would become a doctor.

Held –

(i) res ipsa loquitur did not apply because sufficient facts were established to account for the accident;

(ii) the machine was dangerous when operated over this particular ground and the defendant had failed to take the necessary precautions;

(iii) Fatal Accidents Act damages of Shs. 3,000/-, Law Reform Act damages Shs. 500/-, special damages Shs. 1,500/- were awarded on a basis of full liability.

Judgment for the plaintiff.

Cases referred to in judgment

(1) *Hale v. Jennings Bros*., (1938) 1 All E.R. 579.

(2) *Close v. Steel Company of Wales, Ltd*., [1961] 2 All E.R. 953.

Judgment

Dalton J: In this case the plaintiff is the Public Trustee who has obtained letters of administration to administer the estate of Otopi Waka and the defendant is the City Council of Nairobi a body corporate established by the Local Government Regulations, 1963. The plaintiff brings this action for the benefit of the parents of the deceased under the Fatal Accidents Act, Cap. 32, and for the benefit of the estate of the deceased under the Law Reform Act, Cap. 26.

In para. 5 of the plaint it is alleged:

> "On or about the 7th day of May, 1964, the servant and/or agent of the defendant used a rotary grass-cutting machine, property of the defendant, to cut grass in a public place in Shauri Moyo, opposite and/or near House 106 Nairobi when the said Otopi Katiechi Waka, deceased, was lawfully sitting in the varandah of the said house opposite and/or near the said public place the said agent and/or servant of the defendant was operating the said machine for cutting the grass, when owing to his negligence a part of an iron cutting plate forming part of the said rotary grass cutter came off and was thrown in the direction where the said Otopi Katiechi Waka was sitting, which said part of cutting plate fell on the head of the said Otopi. Alternatively the deceased was struck on the head by a piece of metal which was thrown up by the said machine. By the negligence of the defendant and/or its agent and/or servant or one or other of them the said Otopi sustained injuries and as a result thereof died on May 21, 1964."

The plaint then details some seven particulars of negligence with five more in the alternative which I need not set out at length here, and goes on to detail the injuries suffered by the deceased, who was a

child not quite three years old, and particulars pursuant to the Fatal Accidents Act.

The plaintiff claims damages under the Fatal Accidents Act, damages under the Law Reform Act for the benefit of the estate of the deceased and for loss of

expectation of life, Shs. 2,500/- special damages, interest on special and general damages and the costs of this suit.

The following facts are amongst the admitted facts which the parties have agreed:

(*a*) The accident complained of took place on May 7, 1964, opposite or near House No. 106 situate in Shauri Moyo, Nairobi, where the deceased lived with his parents at the material time.

(*b*) The rotary grass-cutting machine referred to in the plaint was used or operated by one Munga Ibrahim Kamua, agent or servant of the defendant at the material time opposite or near the said house No. 106, Nairobi.

(*c*) The deceased Otopi at the material time was sitting lawfully in the verandah of the said house.

(*d*) The said rotary grass-cutting machine at the material time was used or operated for cutting the grass in the open space or ground near or opposite the said house No. 106.

(*e*) When the said machine was being operated as such a piece of metal was thrown from it in the direction of the deceased and hit him.

(*f*) That the said Otopi died on May 21, 1964. In the defence the defendant denied negligence as alleged or any negligence and prayed that the plaintiff's suit be dismissed with costs.

John Wemali who was living at house 106 was the first witness for the plaintiff. He had been outside the house when the machine was cutting the grass and said that he saw no one with the operator, that is to say the driver of the tractor to which the machine is attached. He said that no one else was around and that Otopi was standing on the verandah and was struck by a piece of metal on the head, such piece of metal having been hit by the machine which caused it to fly in the air and hit Otopi. This witness said that he did not see anyone assisting the driver by removing stones from the front of the machine and that he saw the machine throwing small stones, as it was cutting grass, which was hitting against the wall of house 108; he could also hear the noise of stones hitting the sides of the machine. He estimated the machine to be about 40 feet away from the child at the time of the accident; the driver estimated the child to be 20–25 feet, perhaps more, away from the machine and the turn boy, who said he was there, estimated the distance at 30 ft. So it appears on the evidence that the jagged piece of metal, Ex. 1, after being struck by the cutting machine flew a distance of between eight to twelve yards approximately and struck the child on the head with great force, as the doctor said.

The driver of the machine Kamua said in his evidence that when he was cutting grass around the house at Shauri Moyo on the day in question he had his turn boy, Japheth Nganga, with him and the turn boy's work, which he duly performed on that day, "was to go in front of the machine, remove small stones and tell small children to go away because the machine throws small stones out". He also said: "When I was driving the tractor the turn boy was ahead of me collecting small stones because they sometimes fly out and are dangerous to people". He said that he had worked with the particular machine for seven years and had not an accident with it before and that the machine is covered from all sides and the stones hit the sides – that is inside, though sometimes stones come out but they don't go very far. In cross-examination he said that he knew that the machine threw out small stones, though they do not go very far and he also said "we do not hurry because this is dangerous work". Further he said "nobody has ever complained to me that the machine throws out stones", and he finally said "The machinery is dangerous because if it hits on a small stone and it goes out it may hurt the person."

The turn boy Japheth gave somewhat contradictory evidence. He said he was doing his work that day collecting stones from the grass, the stones can spoil the blades of the machine, and that before the child was hit he had searched the area. In examination in chief he said "The machine does not throw things very far; if exhibit I was in the grass the machine could not have thrown it very far. I could not see Ex. 1 in the grass which was about 6 inches long," but in cross-examination he said "I look for stones because they might damage the blades, no other reason. There is a gap between the bottom of the machine and the ground. The machine doesn't go up sometimes when there is a bump. I have never seen stones thrown out of the machine. The children are chased away because the machine makes a lot of noise". One wonders how the witness is able to say that the machine does not throw things very far if he has never seen stones thrown out of the machine and I find it very difficult to believe that he has given the true reason why children are chased away from the machine.

Mr. Hennessy who was employed in the City Engineer's Department in the transport section in May, 1964, and looked after the maintenance of vehicles and machines, gave evidence that the grass-cutting machine was a standard machine operating in many municipalities with a four foot rotar blade enclosed in a one-eighth gauge mild steel casing with an opening to the front. With regard to the piece of metal Ex. 1 which struck the deceased, this witness said "it is not part of the machine, it is one-sixteenth gauge as opposed to one-eighth. The only possible explanation of the machine throwing it is, if the vehicle went down into a pothole and the machine jerked up and the blades at that moment hit Ex. 1 perched upon mown grass, a thousand to one chance". Concerning the operation of the machine he said that grass when cut is distributed within the casing, that the machine would on occasion hit the odd stone or whatever was lying there and such stone was usually smashed against the casing; if the stone were to come out, owing to the low clearance between the casing and the ground he did not think the stone would go very far. The witness also said that there were ten bars hanging down on the casing of the machine, leaving no spaces when the machine was operating, as an additional safeguard to stop pieces of wood and metal being thrown out. According to Mr. Hennessy there were no holes in the casing of the machine when he examined it the day after the accident and he concluded by saying that there is a mark on Ex. I which looks as if it were hit by the blade of the machine.

Counsel for the plaintiff in his final submission referred to the maxim "res ispa loquitur" and said that there is no doubt that the piece of metal Ex. 1 was flung by the machine and hit the child and he was asked what explanation has the defendant given about the accident. He said that it was the defendant's duty to explain how the accident arose and unless that onus was discharged liability was on the defendant. In 28 Halsbury's Laws (3rd Edn.) it is stated in para. 81:

> "Position where facts sufficiently known. The maxim res ipsa loquitur" applies only where the causes of the accident are unknown but the inference is clear from the nature of the accident and the defendant is therefore liable if he does not produce evidence to counteract the inference. If the causes are sufficiently known, the case ceases to be one where the facts speak for themselves and the court has to determine whether or not, from the known facts, negligence is to be inferred."

Since it is agreed that the rotary grass-cutting machine at the material time was cutting grass opposite the house where the deceased was sitting and whilst cutting grass a piece of metal was thrown from the machine and struck the child it seems clear to me that the maxim res ipsa loquitur does not apply.

In the many cases quoted in Bingham's All The Modern Cases on Negligence, I have not been able to find a case where injury has resulted from the operation of a grass-cutting machine and this would appear to support the defendant's argument that the machine is not dangerous; a machine that is manufactured by the foremost manufacturers of agricultural equipment and a standard machine operating in many municipalities. In the case of *Hale v. Jennings Bros*. (1) the plaintiff was injured by a chain which became detached from a roundabout revolving at considerable speed. It was held that the defendants were liable without proof of negligence, the rule in *Rylands v. Fletcher* applying since the use of the roundabout was an unnatural use of the land, it was inherently dangerous and the defendants had to take the risk of any damage which might result from it. Though some facts are similar to this case and the case is of interest it is not of assistance in determining liability in this case.

I now refer to the case of *Close v. Steel Company of Wales, Ltd*. (2). In that case the appellant, while employed by the respondents in their instrument workshop, operated an electric drilling machine drilling a hole in a gear wheel. The bit of the drill shattered and a piece entered his left eye. Although bits not infrequently shattered, there was no evidence of any such accident having happened previously, for the fragments of a shattered bit were light and did not fly out with force. On a claim for damages for breach of statutory duty under the Factories Act, 1937, s. 14 (1), it was held that the respondents were not in breach of their duty under the section because danger from the use of the bit in the drill in the ordinary course of affairs was not a reasonably foreseeable danger and the bit was not therefore a dangerous part of machinery. In the course of a short speech Lord Goddard said ([1961] 2 All E.R. at p. 961):

> "But at the same time, if in a factory there is a machine which is known from experience has a tendency to throw out parts of the machine itself or of the material on which it is working, so as to be a danger to the operator, the absence of a shield to protect him may well afford him a cause of action at common law."

Counsel in his final submission for the defendant submitted that the machine was not dangerous in itself nor is the process of grass cutting dangerous. As regards the machine with respect I do not agree. The plain undisputed fact in this case is that a piece of metal lying on the ground was by the operation of the machine employed by the defendant picked up and thrown in the air a distance of eight to ten yards and thrown with such velocity as to fracture the facial bone and the temple bone of the deceased child, fragments of the bone penetrating the brain. Mr. Hennessy talked of this being a thousand to one chance but the absence of accidents over a number of years though very relevant evidence is of course by no means conclusive. Mr. Hennessy said also that if a stone was to come out of the machine when it was being operated he did not think it would go very far owing to the low clearance between the casing and the ground but as is known the piece of metal did go quite far and with lethal effect. But there is also evidence of the witnesses on both sides in this case. The first witness for the plaintiff could hear the noise of stones hitting inside the casing of the machine and he also saw the machine throwing out small stones which were hitting against the wall of house 108. The driver of the machine, the first witness for the defendant, described how the turn boy went ahead collecting small stones "because they sometimes fly out and are dangerous to people". Another time he said "we do not hurry because this is dangerous work." I do not believe the second witness for the defence when he said that no stones are thrown outside the machine. He is the witness who said that the children are chased away because the machine makes a lot of noise.

On the evidence I am satisfied that the machine was when operating dangerous

to persons standing or being nearby, and that the defendant failed to take the necessary precautions to prevent the accident that occurred and is therefore liable in negligence.

The evidence of the deceased child's father is that he wished to educate the child to be a doctor; he said he thought he could afford such education. The father is in employment as a welder earning Shs. 300/- a month and has a small shamba in the reserve. He might or might not have been able to educate his child to a professional standard, but I think that there was a reasonable expectation of pecuniary advantage to the father if the child had grown up. I have been referred to Kemp and Kemp and making the best assessment I can, I award under the Fatal Accidents Act the sum of Shs. 3000/-. With regard to the pain and suffering suffered by the deceased child the evidence is that he died fourteen days after the accident and during that time was drowsy and irritable and must have been experiencing pain and I award under the Law Reform Act Shs. 500/-. The evidence given by the father as to the special damages he has suffered is not at all precise; he claimed Shs. 2,500/- but in his evidence said he spent Shs. 2,200/-. I doubt very much if he did spend such a sum; I will award Shs. 1,500/- as special damages.

There will be judgment for the plaintiff against the defendant:

(1) for Shs. 3,000/- under the Fatal Accidents Act;

(2) for Shs. 500/- under the Law Reform Act;

(3) for Shs. 1,500/- special damage; all amounting to Shs. 5,000/-.

(4) interest thereon at court rates from the date of the issue of the writ until payment in full;

(5) the costs of this suit.

Judgment for the plaintiff.

For the plaintiff:
VM Patel
JJ & VM Patel, Nairobi

For the defendant:
R Kapila
R Kapila, Nairobi

Chandarana Super Grocers v Amar Kaur

[1965] 1 EA 764 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	29 November 1965
Case Number:	955/1964
Before:	Harris J
Sourced by:	LawAfrica

[1] Landlord and Tenant – Business premises for specified trade – Shops in trading centre leased by common landlord – Leave to one tenant restricting user to grocery business – Landlord also precluded from letting other premises for such business – Landlord aware of other tenants carrying on business of grocery – Whether landlord in breach of obligation.

Editor's Summary

The plaintiff held two of the defendant's adjoining shop premises under a lease executed on April 25, 1962, for a term of five years, in which the plaintiff covenanted "to use the demised premises only as a shop for the trade of grocers, native trade and general merchants and not to alter the nature of the trade carried on in the demised premises without prior consent of the lessor first had and obtained in writing the granting of such consent to be in the absolute discretion of the lessor" and which also provided that "the lessor shall not let any other shop in the trading centre for business of grocers and native trade". The plaintiff alleged that the defendant had permitted three other tenants in the trading centre to carry on a retail trading in groceries, and claimed damages for breach of the latter provision. The defendant maintained that the restriction placed upon her by the lease was that, apart from the shop leased to the plaintiff, none of the other shops was to be let for the business of grocers; that this covenant being restrictive in its nature, should be strictly construed, and that the evidence did not establish any breach of this restriction. It was further contended that so long as the defendant had not let for the specific purpose of a grocery business she was not in breach of her obligations even if any particular tenant, in fact, subsequently carried on that business in his shop.

Held –

(i) the circumstances under which the lease was granted indicated that both parties had in mind trading restrictions of a reciprocal nature: the lease itself precluded the plaintiff from using the premises otherwise than as a shop for the trade of grocers, native trade and general merchants, in return for which the defendant covenanted not to let any other shops in the trading centre for business of grocers and native trade;

(ii) the defendant's covenant precluded her from permitting any of her other tenants to carry on the business of grocer;

(iii) the defendant had permitted other groceries in the trading centre in breach of her contractual obligations to the plaintiff and damages were awarded for the trade lost from the date of execution of the lease.

Judgment for the plaintiff. Order for damages.

Cases referred to in judgment

(1) *Brigg v. Thornton*, [1904] 1 Ch. 386.

(2) *Kemp v. Bird* (1877), 5 Ch.D. 549.

(3) *Joseph v. National Magazine Co., Ltd.*, [1959] 1 Ch. 14.

Judgment

Harris J: By a lease dated April 25, 1962, the defendant demised unto the plaintiff two adjoining shop

premises numbered five and six

respectively situate on the ground floor of the buildings erected and owned by the defendant on lands described in the lease as all that piece or parcel of land situate at Nairobi Municipality (Parklands) of Nairobi District being land reference No. 209/21/7 registered in the Crown Lands Registry in Vol. N 30 folio 164/1. The term of the lease was five years from January 15, 1961, and the rent was Shs. 2,000/- per month. The lease contained the usual provisions relating to payment of rent, repairs, inspection, and delivery up of possession on the expiration or determination of the term, and the lessee covenanted, in cl. 2 (i), "to use the demised premises only as a shop for the trade of grocers, native trade and general merchants and not to alter the nature of the trade carried on in the demised premises without prior consent of the lessor first had and obtained in writing the granting of such consent to be in the absolute discretion of the lessor". The lease also contained a number of provisos, one of which, proviso (*d*), conferred upon the lessee a right of renewal for a further five years at the same rent, and another, proviso (*e*), stated that "the lessor shall not let any other shops in the trading centre for business of grocers and native trade". In this action the lessee claims damages for an alleged breach by the lessor of this last-mentioned proviso.

The plaintiff uses his premises for the purpose of carrying on a retail grocery business under the name of "Chandrana Super Grocers". His shop constitutes one of more than a dozen ground-floor shops with residential accommodation overhead, grouped in blocks standing fairly closely together, which were erected about the year 1960 and of which the defendant is the lessor, and which are sometimes collectively referred to as "High Ridge Shopping Centre". These shops include in particular (in addition to the plaintiff's premises) three shops to which this suit relates, known respectively as "Altaf Stores", "High Ridge African Green Grocers", and "Chandannis", each of which the defendant has let out to the occupying tenants, and to which I will refer for convenience as the three competing shops.

The shops constituting the High Ridge Shopping Centre stand to one side of a fairly busy public road, which was referred to in evidence as High Ridge Road or Masai Road, at its intersection with Third Parklands Avenue, and on the opposite side of the road there stands a small group of shops known as "Parklands Shopping Centre", which were built prior to the shops in High Ridge Shopping Centre. The principal shop in Parklands Shopping Centre is known as "Parklands Grocers" and is somewhat larger than either the plaintiff's shop or any of the three competing shops.

The history of the relations between the parties in regard to the demised premises goes back to the years 1959 or 1960 when the plaintiff became a tenant of the premises and opened his shop as a grocer, shortly afterwards entering into what he described as "a rough informal agreement" of tenancy with the defendant. This agreement was later replaced by the lease of April 25, 1962, upon which this suit is founded. It seems that the defendant, who was said by her husband in evidence to be illiterate, has been accustomed to conduct her business with the plaintiff and the other tenants through her husband, who is an undischarged bankrupt, and that for a number of years both prior to and since the granting of the lease the defendant and her husband were living and are still living in part of the upstairs residential accommodation comprised in the High Ridge Shopping Centre. The plaintiff alleges that during the currency of his lease the defendant, with knowledge of the matter, has, contrary to the terms of the lease, permitted the competing shops to carry on a retail trade in groceries.

The shop of which the plaintiff principally complains is Altaf Stores. When he originally went into possession of his premises that shop, then known as "Tarun

Stores", was selling goods such as betel leaves and cigarettes but not groceries, and the plaintiff raised no objection to it. About 1961, however, it began to sell groceries, later changing its name to "Abdul Stores" and subsequently to "Altaf Stores", and the plaintiff stated in evidence that the majority of the customers patronizing Altaf Stores, as was also the case with his own shop, were Africans. In addition, Altaf Stores, he said, was favoured by members of the Ismaili community, of which the present lessee is a member, the plaintiff being a Hindu. The plaintiff complains also of High Ridge African Green Grocers, with regard to which he said that the lessees obtained a letting from the defendant in or about April, 1961, and that since prior to April, 1962, they have been selling all types of grocery goods in competition with the plaintiff. He agreed in cross-examination that he had never been inside the shop but he thought that it carried a large variety of groceries in small quantities and that its owners were Africans, which fact attracted African customers. He complains also of "Chandanis", which has been operating since 1963, but, being smaller, constitutes a less dangerous competitor than the other two.

Evidence was given on behalf of the plaintiff by Mr. Barber, a member of a firm of loss adjusters and assessors of some fourteen years' standing, who, with an African assistant, visited the three competing shops in September, 1964, for the purpose of this suit and took certain photographs which were put in as exhibits. While there his assistant purchased for cash a number of articles in Altaf Stores, details of which were shown on a list in the handwriting of the shopkeeper, consisting of flour, tea, butter, soap, bread, salt, sugar and milk, in addition to which the witness said that he observed in the shop for sale other items including sauces, "Ovaltine", "Vim", baby foods and eggs. One of the photographs showed the front entrance to this shop to have the appearance of one in which some groceries at least would probably be obtainable, large notices indicating a brand of mineral waters and ice cream being on display. The witness estimated that the value of the groceries in the shop at the time of his visit was in the neighbourhood of Shs. 10,000/-.

Mr. Barber followed a similar procedure in regard both to High Ridge African Green Grocers and Chandanis. In the former his assistant purchased flour, maize, beans, sugar and rice, in addition to which the witness saw among the stock-in-trade soap, detergents, toilet preparations, harpic, tinned foods, tea, milk, eggs, vinegar, salad, and cooking oils. He estimated the value of the entire stock at about Shs. 8,000/- of which 60 per cent. represented groceries. In Chandanis his assistant purchased flour, tea and butter, while he himself found that the shop contained many and varied types of groceries, including cooking oil, eggs, coffee, sweets, bottles of sauce, tinned fruit, sugar, flour, soap, "Ovaltine" and bottles of minerals, and he placed the approximate value of the stock at Shs. 7,000/- of which 90 per cent. were groceries. One of the photographs showed the front entrance to this shop on which was exhibited, upon a large display window nearly filled with magazines, a poster bearing the words "sweets, chocolates, ice cream, bread, butter, milk, tea, stamp albums, post cards", and the witness said that, although outwardly it appeared to be primarily a newsagency, nearly the entire of the only counter in the shop was devoted to the sale of groceries.

The following facts were admitted regarding licences issued under the provisions of the City of Nairobi (Food Shop and Store) Bye-Laws, 1958.

(*a*) the proprietors of Altaf Stores have held an unrestricted grocer's licence since May 1964, which has been renewed for 1965, but the City Council records of any licences that may have been issued to the proprietors of its predecessors, Tarum Stores and Abdul Stores have, been destroyed;

(*b*) the proprietors of High Ridge African Green Grocers have had a green grocer's licence at all material times and an unrestricted grocer's licence from 1961 to 1965 inclusive.

(*c*) the proprietors of Chandanis obtained in 1963 a grocer's licence in respect of foodstuffs (other than fresh foodstuffs) which was renewed for 1964 and 1965 but limited to "pre-packed goods";

(*d*) the plaintiff is the holder of a grocer's licence.

Mr. Barber valued the grocery stock in the plaintiff's shop at about Shs. 40,000/-, while the plaintiff's own estimate of the average value of the stock carried by him was about Shs. 45,000/- to Shs. 50,000/-. No evidence was offered by the defendant as to the amount of stock carried by any of the four shops.

Certain correspondence between the parties was put in evidence but it affords little assistance to either side. It is clear that during the year 1961 the plaintiff had made several complaints about some of the defendant's tenants engaging in the grocery trade contrary, he said, to the tenancy agreement at that time subsisting between the parties, and had suggested that the defendant should allow a reduction in the rent then being paid. The defendant does not appear to have denied the substance of these complaints but by her advocate's letter of November 23, 1961, she asserted that the plaintiff had no justification for complaining in view of the fact that he "had not yet signed the lease". This would seem to be a reference to the lease of April 25, 1962, upon which this action is founded. The next letter put in evidence is one from the plaintiff's advocates dated September 24, 1964, and may be said to have been the first concrete step taken in the present proceedings. In cross-examination the plaintiff stated that until he consulted his present advocates he did not know that he could make a claim against the defendant and that furthermore he felt that he should keep quiet in view of his having invested Shs. 20,000/- in office furniture for the premises.

On the evidence I am satisfied that the trade carried on in each of the three competing shops includes the "business of grocers" within the meaning of those words as used in the defendant's covenant with the plaintiff and that these shops are to that extent in competition with the plaintiff's business. The question arises, therefore, as to whether this involves an actionable breach of that covenant on the part of the defendant.

The plaintiff's claim in substance is that as from the commencement of the term of his lease, that is, January 15, 1961, he was entitled to trade as a grocer in his premises without having to compete with any other seller of groceries in the centre; that the defendant, in breach of her obligations to him, made lettings during that time to the tenants of the three competing shops, the proprietors of which, as she must have been aware, carried on and would continue to carry on therein, either alone or with other classes of trade, the business of grocers; and that, as a result, he made lower profits from his shop than would otherwise have been the case.

Apart from a suggestion in the statement of defence that the plaintiff was himself in breach of contract, which, however, was not pursued, the main defence put forward on this issue is that the restriction placed upon the defendant by the lease was that, apart from the shop leased to the plaintiff, none of the other shops was to be, in the words of the covenant, "let . . . for business of grocers"; that this covenant, being restrictive in its nature, should be strictly construed; and that the evidence does not establish that any breach of this restriction had taken place. The defendant contended that so long as she had not made a letting to a tenant for the specific purpose of enabling him to carry on a grocery business she was not in breach of her obligations even if any particular tenant, in fact, subsequently carried on that business in his shop, though she conceded

that it would have been different had her covenant been so framed as expressly to preclude her from letting or permitting the premises of her other tenants to be used for the grocery trade.

A preliminary issue was raised by the defendant to the effect that the covenant in the lease upon which the plaintiff relies is void for uncertainty, the term "trading centre" used therein being, it was suggested, too vague to permit of the covenant being enforceable. The defendant's husband said in evidence that the block of premises known as the "High Ridge Shopping Centre" was built in the year 1960, that a certificate of occupancy was issued in December of that year relating to the entire block, and that he, on behalf of his wife, has attended to everything connected with the letting of the shops in the Centre. I am satisfied, from the perusal of the lease, that the "trading centre referred to is the High Ridge Shopping Centre and that the covenant is not void for uncertainty.

Before proceeding to consider the precise effect of the defendant's obligations under the lease, it will be convenient to ascertain the date from which those obligations, whatever may be their extent, came into operation. The plaintiff asserts that the material date is January 15, 1961, being the date of the commencement of the term created by the lease, and the defendant, while not expressly conceding that that is the material date, has not suggested any alternative date. In English law, however, a lease operates as a grant only from the time of its execution and not from either the commencement of the term (which may, of course, be retrospective) of the date of the deed should they differ from the time of execution, and it is settled law that the lessee is not liable for breaches of covenant committed prior to the time of execution. In this country the position would appear to be the same, subject to any special requirements as to registration, and if that be the position in relation to the obligations of a lessee I can see ground for distinction in relation to the obligations of a lessor. The only requirement as to registration in the present case is that the lease, being of premises registered under the Crown Lands Act, should itself be registered under that Act in order to enable it to be received in evidence and to preclude the danger of avoidance as against persons claiming an adverse interest on valuable consideration by virtue of a subsequent document which has been registered. The lease was in fact registered on May, 25, 1962, that is, one month after the apparent time of execution, and while it is not entirely clear whether that date or the date of execution should be taken to be the operative date, I am of the opinion that no earlier date can properly be regarded as the time of the effective grant to the lessee. April 25 of that year would therefore appear to be the earliest time from which the defendant's obligations to the plaintiff in regard to her other tenants arose.

To return to the main issue, the plaintiff relied upon the decision of the Court of appeal in England in *Brigg v. Thornton* (1) and the defendant, as I understood his counsel to say, did not dispute the correctness of that decision though contending that it had no application to the facts of the present suit. In that case two of the three defendants, landlords of an arcade containing shops, had agreed to lease one of the shops to the plaintiff, the lease to contain a covenant by the lessee not to carry on upon the premises any trade or business other than such as were therein specified, including that of "artistic and heraldic stationer . . . and the accessories to the said trade or business", and a covenant by the lessors "not to let any other portion of the said arcade for the trade or business hereinbefore mentioned to be carried on by the tenant". The lease was never executed but the plaintiff had entered into possession under the agreement and begun to carry on his business. Shortly afterwards these two defendants as landlords let another portion of the arcade to the third defendant, binding him not to

carry on any business therein other than that of "librarian, newsagent, bookseller or stationer", after which the third defendant began to sell various articles of stationery. The Court of Appeal held that the plaintiff was entitled to a declaration as against the first two defendants that the letting by them to the third defendant was a breach of their covenant not to let any other portion of the arcade for the trade or business therein mentioned and to an enquiry as to damages.

Although that case supports the proposition that a lessor of premises, who has covenanted with a lessee that during the term of the lease he will not let other premises for certain purposes, will be in breach of his covenant if by a subsequent lease he in fact lets other premises for any of these purposes, it does not appear to extend to the position arising where the subsequent lease is not made for any of those purposes but nevertheless the lessee thereunder chooses to use the premises for those purposes. Stirling, L.J., in the course of his judgment ([1904] 1 Ch. 397) expressed the view that the covenant in that case did not preclude the lessors from either themselves carrying on the particular business in another part of the arcade or selling part of the arcade for that purpose and that since the covenant, as it stood, was "intelligible and rational", there was no reason for reading it as restricting not merely the letting but also the user of the other portions of the arcade.

No evidence has been given as to the terms of the various lettings by the defendant of the competing shops during the relevant period and I am in agreement with counsel for the defendant that the facts before me do not bring this case within the ambit of *Brigg v. Thornton* (1) On the other hand I do not agree that in the present case the defendant's obligations to the plaintiff, as his lessor, go no farther than to require her to abstain from making lettings of other shops in the trading centre for the express purpose of the carrying-on of the grocery business. In my opinion her obligations are more far-reaching than this, for the circumstances under which the lease was granted manifestly indicate that both parties had in mind the imposition of trading restrictions of a reciprocal nature. The lease itself precludes the plaintiff from using the premises otherwise than "as a shop for the trade of grocers, native trade and general merchants", in return for which the defendant entered into the covenant with which we have been dealing, that is, not to let any other shops in the trading centre "for business of grocers and native trade". The undertakings would appear to be clearly of much importance to both parties, and if the plaintiff had flouted his undertaking by extending into a branch of operations not connected with the grocery trade but impinging upon that of one of the defendant's other tenants the defendant might well have found herself involved in legal proceedings at the instance of that other tenant. These mutual obligations may be assumed to have been entered into in good faith and sincerity on each side, and the ordinary principles of commercial integrity envisage that each party to such an obligation will give full force and effect to its undertakings so far as may be reasonably possible. In my opinion the defendant's covenant precludes her, during the continuance of the plaintiff's lease, from deliberately permitting any of her other tenants in the trading centre to carry on the business of grocer, for the avoidance of this situation is the very essence of the purpose behind her covenant.

No authority has been cited to me which clearly leads to this conclusion, nor have I myself been able to find any, but apart from the general principles upon which it is based I think some measure of support may be found in the judgments in *Kemp v. Bird* (2), which was cited with approval in *Brigg v. Thornton* (1) and where a somewhat similar set of circumstances has arisen. There the first defendant had demised an eating-house for a term of twenty-one years and covenanted that he would not during the term let any house in the same

street "for the purpose of carrying on the business of an eating house". Subsequently the defendant let the adjoining house for twenty-one years to another person who covenanted with him not to carry on there any trade or business without the licence of the defendant. The first lease was later assigned to the plaintiff and the second lease to the second defendant, who proceeded to open and carry on an eating-house in the premises, whereupon the plaintiff brought an action seeking an injunction to restrain the second defendant from carrying on, and to restrain the first defendant from permitting him to carry on, the trade or business of an eating house, and claiming damages.

Although the action failed, Fry, J., in the course of his judgment said ((1877), 5 Ch.D. at p. 552).

> "Now it strikes one at first sight that a demise of one of these houses to a tenant who covenants not to carry on there any trade or business without the assent of the lessor, cannot possibly be in itself a breach of the covenant which the plaintiff is seeking to enforce unless it can be shown that the lease was really granted with the intention that the lessee should carry on one of the prohibited trades, and that the covenant against carrying on a trade was a sham."

Again, referring to the meaning of the first defendant's covenant not to let premises "for the purpose of" carrying on the particular trade, he said (ibid. p. 553):

> "the covenant, as it stands, is intelligible and reasonable – that Bird will not grant a lease with a view to the business of a coffee-shop or eating-house being carried on."

The decision of Fry, J., was upheld by the Court of Appeal (reported at (1877) 5 Ch.D., 974), and James, L.J., in the course of his judgment said (ibid. at p. 976) that he would have been prepared to assume that the question raised would have been different if, instead of letting the premises with the restrictive covenant, the first defendant had, in the second lease, let the premises generally so as to allow the tenant to do as he liked.

The facts which I have found are not very far removed from those envisaged by Fry, J., when he referred to a lease containing a covenant prohibiting the carrying-on of a particular trade being granted with the intention nevertheless that the lessee should carry on that trade so that the covenant to the contrary was a sham, unless indeed the lettings of the competing shops allowed the tenants, as James, L.J., put it, to do what they liked. The position of the present plaintiff is further strengthened if one adopts Fry, J.'s interpretation of a covenant not to let for the purpose of a particular trade as meaning not to grant a lease "with a view to" that trade being carried on.

There is no suggestion that there was subsisting on April 25, 1962, a registered lease by the defendant of any of those three shops permitting the carrying on of the grocery trade. If there had been such a lease duly registered it might perhaps be said that the plaintiff should be deemed to have had notice of that fact and the possibility of the defendant being unable as a matter of law to effect compliance with her own obligation to him during the currency of such lease. The defendant's husband said that such a lease had been granted to Altaf Stores, when it was known as "Tarun Stores", and he tendered in evidence what purported to be a lease by the defendant to one Jashoda, the wife of Dhanji Mepa Shah, for a term of five years from October 1, 1960, reserving a monthly rent, but since this instrument was never registered it was ineffective to create the proposed leasehold term. It appears, however, that the lessee named remained in possession until some time in 1962 and was permitted under the supposed lease to use the premises as a shop for the sale of various types of

articles including sweets, soda and cigarettes, all of which I would regard as articles normally sold by retail grocers as part of their business. The husband said that this shop operated for about a year and broke up in 1962 when he took over the stock as the rent was in arrear and found another tenant. The inference to be drawn from this is that both prior and after April 25, 1962, the defendant was in the position of landlord of this shop whose tenant, holding on monthly terms, was expressly permitted to carry on at least a limited trade in groceries, with the result that, in relation to the shop known successively as "Tarun Stores", "Abdul Stores" and "Altaf Stores", the defendant was in breach of her obligations under the plaintiff's lease as from April 25, 1962 and, so far as the evidence shows, has so remained down to the date of the filing of this suit.

In regard to the other two shops I am satisfied that High Ridge African Green Grocers has been selling groceries since prior to April, 1962, and continues so to do, and that Chandanis has been selling groceries since some time in the year 1963. The defendant has not offered any reason, either based on difficulty of performance or otherwise, why these activities should have been permitted and it appears to me that she has had ample opportunity to take steps to ensure that the trade being carried on in these shops did not bring about a situation whereby she, as the common landlord, was put in breach of her obligations to the plaintiff.

It is clear that the defendant at all material times was living in one of the upstairs premises erected over the shopping centre and that her husband was managing the property for her and enforcing the payment of rent by the tenants, and I must therefore hold that the defendant has been in deliberate breach of her contractual obligations to the plaintiff in relation to Altaf Stores and High Ridge African Green Grocers since April 25, 1962, and, in relation to Chandanis, since at least the end of 1963.

I turn now to the question of damages. The plaintiff has put in evidence certain trading accounts and profit and loss accounts prepared by a firm of accountants for income tax purpose covering the respective financial years ending on October 21 in the years 1961, 1962, 1963 and 1964, and which, he says illustrate the damage to him resulting from the trade carried on by the competing shops. An examination of these accounts discloses the following figures:

(i) Year to October 31, 1961: turnover Shs. 567,648; gross profit Shs. 63,657; expenses Shs. 45,057; net profit Shs. 18,600;

(ii) Year to October 31, 1962; turnover Shs. 502, 480; gross profit Shs. 54,584; expenses Shs. 47,031; net profit Shs. 7,553;

(iii) Year to October 31, 1963; turnover Shs. 319,994; gross profit Shs. 49,216; expenses Shs. 40,813; net profit Shs. 8,403;

(iv) Year to October 31, 1964; turnover Shs. 436,679; gross profit Shs. 62,672; expenses Shs. 40,900; net profit Shs. 21,772.

While it was clearly desirable that the plaintiff should produce evidence of this nature these accounts in fact are ambivalent, for although the turnover for the year to October 31, 1961, was higher than in any of the subsequent years, the net profits for the year ended October 31, 1964, was greater than for any of the earlier years. The plaintiff is in a further difficulty arising from the fact that the fluctuations in retail trading conditions obtaining in recent years in Nairobi has had the effect of rendering comparisons of one year with another for present purposes somewhat unreal. Nevertheless it is well settled that the fact that damages may be difficult to assess does not of itself disentitle a plaintiff and in such circumstances the court must endeavour to do justice between the parties bearing in mind all relevant factors which it can properly take into account.

The period with regard to which the damages are to be assessed is that commencing at the earliest, on the date of execution of the lease, namely, April 25, 1962, and terminating on the date of the filing of this suit, namely, November 11, 1964. During the whole of this time Altaf Stores would appear to have been dealing in groceries. Early in the year 1962 the defendant filed an action against High Ridge African Green Grocers, apparently at the instance of the present plaintiff but before he obtained his lease, and those proceedings led to the making of a constant order by this court on May 4, 1962, by which High Ridge African Green Grocers agreed not to carry on the trade of grocers in their premises. It is not stated how long this agreement was adhered to but from the evidence of Mr. Barber it is clear that it was not being adhered to in September, 1964. The shop known as Chandannis operated since, at the latest, the end of 1963. It is reasonable to assume that none of these three shops would have carried on its grocery business otherwise than at a profit and that most of that profit, if not earned by them, would have been shared between the plaintiff's shop and the shops in the nearby Parklands Shopping Centre. In this connection it is probably correct to say that, as counsel for the plaintiff pointed out, once the plaintiff had met the general overhead expenses of operating his shop a moderate increase of trade would have involved little or no additional expense and its yield would have been almost entirely net profit.

Mr. Barber's estimate, made in September, 1964, of the value of the grocery stock carried by plaintiff was Shs. 40,000/- and that carried in all by the three competing shops was just over Shs. 20,000/-, which gives a ratio as between the plaintiff's business and that of the competing business of two to one. The aggregate net profits of the plaintiff's business for the period of thirty months from April 1, 1962, to October 21, 1964, treating those for the six months from April to October, 1962, as equivalent to one-half of those for the full year to October, 1962, amounted to just under Shs. 34,000/-, which is equivalent to an average of a little over Shs. 13,000/- per annum, on which basis the annual profits earned by the competing shops would perhaps have been in the neighbourhood of Shs. 6,500/-. The period in relation to which the damages are to be assessed, that is, from April 25, 1962, to November 11, 1964, is approximately two and a half years, which, after making allowance for the fact that Chandanis was in operation for only about one-third of the material time, would suggest an aggregate net profit from the competing shops during that time of perhaps about Shs. 11,000/-.

The plaintiff admitted that during the whole of the relevant period he had entered Chandanis once only, a visit which he paid for some purpose connected with the present suit, that he had not entered either of the other two shops at all, and that the only complaint to the defendant that he had made in writing during the relevant period was contained in his advocate's letter of September 24, 1964, written immediately prior to the institution of this action. Furthermore, he has not at any time sought relief by way of an injunction to prevent the defendant from continuing to permit the competing shops to sell groceries notwithstanding that, equally with the defendant, he must have been aware of their activities. It is perhaps not unreasonable that I should pay some small regard to these matters as having a possible bearing upon the extent to which, in the plaintiff's own opinion, the defendant's breach of covenant was adversely affecting his business.

As was said in *Joseph v. National Magazine Co., Ltd.* (3) ([1959] 1 Ch. at p. 21), the measure of damages in a case such as this is not susceptible to accurate assessment and must remain a matter of guesswork upon which a judge, sitting alone, has to do the best he can. Following this course and bearing in mind the several factors to which I have referred and such other factors as appear to be

relevant I assess the damages at Shs. 7,000/- for which sum there will be judgment for the plaintiff with costs.

Judgment for the plaintiff. Order for damages.

For the plaintiff:
B O'Donovan, QC and *JK Winayak*
JK Winayali & Co, Nairobi

For the defendant:
Satish Gautama
Satish Guatama, Nairobi

Kigecha Njunga v Republic
[1965] 1 EA 773 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	12 August 1965
Case Number:	32/1965
Before:	Sir John Ainley CJ, and Madan J
Sourced by:	LawAfrica

[1] Criminal Law – Practice – Charge – Accused charged with being armed by day with intent to commit a felony under s. 308 (1) (*d*) *of the Penal Code – Nature of felony to be stated in charge.*

[2] Criminal Law – Evidence – Hearsay – Police witnesses state in evidence information given by informer – Informer not called to give evidence – Accused wrongly convicted.

Editor's Summary

The appellant, driving a disguised car, was successfully chased by a police car acting on information received. Under the driver's seat of the car was a simi. He was charged with the offence of being armed by day with intent to commit a felony contrary to s. 308 (1) (*d*) of the Penal Code, and at the trial the police witnesses gave evidence saying they had been told by a police informer that there was a plot to use this disguised car for the purpose of an armed robbery but the informer was not called to give evidence nor was his name revealed. The trial magistrate relied on the hearsay evidence and convicted the appellant. On appeal,

Held –

(i) the trial magistrate had before him hearsay evidence of a very damaging nature and made no

attempt to disabuse his mind of it;

(ii) without the hearsay evidence the court below could not have found the necessary intent to commit a felony;

(iii) the felony which the assused is alleged to have intended should be stated in the charge and if there is doubt as to the particular felony intended, different felonies can be stated alternatively.

Appeal allowed. Conviction and sentence set aside.

Judgment

Sir John Ainley CJ: read the following judgment of the Court.

The appellant was convicted of the offence of being armed by day with intent to commit a felony contrary to s. 308 (1) (*d*) of the Penal Code.

There is no doubt that the appellant was on November 26. 1964, driving a disguised car which the police attempted to stop. The appellant very clearly knew that the police wished to stop him. He did not wish to be stopped, and he led the police, who pursued him in a 999 car, upon a wild chase through the streets of Nairobi. Eventually the appellant drove against a pavement, and thus burst the tyre of the car which he was driving. He then tried to escape on foot from his pursuers, but was knocked down and arrested.

Under the driving seat of the car he drove was a simi. Now what, it may be asked, was all this about? The appellant was clearly up to no good. He was, possibly, "armed". But whatever he was fleeing from the scene of a crime already committed, or was making off with a stolen car, or was intent on the commission of a felony, misdemeanour or tort is, on the evidence so far considered, a matter of mere speculation. This man wanted, very badly, to avoid the police. That is really all one can say.

The prosecution clearly realised that this evidence, standing alone would not come within a measurable distance, of proving an offence contrary to s. 308 (1) (*d*) of the Penal Code. But they were in a difficulty. They had been told by a police informer that there was a plot to use this disguised car for the purpose of an armed robbery. They were anxious to conceal the identity of this informer. Their anxiety was natural and perfectly proper. They were, no doubt, entitled to conceal the course of the information which led them to pursue the car driven by the appellant. It was perfectly proper for the police witnesses to say that, acting on information received, they pursued the appellant. It was quite proper for these police witnesses to refuse to reveal the identity of the man who gave them the information which led to the prusuit. But, if we may so express it, the prosecution sought to have it both ways. They revealed to the learned trial magistrate the information given to the police by the informer, but refused to reveal the name of the informer, or to call him as a witness.

The learned trial magistrate accordingly had before him hearsay evidence of a very damaging nature. He made, with respect, no attempt to disabuse his mind of this hearsay evidence. It is clear from his judgment that he relied upon it. He said, having referred to the behavious of the appellant:

> "All these facts coupled with the information the police had about this car and its occupants, I am convinced (convince me) that the simi belonged to the accused and that he had it with an intent to commit a felony."

Informers play a useful part no doubt in the detection and prevention of crime, and if they become known as informers to that class of society among whom they work their usefulness will diminish and their very lives may be in danger. But if the prosecution desire the courts to hear the details of the information an informer has given to the police, clearly the informer must be called as a witness.

In this case the informer, whoever he was, may very well have given true information. Very possibly this disguised car was to be used to commit the felony of robbery. The driver of the car, the appellant, very possibly was a party to that felonious enterprise. Very possibly the simi which was under his seat was there to play its part in the robbery. But the knowledge which the court below had of this felonious enterprise was derived from what a Sergeant of Police told the court an uncalled, unnamed and unsworn individual had told him. Without that hearsay evidence the court below very clearly would have found it difficult, if not impossible, to have determined whether the appellant had the intent to commit a felony and if so what felony. The learned magistrate did not say what felony he considered the appellant intended to commit. We think, however, that he must have supposed that the appellant intended to commit the felony of robbery. It would of course have been quite wrong to have held that while the felony intended could not be ascertained, yet some kind of felony from murder to theft must have been intended.

In cases of this nature the felony which the accused is alleged to have intended should of course be stated in the charge, and if there is doubt as to the particular felony intended, different felonies can be stated alternatively. The defect in the charge in the present case, no specific felony was mentioned, would not however have been fatal to the conviction had it been obvious from the evidence what the

felony intended was said to be. The intention alleged was fairly clearly the intention to commit robbery and had this intention been made out by admissible evidence we should have supported the conviction.

A belief in this intention was however induced by inadmissible hearsay evidence.

For this reason the appeal must be allowed, the conviction quashed and the sentence set aside.

Appeal allowed. Conviction and sentence set aside.

The appellant did not appear and was not represented.

For the respondent:
GJ Muruka (State Counsel, Kenya)
The Attorney-General, Kenya

Mohan Singh Chadha v Sadhu Singh Bhogal
[1965] 1 EA 775 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	10 December 1965
Case Number:	32/1965
Before:	Rudd J
Sourced by:	LawAfrica

[1] Practice – Review – Plaintiff and his witnesses absent at hearing – Plaintiff's advocate present – Amount of claim admitted by defendant but set off and counterclaim pleaded – Evidence in support of defence and counterclaim heard – Defendant cross-examined by plaintiff's advocate – At close of defendant's case application for adjournment refused – Judgment entered on basis of set off and counterclaim – Application for review refused – Appeal against refusal.

Editor's Summary

The appellant sued the respondent on the basis of an account stated and the respondent admitted the account stated as claimed but he claimed a set off and counterclaim in respect of moneys due to him by the appellant on the basis of another account. On the day of the hearing neither the appellant nor any witness for him attended the court but the appellant's advocate appeared for him. The respondent gave evidence in support of his defence and counterclaim and was cross-examined by the appellant's advocate. At the close of the respondent's case the appellant's advocate asked for an adjournment which was refused and judgment was entered for the respondent. The appellant then applied to the trial magistrate for review of his decision on the ground that he personally had never received the notice of hearing and the application was refused. The magistrate held that he could not go beyond the fact that at the trial the

appellant was represented by an advocate who did not attempt to withdraw or claim that he had no instructions. The magistrate added that if the fact that after a proper hearing judgment was given against the appellant due to some inefficiency or professional negligence on the part of his advocate he could have a separate remedy and that this was his proper remedy. On appeal by leave against the refusal to review it was contended that justice demanded a review in the circumstances and that there were misdirections in the magistrate's ruling as to the direction that the appellant had been represented by an advocate who did not claim to be without instructions and did not ask leave to withdraw and as to the magistrate's comments on the appellant's remedy by complaint against the advocate concerned.

Held –

(i) the ruling appealed from contained no misdirection as regards appellant's power to complain against the advocate;

(ii) the magistrate in his discretion was entitled to refuse to review in the circumstances that the hearing was a proper hearing actively prosecuted or defended on behalf of the appellant by his advocate.

Appeal dismissed.

Cases referred to in judgment

(1) *Sardar Mohamed v. Charan Singh Nand Singh* (1959), E.A. 793 (K).

Judgment

Rudd J: The facts in this matter so far as they are known are as follows. The appellant sued the respondent in the resident magistrate's court, Kisumu, on the basis of an account stated. The respondent admitted the account as claimed but he claimed a set off and counterclaim in respect of moneys due to him by the appellant on the basis of another account.

The suit was set down for hearing at the instance of the respondent and the hearing notice was duly served on the appellant at his address for service which was that of a Nairobi firm of advocates who instructed Mr. Malik of Kisumu to conduct the appellant's case at the hearing. They also claim to have written to the appellant informing him of the hearing date.

On the day fixed for the hearing neither the appellant nor any witness for him attended the court but Mr. Malik duly appeared for him. The respondent gave evidence in support of his defence and counterclaim but there was no one to give evidence on behalf of the appellant. Mr. Malik cross-examined the respondent and made some legal submissions. He also at the close of the respondent's case asked for an adjournment but could give no reason other than that the appellant had not come to court as he had expected. The adjournment was refused and the respondent got judgment on the basis of his set off and counterclaim.

The appellant then applied to the lower court for a review on the ground that he personally had never received notice of the hearing date and that the letter from his Nairobi advocates had never reached him.

The learned magistrate refused to review his previous decision holding that he could not go beyond the fact that at the trial the appellant was represented by an advocate who did not attempt to withdraw or claim that he had no instructions though he did apply for an adjournment at the close of the respondent's case. He added that if the fact that after a proper hearing judgment was given against the appellant due to some inefficiency or professional negligence on the part of his advocate, he could have a separate remedy and that this was his proper remedy.

The appellant now appeals by leave from the refusal of the lower court to review its decision of the suit. The main arguments on behalf of the appellant were:

(1) that justice demands a review in the circumstances

(2) that there were misdirections in the magistrate's ruling as to the direction that the appellant had been represented by an advocate who did not claim to be without instructions and did not ask leave to withdraw and as to the magistrate's comments on the appellant's remedy by complaint against the advocate concerned.

I do not think that the ruling appealed from contains any misdirections as regards the appellant's power

to complain against the advocates. What the magistrate said as to that is all properly correct. He did not go so far as to say that the possibility of a claim against the advocates barred the grant of relief by way of review.

By s. 80 of the Civil Procedure Act there was a right to apply for a review and on an application being made the lower court could make such order thereon as it thought fit. There was thus an unfettered power in the lower court to review or to refuse to review its decision as it thought fit. The only fetter is that the court should exercise this unfettered discretion judicially. If it had decided to review the decision on reasonable terms I do not think its decision would have been upset. See *Sardar Mohamed v. Charan Singh Nand Singh* (1).

It seems to me that though in a sense the magistrate would not have been right if he meant that the court was legally precluded from granting a review since the appellant was represented by counsel who elected to proceed as best he could and did not ask to be allowed to withdraw, yet these facts were nonetheless most material and I think too that the magistrate in his discretion was entitled to refuse to review in the circumstances that the hearing was a proper hearing actively prosecuted or defended on behalf of the appellant by his advocate.

For this reason I dismiss the appeal with costs.

Appeal dismissed.

For the appellant:
DN Khanna
Khanna & Co, Nairobi

For the respondent:
Satish Gautama
Satish Gautama, Nairobi

Akber Rashid Nathani v Republic
[1965] 1 EA 777 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	25 November 1965
Case Number:	187/1965
Before:	Newbold V-P, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – Georges, C.J

[1] Criminal Law – Charge – Joint offenders – Joinder of courts alleging corrupt transactions and tax theft by different accused – Irregularity disregarded because no failure of justice – "Same transaction" explained – Criminal Procedure Code, s. 137 (*c*) (T.).

[2] Criminal Law – Appeal – Inferences from established primary facts – Whether it is not reasonably

possible to draw a particular inference in a question of law.

Editor's Summary

Both the appellant, the proprietor of a travel agency, and a public officer called Mkaanga, were jointly tried in the resident magistrate's court on a charge containing a number of counts. The appellant was convicted on one count for corruptly giving Shs. 1,300/- to Mkaanga and the latter was convicted on another for corruptly receiving it; Mkaanga was convicted at the same trial of stealing Shs. 3,000/- on a second count based on a transaction with which the appellant was not then concerned. The appellant's appeal to the High Court was dismissed. On further appeal the appellant argued firstly that there had been a misjoinder of the count charging Mkaanga of stealing Shs. 3,000/- with the corruption count against the appellant and secondly that on the primary facts established it was not reasonably possible to draw the inferences necessary to support the count of corruption against the appellant.

Held –

(i) the bribe was neither at the same time as nor was it given in relation to the theft: in order that different acts should make up one transaction for the

purpose of joinder of charges of it must be inherent in them that from the very beginning of the earliest act the other acts should either be in contemplation, or necessarily arise therefrom, or form component parts of one whole;

(ii) misjoinder was not necessarily a fatal irregularity; s. 346 of the Criminal Procedure Code enabled the court as here to disregard a misjoinder that occasioned no failure of justice;

(iii) there was material from which the resident magistrate acting reasonably could draw the inference that the appellant corruptly gave Shs. 1,300/- to Mkaanga and accordingly no appealable question of law arose.

Appeal dismissed.

Cases referred to in judgment

(1) *Dalip Singh v. R.* (1943), 10 E.A.C.A. 121.

(2) *Saidi Nsubuga v. R.* (1941), 8 E.A.C.A. 81.

(3) *Ayyar v. King-Emperor* (1902), 25 Mad. 61.

(4) *Yakobo v. R.*, [1963] E.A. 542 (C.A.).

(5) *R. v. Gulamhussein* (1946), 13 E.A.C.A. 107.

Judgment

Newbold V-P: read the following judgment of the court.

The appellant, who is the proprietor of a travel agency, and a public officer named Mkaanga, were jointly tried in the resident magistrate's court on a charge which contained a number of counts. The appellant was convicted on a count charging him with corruptly giving to Mkaanga on February 1, 1965, a bribe of Shs. 1,300/- in order to obtain air travel business. Mkaanga was convicted on a count charging him with corruptly receiving from the appellant on February 1, 1965, a bribe of Shs. 1,300/- in order to place with the appellant air travel business. In addition, Mkaanga was convicted of theft on a count which charged him with stealing on December 8, 1964, Shs. 3,000/- which came to him by virtue of his employment. The appellant's appeal to the High Court was dismissed and he now appeals to this court on two main grounds: first, that there was a misjoinder of the larceny count; and, secondly, that on the primary facts established it was not reasonably possible for either the resident magistrate or the Chief Justice to draw the inferences which had to be drawn before the appellant could be convicted on the corruption count.

The material facts relating to the three counts were as follows: Mkaanga, in his capacity as a public officer, signed payment vouchers in respect of allowances payable to three men who had been selected to go abroad as embassy staff. On December 8, 1964, Mkaanga went with the three men to a bank, cashed the vouchers and handed to each man the amount due to him less Shs. 1,000/-. In the result Mkaanga retained in his possession Shs. 3,000/-, though he was to refund to each of the men Shs. 1,000/- either on demand or, at the latest, shortly before each man was due to set off on his journey abroad. Thereafter on a number of occasions each of the men demanded his Shs. 1,000/- but no one received it until, on February 1, 1965, Juma, one of the men, received his Shs. 1,000/- in circumstances which gave rise to the

corruption counts against the appellant and Mkaanga. On February 1, 1965, Juma, in company with a policeman who was posing as a creditor of Juma, went to Mkaanga's office at about 8.20 a.m. and demanded his Shs. 1,000/-. They were told to wait as the money was in the bank, This they did in a waiting room until about 11 a.m. when they returned to Mkaanga's office where they found the appellant and Mkaanga. Mkaanga then stated, "time is finished – let's go" and they all started to leave the building. While they were going out the appellant asked Mkaanga who

needed the air ticket urgently and Mkaanga pointed to Juma; the appellant then asked who was demanding the Shs. 1,000/- and Mkaanga again pointed to Juma. When they got outside Mkaanga originally told Juma and the policeman to get into the car of the appellant but then changed his mind and told them to get into his, Mkaanga's car, which they did. Mkaanga then drove in the direction of National and Grindlays Bank, parked nearby and got out of the car and went in the direction of, and was seen to enter, that bank. Mkaanga did not have an account at that bank or at any bank in the neighbourhood, but the appellant's travel agency firm had its account there. A few minutes later Mkaanga returned to the car with Shs. 1,300/- in Shs. 100/- notes and gave Shs. 1,000/- to Juma and retained Shs. 300/- himself. Juma and the policeman then left the car and Mkaanga drove away. In the meanwhile, on January 29, 1965, on Mkaanga's instructions air warrants addressed to East African airways in respect of passages to be paid for from official funds were prepared and handed to Mkaanga. Normally, though not invariably, the bookings in respect of government passages would be made through East African Airways and the warrants would not be handled by Mkaanga. After the warrants were handed to Mkaanga the appellant was seen in Mkaanga's office and Mkaanga was told by his superior not to give the warrants to the appellant, which instructions Mkaanga acknowledged, but did not obey. On the following day, that is January 30, which was a Saturday, Mkaanga gave instructions for a cheque in favour of the appellant's travel agency to be prepared, as a matter of urgency and without the usual supporting documents, in payment for eight of the passages covered by the air warrants. This cheque was for Shs. 57,600/- and was deposited on February 1, 1965, to the credit of the appellant's travel agency in the National and Grindlays Bank. On the same day, that is February 1, a cheque for Shs. 2,520/- was cashed by the appellant at that Bank. Subsequently three successive entries dated February 1, 1965, were found in the books of the appellant's travel agency. The first was a credit of Shs. 55,080/- to a branch of the appellant's travel agency; the second was for Shs. 2,520/- stated to be on a loan account; and the third was a debit to the government for Shs. 57,600/-. It is to be noted that the sum of the first two entries totals the third. There were other entries which showed that the appellant had loaned money to Mkaanga. The appellant did not give evidence, but when he was questioned by the police about the entry of Shs. 2,520/- on February 1, 1965, he stated that he had drawn it to buy a draft for £100 on London and that the balance was for Idd expenses. He also stated that he had bought the draft two or three days later. In fact he had bought a draft for £100 on London nearly four weeks later. He also denied giving Mkaanga any sum out of the Shs. 2,520/- and stated that he did not remember seeing Mkaanga at the Bank on February 1.

The first ground of appeal was that there had been a misjoinder of the count of larceny against Mkaanga with the count of a corrupt transaction against the appellant. It was submitted by counsel for the appellant that such misjoinder was not an irregularity which could be disregarded under s. 346 of the Criminal Procedure Code (hereinafter referred to as the Code) and that in any event the misjoinder had occasioned a failure of justice. Counsel for the Republic submitted that the counts had been properly joined under s. 137 (*c*) of the Code and that in any event, if there had been a misjoinder, it should be disregarded as it had occasioned no failure of justice.

Two or more accused may only be joined in one charge or information and tried together in the circumstances set out in s. 137 of the Code; of these circumstances, only those set out in para. (*c*) are relevant, that is, where the persons are "accused of different offences committed in the course of the same transaction." Counsel for the Republic submits that the theft and receipt of the bribe are part of one large transaction as the theft led up to and was not completed until at or around the time the bribe was received. It is not clear to us what is

the nature of the large transaction of which the theft and the receipt of the bribe formed component parts. The Chief Justice, relying largely on *Dalip Singh v. R.* (1) held that there was no misjoinder. With respect, however, it seems to us that Dalip *Singh's* case (1) is quite different. In that case the offence of bribery was committed by one accused immediately after, and clearly arose from, the joint offence of larceny committed by both accused, and the offer of the bribe was made in relation to the larceny. In this appeal the position is quite different. The corrupt transaction neither occurred immediately after, nor did it clearly arise from the theft; nor was the bribe given in relation to the theft. The corrupt transaction was quite independent of the theft and had no more connection with it than with any other transaction of Mkaanga which had resulted in Mkaanga being short of money. Put in another way, a transaction which results in a motive for an act does not necessarily make the act part of the transaction. In order that different acts should make up one transaction it must be inherent in them that from the very beginning of the earliest act the other acts should either be in contemplation, or necessarily arise therefrom, or, from the very nature of the transaction in view, form component parts of one whole. We consider this to be the proper test to apply in order to determine whether different offences have been committed in the course of the same transaction. In *Saidi Nsubugu v. R.* (2) this court held that a reasonable construction of the phrase "same transaction" would be "if a series of acts are so connected together by proximity of time, community of criminal intent, continuity of action and purpose or by the relation of cause and effect as to constitute, . . . one transaction" and we would reiterate those words subject to the proviso that acts linked by cause and effect will not necessarily form part of the same transaction. We are unable to accept that in this appeal the acts constituting the offence of theft by Mkaanga and the acts constituting the offences of corrupt transactions by the appellant and Mkaanga form part of the same transaction in accordance with either of these tests. We are satisfied therefore that there was a misjoinder.

It was submitted by counsel for the appellant that if there was a misjoinder then the convictions must be quashed; and reliance was placed on *Ayyar v. King-Emperor* (3) and *Yakobo v. R.* (4). We cannot accept that a misjoinder will automatically result in the conviction being quashed. Each case must depend on its own facts and the provisions of s. 346 of the Code apply as much to a misjoinder of charges as they do to any other irregularity. It is true that in certain old authorities a misjoinder is treated as having the effect of making the trial a nullity. It is also true that what is a nullity cannot be treated as an irregularity and rectified. But if the trial is a nullity it means that the accused could be retried and we consider that it be quite wrong to say that had an accused person been acquitted when there was a misjoinder then he could be retried as if he had never been in jeopardy. We see no reason why a misjoinder should not be treated as an irregularity, and it has been so treated in a large number of cases (see, for example, *R. v. Gulamhussein* (5)). This being so, the next question is whether the misjoinder has occasioned a failure of justice so as to preclude the operation of s. 346 of the Code.

The Chief Justice stated that if it had been necessary so to do he would have held that the misjoinder did not occasion a failure of justice. We agree. The facts relating to the larceny count were simple and their introduction did not in any way tend to confuse the facts relating to the corruption counts. Two important witnesses on the larceny count were also important witnesses on the corruption counts in respect of the receipt of the bribe. The evidence generally in relation to the larceny count would have been relevant evidence on the corruption count against Mkaanga as providing a motive for the acceptance of the

bribe. As the evidence in relation to the larceny was relevant and admissible on the trial of the corruption counts for one purpose we cannot see why, because it was used also for another purpose, it can be said to have occasioned a failure in justice (see *Gulamhussein's* case (5)).

The second ground of appeal was that on the primary facts established it was not reasonably possible to draw the inference that the appellant had corruptly given Shs. 1,300/- to Mkaanga. On this ground counsel for the appellant also urged that the Chief Justice had misdirected himself in saying: "Once a strong *prima facie* case had been made out the failure of the appellants to give any explanation became relevant."

We agree that there is no duty on an accused to give any explanation and we also agree that the failure to do so cannot be used to bolster up what is merely a *prima facie* case. An accused person is entitled to have the case against him proved beyond reasonable doubt and before he can be convicted the judge or magistrate must be sure that he is guilty. Until it is so proved the failure of an accused person to give an explanation cannot be relevant as he cannot be convicted. There are, however, many circumstances in which the facts proved by the prosecution are such as, in the absence of explanation, leave no doubt in the mind of the judge or magistrate that the accused is guilty. The words of the Chief Justice referred to above were followed immediately by a reference to the duty of the prosecution to prove the charge and we are satisfied that the Chief Justice meant no more by these words than that the prosecution had proved the charge beyond reasonable doubt and that the accused had done nothing to dispel the sureness of guilt in the mind of the resident magistrate.

As regards the question whether it was open to the resident magistrate and the Chief Justice to draw the inference that the appellant had corruptly given Shs. 1,300/- to Mkaanga, this is an inference of fact and an appeal will not lie to this court unless it was not reasonably possible to draw which an inference from the primary facts proved. If it was reasonably possible to do so then, even if a different inference could also be drawn from the primary facts proved, no appeal lies to this court as the drawing of one inference of fact in preference to other inferences which could equally be drawn is not a question of law. The primary facts proved were, as far as relates to the placing by Mkaanga with the appellant of air travel business, that Mkaanga, contrary to the normal practice and in defiance of specific instructions, placed with the appellant an order for eight air tickets costing Shs. 57,600/- and arranged for payment of that sum to be made to the appellant urgently and in usual circumstances. As far as relates to the giving of Shs. 1,300/- by the appellant to Mkaanga, the primary facts were that the appellant, knowing that Mkaanga had to give Shs. 1000/- urgently to Juma, left Mkaanga's office in company with Mkaanga and Juma and was originally going to take Juma in his, the appellant's, car but this was changed and Juma went in Mkaanga's car. Mkaanga then went to a bank in which he had no account but in which the appellant, in the name of his firm, had an account and shortly thereafter Mkaanga returned with Shs. 1,300/-. The appellant cashed a cheque for Shs. 2,520/- at that bank on that day and not only was a statement made by the appellant in relation to the use of part of that sum incorrect but that figure appears in the appellant's books as on loan account and in juxtaposition with the figure of Shs. 57,600/-. It is quite clear that the corrupt gift of Shs. 1,300/- can be established either by direct evidence of the gift and the purpose thereof or by evidence of facts from which the inference of the gift and the purpose thereof can reasonably be drawn. On the primary facts established we consider that there was material from which the resident magistrate acting reasonably could draw the inference that the appellant corruptly gave Shs. 1,300/- to Mkaanga for the purpose of air travel business being placed with the appellant.

For these reasons we do not consider that there would be any justification in interfering with the decision of the Chief Justice and the appeal is dismissed.

Appeal dismissed.

For the appellant:
PJ Wilkinson, QC and *AA Lakha*
Fraser, Murray, Roden & Co, Dar-es-Salaam

For the respondent:
V Campbell (Senior State Attorney, Tanzania)
The Attorney General, Kenya

Solomon Mungai and others v Republic
[1965] 1 EA 782 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	19 October 1965
Case Number:	13/1965
Before:	Sir Samuel Quashie-Idun P, Crabbe and Law JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya, Nakuru – Trevelyan, J

[1] Criminal law – Murder – Common intention – Collateral act causing death done by one of several participants in unlawful concerted action – Two appellants outside shop but knew that killer had used violence capable of causing death – Whether appellants guilty of murder – Penal Code s. 21 (*K.*).

[2] Criminal Law – Joint offenders – Whether acquittal of one of three accused will vitiate the convictions of the others.

Editor's Summary

The three appellants were tried together with a fourth accused called Thiongo, who was acquitted, on a charge of murdering an Indian merchant. All the accused planned the theft in the course of which the deceased was clubbed to death and his body was burnt. Thiongo was horrified and disassociated himself from it by running away; the others carried out the theft as planned. Apart from a short statement in the dock by Thiongo, the facts of the murder emerged inconclusively from voluntary extra-judicial statements made by the appellants before the trial to the effect that the second appellant clubbed the deceased while the first appellant mounted guard. The trial judge held that the three appellants shared a common purpose to commit theft and arson and that the harm causing death was for a purpose that all the

appellants shared so that under ss. 21 and 203 of the Penal Code each of them was deemed to have committed murder. On appeal it was argued that the presence of the first and third appellants was not sufficient proof of a common violent intention and that the conviction of the appellants could not stand with the acquittal of Thiongo.

Held –

(i) if the evidence supports the inference that violence of any degree has been used in prosecuting a common design incidentally resulting in death, and if the offence charged was a probable consequence of the use of that violence, then all sharing in the design are murderers: *Wanjiro Wamiro v. R.* (1955), 22 E.A.C.A. 521 considered;

(ii) the appellants complied in substance with the common design, varying only in the manner of execution, namely the collateral clubbing of the deceased;

(iii) a common intention may develop in the course of events and the first appellant's conduct showed that there was a plan to rob with some degree of violence which coupled with his presence made him a principal of the second degree to the crimes of the second appellant;

(iv) if two accused are convicted on the basis that they acted in concert and one is acquitted the conviction of the other cannot stand; where the convictions

of more than two accused are based on a common design the acquittal of one will not affect the convictions of the others if the evidence establishes that the others shared a common design.

Appeals dismissed.

Cases referred to in judgment

(1) *R. v. Whybrow* (1951), 35 Cr. App. R. 141.

(2) *Wanjiro Wamerio v. R.* (1955), 22 E.A.C.A. 521.

(3) *R. v. Selemani* (1947). 14 E.A.C.A. 94.

(4) *R. v. Biguli* (1947), 14 E.A.C.A. 115.

(5) *Mwangi v. R.* (1954), 21 E.A.C.A. 308.

(6) *R. v. Adbi Ali* (1956), 23 E.A.C.A. 573.

(7) *Ezera Kyabanamaizi v. R.*, [1962] E.A. 309 (C.A.).

(8) *R. v. Betts and Ridley* (1930), 22 Cr. App. R. 148.

(9) *Woolmington v. D.P.P.*, [1935] A.C. 462.

(10) *King v. R.*, [1962] 1 All E.R. 816.

(11) *R. v. Grant and Gilbert* (1954), 38 Cr. App. R. 107.

(12) *R. v. Vickers*, [1957] 2 All E.R. 741.

Judgment

Crabbe JA: read the following judgment of the court:

The three appellants were tried together with one other accused person, called Thiongo, who was acquitted, on a charge or murder before the Supreme Court of Kenya at Nakuru. The appellants were convicted and sentenced to death.

The brief facts of the case, so far as they are relevant and unchallenged, are that the three appellants and Thiongo planned a theft at the shop of the deceased, an Indian merchant, and there he was clubbed to death, and his body was burnt. Thiongo was so horrified at the spectacle that he ran away, but the three appellants remained behind and carried out the theft as planned.

There can be no doubt on the medical evidence that the multiple injuries which were inflicted on the deceased were so severe as to amount to grievous harm, as the learned trial judge properly held. The injuries themselves showed a deliberate and wicked intention to kill. But as to whether the killing was done by the act of all the appellants or by one or two of them only, the medical evidence was rather inconclusive. The statement by the second appellant that they all struck the deceased was evidence only against himself.

The crucial issue in this appeal, and on which all three counsel for the appellants addressed us at considerable length, is whether the learned trial judge was right in convicting all the appellants of murder.

In concluding his lengthy, well-considered and, if we may say so with respect, very able judgment, the learned trial judge said:

> "I am satisfied well beyond any reasonable doubt that on August 14 last at Subukia the deceased, Bikubhai Parmar, met his death in the course of a felony carried out by Solomon, Githua and Samuel, that his death was caused by the three named accused intending to commit felonies, namely theft and arson and in the furtherance of those felonies or one or other of them. It was a probable consequence of the prosecution of those felonies and the three persons concerned shared that common purpose. In any event death or grievous harm was an inevitable consequence of their actions. I convict the three of them of murder. I acquit Thiongo as there is a doubt concerning him."

This conclusion arrived at by the learned trial judge requires a consideration by this court of three important sections of the Penal Code of Kenya: ss. 21, 203 and 206. Section 21 reads:

> "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

Section 203 defines murder in these terms:

> "Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."

Section 206 also reads:

> "Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:
>
> (*a*) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;
>
> (*b*) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> (*c*) an intent to commit a felony;
>
> (*d*) an intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony."

There was not eye-witness to the killing, and, apart from Thiongo who made a short statement from the dock, none of the appellants gave evidence or called any witness. Therefore, the only evidence of what happened in the shop of the deceased is what was said by the appellants in their extra-judicial statements. In applying the relevant provisions of the Penal Code to the facts in this appeal we consider it convenient to deal first with the case of the second appellant. This appellant admitted in his extra-judicial statement that he went to the shop of the deceased to steal. He said:

> ". . . we went inside the shop and we all hit the Asian. We took the money. We ran away. I do not know who burnt the shop. We went and divided the money. I had over Shs. 300/- I don't know how much and two watches and one bracelet. The police arrested me and I showed them where my money was. That's all."

The second appellant retracted this statement at the trial, but, after due warning, the learned trial judge was satisfied that it was voluntarily made by the second appellant and that it was safe for him to act upon it without corroboration. There was indeed, in our opinion, ample evidence to corroborate his statement, though the learned judge appears to be over-generous to the second appellant by saying that he did not look for it. We think that the learned trial judge was in all the circumstances justified in relying on the second appellant's statement. The facts as narrated by the second appellant himself show that the felony or theft was committed by him in furtherance of which he used violence. The violence used was itself eloquent of an intention to kill or do grievous bodily harm, and in these circumstances we think that the requirement of s. 206 of the Penal Code had been satisfied, and that the learned judge was right in convicting

the second appellant of murder on that basis. In *R. v. Whybrow* (1) Lord Goddard, C.J., said (1951) 35 Cr. Ap. R. at p. 146:

> "In murder the jury is told – and it has always been the law – that if a person wounds another or attacks another either intending to kill or intending to do grievous bodily harm, and the person attacked dies, that is murder, the reason being that the requisite malice aforethought, which is a term of art, is satisfied if the attacker intends to do grievous bodily harm. Therefore, if one person attacks another, inflicting a wound in such a way that an ordinary reasonable person must know that at least grievous bodily harm will result, and death results, there is the malice aforethought sufficient to support the charge of murder."

We agree with the observations of the learned trial judge that the injuries inflicted on the deceased were so serious that any reasonable person in the position of the second appellant must have realized that they would probably cause death. The question whether the second appellant intended to do grievous bodily harm was one of fact for the learned trial judge, and we are satisfied that there was sufficient evidence to support his finding on this issue. We find no substance whatsoever in the arguments put forward on behalf of the second appellant, who, we think, was rightly convicted.

We now proceed to deal with the appeals of first and third appellants. It was conceded by both counsel for these appellants that each of them went into the shop of the deceased with a common intention only to rob, and we were addressed at considerable length on s. 21 of Penal Code.

The first appellant made two statements to the police. In his first statement (Ex. 41) which the learned judge acted upon, and we think on good grounds, the first appellant said that on their arrival at the deceased's shop he mounted guard at the entrance, whilst the second appellant entered and hit the deceased on the head with a rungu. Then the first appellant said he proceeded, apparently after the deceased had been overpowered, to steal sheets, a blanket, a raincoat and money, which he subsequently shared with his confederates. The statement concluded: "I did not kill the Asian. If I had known he was to be killed I would not have gone". Dealing with this aspect of the case against the third appellant the learned judge said:

> "On the basis of this statement it must be that the accused admits that he went along to the shop with the others to steal and that in the course of stealing he saw Githua hit the deceased upon the head. I believe that Solomon contemplated the use of violence should it be necessary (and be it remembered that if the deceased saw him he would know him for he was previously employed at the shop) and that out of his own mouth the killing was committed in the prosecution of an unlawful purpose, was a probable consequence of the prosecution of that purpose and he was part of a gang sharing that purpose. He did not disassociate himself from it. He says that he stood at the door. That must have been as guard. What else could it point to?"

Later the learned judge said:

> "I am perfectly satisfied that the accused saw Githua hit the deceased over the head in order to further the prosecution of the felony, that he associated himself with it and did nothing to disassociate himself from it. It follows then that he must be guilty of murder."

The learned trial judge next dealt with the second statement (Ex. 44) made by the first appellant to the police. Again, we are satisfied that the learned judge was right in acting upon this statement. In this the first appellant spoke of a

plan to steal, but he said "we did not plan to kill." He then narrated how the second appellant struck the deceased on the head three times, and how they robbed the shop. The learned judge made careful analysis of the evidence provided by this second statement and said:

> "Solomon says that when Githua told him of the killing he said that he would inform the police. That is untrue. He did not inform the police. He also says that he took the police to the houses of Samuel and Githua, which is true, but this was not until some hours later. Solomon was taken in for questioning about midnight. He did not take the police to Samuel and Githua until five hours later. That does not indicate that he was horror-struck or disassociated himself from anything. On the contrary, I believe that he knew that violence would undoubtedly be used, because the deceased knew him."

He continued:

> "I believe that Solomon was in a plan to steal and that he knew that violence would be used if required. If that is overstating it undoubtedly when Githua hit the deceased, he Solomon, associated himself with it and proceeded to steal. After that he waited outside while the place was being burned down and he associated himself with that. If the second statement is intended to indicate that Solomon did not know that the deceased was not already dead he yet associated himself with what had gone on. On any hypothesis this accused is undoubtedly guilty of murder."

Several points were taken in this appeal by counsel on behalf of the first appellant who argued with great force and pertinacity. The entire argument of counsel was based substantially upon the application of s. 21 of the Penal Code to the facts of the case. We therefore consider it appropriate to quote at the outset the following passage from the judgment of this Court in *Wanjiro Wamiero etc. v. R.* (2) ((1955), 22 E.A.C.A. at p. 523):

> ". . . in order to make the section applicable it must be shown that the accused had shared with the actual perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged."

Counsel for the appellant's first submission was that the mere presence of the first appellant at the scene does not mean that he also intended that violence should be used. He contended that the prosecution must further prove that the first appellant shared a common intention to use violence. He referred to *R. v. Selemani* (3), *R. v. Biguli* (4), *Mwangi v. R.* (5), *R. v. Abdi* (6), *Ezera Kyabanamaizi v. R.* (7) and other cases, and submitted that in each case this court had confirmed a conviction only because a common intention to kill could be inferred from the fact that arms were carried by some or a member of the gang engaged in the unlawful act. We think that although the carrying of lethal weapons by one or many who engage in an unlawful act may be cogent evidence of a murderous intention shared by all, it is by no means the only criterion. We think that if there is sufficient evidence from which it can be inferred that some instrument or lethal weapon had been used, or that violence of any degree had been used in the prosecution of an unlawful common design resulting in death, then if the offence charged was a probable consequence of the use of that violence all those proved to have shared in that common design would be responsible for the killing that ensued. As Foster pointed out in his oft-quoted passage in Crown Law, at p. 369:

> " 'Much has been said by writers who have gone before me, upon cases where a person supposed to commit a felony at the instigation of another

> hath gone beyond the terms of such instigation, or hath, in the execution, varied from them. If the principal totally and substantially varieth, if being solicited to commit a felony of one kind he wilfully and knowing committeth a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt . . . but if the principal in substance complieth with the temptation, varying only in circumstance of time of place, or in the manner of execution, in these cases the person soliciting to the offence will, if absent, be an accessory before the fact, if present a principal'."

It was further submitted by counsel for the first appellant that there is no evidence that any of the accused persons carried a weapon to the shop, and it was well within the bounds of possibility that the second appellant might have picked up the weapon in the shop without the prior approval of the first appellant. Therefore, he argued, the prosecution failed to prove beyond reasonable doubt that before the appellants set out to the shop there was any preconceived plan to kill the deceased. He coupled this argument with reference particularly to the statement of Thiongo and submitted that all the circumstances pointed to the fact that the original intention was merely to rob. He conceded, however, that subsequent conduct of the first appellant after the use of the violence by the second appellant would be relevant in ascertaining the intention of the first appellant. In *Wanjiro v. Reg*. (2) the court observed:

> " 'Common intention' generally implies a pre-arranged plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with."

There can be no doubt, in the first place, that the first appellant and his confederates knew, when they set out, that they would meet the deceased in his shop, and that he would resist any attempt to remove his money and goods. The only way to overcome such resistance would be to use force, and this was resorted to with fatal consequences. After the deceased had been battered, the first appellant, unlike Thiongo who dissociated himself from the use of violence by running away, persisted in carrying out the concerted plan of robbery. It is clear from the conduct of the first appellant that there was a plan to rob with some degree of violence, and that he associated himself with the execution of that plan, and being present as a principal of the second degree was equally responsible for the death of the deceased (see *R. v. Betts and Ridley* (8)). We think the argument that the prosecution could only establish an intention to kill by proving that the appellants carried a weapon to the shop is fallacious. The intention to kill may be inferred from the nature of the harm which caused the death, and once the prosecution shows that such harm which caused by the voluntary act of the accused the burden on the prosecution is discharged. There was no burden on the prosecution to prove the nature of the instrument which was used in inflicting the harm, nor was there any obligation to prove how the instrument was obtained by the second appellant. As Viscount Sankey, L.C., said in *Woolmington v. D.P.P*. (9) ([1935] A.C. at p. 482) when explaining the burden of proof on the prosecution:

> "When dealing with a murder case, the Crown must prove (*a*) death as the result of a voluntary act of the accused and (*b*) malice of the accused."

In this case there is positive evidence that the severe wounds inflicted on the deceased were caused by the voluntary act of the second appellant. There is also clear evidence that the first and third appellants associated themselves with this act of violence in pursuance of a concerted plan. *Prima facie*, each appellant is guilty of murder.

Counsel for the first appellant placed great reliance on the case of *King v. R.* (10) and submitted, if we understood his argument, that if two accused persons are convicted on the basis that they acted in concert and one is acquitted then the conviction of the other should not be allowed to stand. We think that that is a sound principle of law. But counsel further submitted that the principle also applies even to a case where the convictions of more than two persons are based on a common design. He said that if one is acquitted the others must also be acquitted. With respect to counsel, we think we should have to do considerable violence to the ratio decidendi of *King v. R.* (10) in order to uphold his second contention. In the opinion of this court, where the case against two accused persons proceeds on the basis of their acting in concert then both can be found guilty, if the evidence establishes that they were acting jointly; but if there was no preconceived plan or acting together then a conviction based on common design cannot stand. In this latter case a conviction can be recorded against only one accused, if the offence is proved to have been committed by him independently. But where more than two persons are charged with committing a joint offence, the acquittal of one accused only does not, in our opinion, affect the convictions of the others, provided these others shared among them a common purpose to commit the offence charged.

On the whole we are satisfied that the conviction of the first appellant was correct, and we are therefore unable to interfere with it.

It is unnecessary to consider in detail the arguments which counsel advanced on behalf of the third appellant, since he adopted and developed the arguments of counsel for the first appellant, and whatever he said independently was a repetition of counsel for the first appellant's submissions put in different words. He cited about the same cases in support of his arguments, and, like counsel for the first appellant, he also conceded that the subsequent conduct of the third appellant was some evidence of his intention. Dealing with the case against the third appellant the learned trial judge said:

> "I believe that Samuel contemplated that violence might be used, that its use would be in the prosecution of an unlawful purpose, was a probable consequence of that unlawful purpose, and that he was a member of the gang and shared that common purpose."

Finally, he said:

> "It is true that he says he did not know that the deceased would be killed. Assuming in his favour here that he was not in a plan to kill he undoubtedly associated himself with the killing at the shop. The statement of Mr. Dhillon indicates that there was some violence to be used for he says 'We will catch Kabunga and steal because he is alone and has no pistol'."

There can be no doubt, on the third appellant's own showing that when he and the others set out on this unlawful enterprise they had pre-arranged to offer some violence to the deceased. As was pointed out by Lord Goddard, L.C.J., in *R. v. Grant and Gilbert* (11) ((1954), 38 Cr. App. Rep. at p. 110):

> "The degree of violence does not matter if it was a degree of violence which caused death; that has always been the law."

In our view, having intended that some violence should be used in the prosecution of the common unlawful purpose, the third appellant is precluded in the circumstances of this case from saying that he intended only a lesser degree of violence. He must take the consequences of the violence that was in fact used by the second appellant: see *R. v. Vickers* (12).

We are satisfied that on the evidence as a whole the first and third appellants were rightly convicted of murder, for the law is that in the case of a common design to commit robbery with violence if one prisoner causes death while another is present aiding and abetting the felony, as a principal in the second degree, both are guilty of murder although the latter had not specifically consented to such a degree of violence as was in fact used. The evidence in this case clearly leads to the irresistable conclusion that both these appellants contemplated the use of force of some sort in order to achieve their purpose of robbery.

In the result, we are of the opinion that the conviction of each appellant for murder was correct, and we accordingly dismiss their appeals.

With regard to the first appellant he produced to us a certified true copy of Birth Certificate issued from the Salvation Army Citadel at Subukia in the Rift Valley Region, which shows that he was under 18 years of age at the date of his conviction, and State Attorney concedes that he was in fact under 18 at such date. He was not therefore liable to be sentenced to death. We accordingly set aside the sentence of death in respect of the first appellant and order that he be detained at the pleasure of the President of the Republic of Kenya.

Appeals dismissed.

For the first appellant:
Hoshang Shroff
Hoshang Shroff, Nairobi

For the second appellant:
MK Bhandari
Bhandari & Bhandari, Nairobi

For the third appellant:
SK Kapila
SK Kapila, Nairobi

For the respondent:
The Attorney-General, Kenya
DJG Jones (State Attorney, Kenya)

In the Estate of Shamji Visram and Kurji Karsan v Shankerprasad Maganlal Bhatt and others

[1965] 1 EA 789 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	18 November 1965
Case Number:	25/1964

Before:	Newbold V-P, de Lestang and Spry JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Kenya, Nairobi – Miles, J

[1] Damages – Trespass – Special damages for wrongful quarrying – Special damages for failure to erect a fence.

[2] Practice – Appeal – Point not taken at trial – Whether evidence on record a complete investigation of the issue.

[3] Statute – Construction – Marginal notes to be considered – Evidence Act, 1963, *s.* 99 *and s.* 102 (*K*).

[4] Evidence – Admissibility – Oral evidence to explain application of unambiguous document – Evidence Act, 1963, *s.* 99 *and s.* 102 (*K*).

Editor's Summary

The plaintiffs demised to the defendant an undefined area within one of two plots owned by the plaintiffs measuring 525 feet by 325 feet for quarrying purposes at a monthly rent. The defendants covenanted to fence the area but failed to do so. From time to time the plaintiffs observed the quarrying operations of the defendants but only complained at the use of land allegedly outside the demised area for quarrying and ancillary purposes when the lease had nearly expired. On a claim for special and general damages in trespass for wrongful quarrying the trial judge awarded in all Shs. 98,285/- damages, which exceeded the total value of the plot, although the trespass was innocent. The judge relied, without objection by the defendants, on oral evidence defining the area

demised. On appeal the defendants argued that the oral evidence was wrongly admitted to explain a patent ambiguity under s. 99 of the Evidence Act, 1963; that (a point not argued below) there had been an election by conduct as to the area demised, and that the wrong measurers for general and special damages had been used. The plaintiffs argued that the oral evidence was properly received under s. 102 ibid, as extrinsic evidence resolving an ambiguity as to the application of the lease in its context, and that the proper measure of special damages was the value of the stone at the stacking grounds less the cost of production.

Held –

(i) where an issue, which should have been raised in the pleadings and canvassed before the trial judge, is raised for the first time on appeal, the court will not give leave to argue it unless it is satisfied that the evidence establishes beyond doubt that the facts, if fully investigated, would have supported the plea of the party seeking to raise the new issue;

(ii) the marginal notes to sections in Kenya Acts should be considered when interpreting the Act and in particular the court should have regard to the word "patent" in the marginal note to s. 99 of the Evidence Act, 1963;

(iii) where the words in a demise are clear in themselves and it is only by extrinsic evidence that the ambiguity is shown to exist, extrinsic evidence to resolve the ambiguity is admissible under s. 2 ibid., and the oral evidence of the area leased was properly admitted;

(iv) the proper measure of special damages for trespass to property is the loss suffered by the plaintiffs and not the profit made by the defendant as a result of the trespass. In assessing the plaintiffs' loss, the particular facts of the case must be taken into account including what the plaintiffs would in fact had made of the land had the trespass not occurred.

(v) where there has been a breach of covenant to fence, the measure of damages is not normally the cost of the entire fence, it is usually the depreciated value of the land.

Damages reduced to Shs. 9,396/-, appeal otherwise dismissed.

Cases referred to in judgment

(1) *United Marketing Co. v. Hasham*, [1963] E.A. 276 (P.C.).

(2) *Warehousing & Forwarding Co. v. Jafferali & Sons, Ltd.*, [1963] E.A. 385 (P.C.).

(3) *Miller v. Babu* (1896), 23 I.A. 106.

(4) *Jacker v. International Cable Co*. (1885), 5 T.L.R. 13.

(5) *Gilbert v. Endean* (1878), 9 Ch.D. 259.

(6) *Plant v. Bourne* (1897), 2 Ch.D. 281.

(7) *Fatuma v. Nurbhai Adamji & Co*. (1912), 4 E.A.L.R. 114.

(8) *Van Diemen's Land Co. v. Marine Board of Table Cape*, [1906] A.C. 92.

(9) *Livingstone v. Rawyards Coal Co*., [1880] 5 A.C. 25.

(10) *Jegon v. Vivian* (1871), 2 Ch. App. Cas. 742.

(11) *Rookes v. Barnard*, [1964] A.C. 1129; [1964] 1 All E.R. 367.

(12) *Kiwanuka v. Attorney General of Uganda*, E.A.C.A. Civil Appeal No. 19 of 1965 (unreported).

(13) *Phillips v. Ward*, [1956] 1 All E.R. 874.

(14) *Darbishire v. Warran*, [1963] 1 All E.R. 310.

(15) *Re United Merthyr Collieries Co*. (1872), L.R. 15 Eq. 46.

(16) *Whitwham v. Westminster Brymbo Coal and Coke Co*., [1896] 2 Ch. 538.

(17) *Peruvian Guano Co. v. Dreyfus Brothers & Co*., [1892] A.C. 166.

(18) *Wigsell v. School for Indigent Blind* (1882), 8 Q.B.D. 357.

November 18. The following judgments were read.

Judgment

Newbold V-P: The respondents (whom I shall refer to as the plaintiffs) are the owners of two contiguous plots of land, which I shall refer to as plots 37 and 38. On March 31, 1954, the plaintiffs, by what is described as an indenture of lease, demised to the appellants (whom I shall refer to as the defendants) a portion of plot 37. Subsequent to the commencement of the proceedings one of the defendants died and his administratrix was substituted for him in the proceedings, but nothing turns on this and I shall continue to refer to them as the defendants. The northern boundary of plot 37 is a meandering river, but the western, southern and eastern boundaries of plot 37 are straight lines measuring respectively approximately 1,022 feet, 482 feet and 779 feet. Plot 37 lies to the west of plot 38 and the western boundary of plot 37 is fairly easily discernable by a line of sisal poles, but there is nothing on the ground which enables its eastern boundary, which is the western boundary of plot 38, to be ascertained. The portion of plot 37 which was the subject of the demise is described as "all that piece or parcel of land forming a portion of the land hereinbefore described measuring 525 feet by 325 feet or thereabouts". By cl. 2 (1) of the lease the defendants had the right "to enter upon the said land and to search for dig work and obtain by excavation and quarrying open to daylight the blacktrap stone and to manufacture concrete and ballast therefrom for their own benefit". The defendants were also entitled to erect upon the demised land buildings and machinery and generally to do all things necessary for working and making merchantable the quarried stone. By cl. 5 the defendants were to pay a monthly rent of Shs. 525/- and by cl. 6 they were required, *inter alia*, "to fence the said demised land in manner hereinbefore stated", which manner was "with wood poles and wires".

Prior to the demise two relatively small quarry pits had been worked on the land by Mr. Valji. There is a contradiction in the evidence as to whether the plaintiffs or any of them were partners in this quarrying business and whether the plaintiffs or any of them had any knowledge of quarrying. Having regard the finding of the trial judge I shall assume, though I am not certain that the assumption is correct, that none of the plaintiffs was a partner in this business and that none of them had any knowledge of how to quarry. It is, however, undisputed that certain quarrying machinery and labour lines had been erected on plot 37, which machinery and lines belonged either wholly or partly, to the plaintiffs and were sold by them to the defendants.

On occasions during the period of the lease one or more of the plaintiffs visited plot 37 and saw the quarrying operations and the activities of the defendants. It was not until shortly before the termination of the lease that any protest was made by the plaintiffs to the defendants that they had trespassed beyond the area leased to them. However, about three months before the termination of the lease, one of the plaintiffs alleged that a trespass had been committed by the defendants using land outside the demised area both for quarrying and for ancillary purposes. As the dispute could not be amicably settled the plaintiffs filed suit claiming damages for trespass. In the plaint it was alleged that the trespass extended not only to land within plot 37 but outside the demised portion thereof but also into plot 38; and special damages were claimed under four heads together with a claim for general damages.

The trial judge held that there had been a trespass and he awarded damages in respect of three of the four heads of special damages claimed and also a sum for general damages. He held, however, that the

trespass had been committed

innocently or inadvertently, in the sense that the defendants were unaware that their activities had taken place beyond the demised area. In arriving at his decision that the defendants had trespassed, the judge, without any objection on the part of the defendants, admitted oral evidence of the fact that the area of 525 feet by 325 feet demised in the lease and forming part of plot 37 had been pointed out to the defendants and agreed to by them shortly before the lease was executed and he accepted that evidence as truthful. In the result the trial judge gave judgment in respect of the claims both for special and general damages in a total sum of Shs. 98,285/-. The evidence was that the total value of plot 37 was Shs. 70,000/-.

The defendants appealed against this decision and filed a memorandum of appeal which contained nearly sixty grounds of appeal. At the hearing they applied by motion to add a further four grounds. The original memorandum of appeal clearly contravened r. 62 of the Rules of this court in that it was discursive, repetitive and argumentative, and generally it was embarrassing to the extent that it was difficult to determine precisely what were the grounds of appeal. At the hearing we called upon counsel, who appeared for the defendants, to show cause why the entire memorandum should not be struck out. Counsel then stated that his argument would be limited to four of the grounds (later another was included) and on that basis we allowed those grounds to stand. In effect, those five grounds raised the following three issues: first, whether the trial judge had erred in law in admitting oral evidence identifying the portion of plot 37 which had been demised: secondly, whether he had erred in law in the principles which he had applied to measure the special damages; and thirdly, whether he had erred in his award of general damages.

Counsel for the defendants also sought leave to argue further grounds which raised the following issues. First, whether the effect of the lease was to grant an election to the defendants to take any area of 525 feet by 325 feet within plot 37 as being the subject of the lease, which election had been exercised by the defendants by their conduct; and secondly, whether the special damages awarded in respect of the claim relating to fencing had been correctly awarded having regard to the pleadings and the evidence. Counsel, who appeared for the plaintiffs, objected to these additional grounds being admitted. He submitted that they raised issues which had never been raised either on the pleadings or in the evidence or in the argument before the trial judge and that had they been raised the plaintiffs might well have called further evidence, with the result that it could not be said that all the evidence relating to the new grounds was before the court. We allowed the new grounds to be argued de bene esse on the basis that when we came to consider our judgments we would then decide whether or not leave should be given, as it would not be until then that we would be in a position to determine whether or not we were satisfied that all the evidence relating to the new grounds was before the court.

I turn now to consider the first of the additional grounds, which is that the effect of the lease is to grant to the defendants an election to take any area of 525 feet by 325 feet within plot 37, which election was exercised by the conduct of the defendants. This ground presupposes that the judge erred in admitting oral evidence to identify the area leased (this is one of the original grounds which I shall deal with next) and I shall consider the position on that assumption. The judge, relying on the oral evidence, held that the western boundary of the leased area coincided with the western boundary of plot 37, and that the southern boundary of the leased area was just south of the labour lines. If this were the position of the leased area then about half of the excavated area, most of the stacking area and the road from the excavated area to the stacking area was outside the leased area. The defendants submit, however, that the lease gave them an election to choose the area and that by the conduct in utilizing the eastern

side of plot 37 they had elected that the eastern boundary of the leased area should coincide with the eastern boundary of plot 37. If this were the position of the leased area, then, apart from the admitted trespass into plot 38, almost all the excavated area and all the stacking area would be within the leased area. The plaintiffs submit that this question of an election exercised by conduct was never raised in the pleadings, as it should have been under O. VI, rr. 1 and 5, nor was it referred to in the evidence nor canvassed before the judge. They point out also that had the matter been raised they might have been able to call evidence to show that the area first utilized by the defendants was that on the western side, which included the sites of the crushing machinery and the old labour lines, none of which would fall within the eastern area; and that if the defendants did have an election which could be exercised by conduct then not only would the defendants have had to state when and in respect of what area the election had been made but the plaintiffs might well have led evidence to show that by their conduct the defendants had elected for the same area which the plaintiffs alleged, and the judge had found, had been leased. I am quite satisfied that this issue of an election should have been raised in the pleadings and canvassed before the trial judge. I am not satisfied that the evidence upon which this court is asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the plea now raised for the first time by the defendants. Unless a court of appeal is so satisfied leave to raise the new issue should not be granted (see *United Marketing Co. v. Hasham* (1) and *Warehousing & Forwarding Co. v. Jafferali & Sons, Ltd*. (2)). Accordingly, I would not grant leave to the defendants to raise on this appeal this new issue of an election and it thus becomes unnecessary to consider the matter further:

I turn now to the first issue under the original grounds, which is whether the trial judge erred in admitting oral evidence to identify the leased area. As I have said, the demise was of "all that piece or parcel of land forming a portion (of plot 37) measuring 525 feet by 325 feet or thereabouts". The evidence was that there could be more than one area with those measurements in plot 37 and the trial judge, without objection, admitted and believed evidence to the effect that the leased area had been pointed out to the defendants, measured in their presence and had been agreed to by them prior to the execution of the lease. Counsel for the defendants submitted that this oral evidence was inadmissible under s. 99 of the Evidence Act, 1963, which section reads as follows.

"*Evidence to explain a patent ambiguity.*	99 When the language used in a document is on the face of it ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects."

He submitted that as the leased area was clearly a part of a larger area there was a patent ambiguity which could not be resolved by oral evidence. On the principle that a court should not give a decision based on inadmissible evidence (see *Miller v. Babu* (3) (1896), 23 I.A. at p. 116) he submitted that it was the duty of the court to reject the evidence even if there had been no objection to it (see *Jacker v. International Cable Co*. (4)). He further submitted that the evidence relating to the identification of the leased area was evidence of what took place during preliminary negotiations and was inadmissible as the contract was subsequently incorporated in the lease. Counsel for the plaintiffs, on the other hand, referred to s. 102, which reads as follows:

"*Evidence of application to one of several subjects*.

102 When the facts are such that the language used in a document might have been meant to apply to anyone, and could not have been meant to apply to more than one of several persons or things, evidence may be given of facts which show to which of those persons or things it was intended to apply."

He submitted that there was nothing on the face of the lease which disclosed any ambiguity, as there might have been only one area of that size in plot 37; and that as on the facts there was more than one area to which the lease could apply the admission of oral evidence to show to which area it was intended to apply was clearly permissible under s. 102. He further submitted that the conduct of the defendants at the trial clearly precluded them from objecting on appeal to the admission of the evidence (see *Gilbert v. Endean* (5) (1878), 9 Ch.D. at p. 269).

It would seem from the authority of *Plant v. Bourne* (6) that in Britain oral evidence would have been admissible to identify the area leased; but the issue must not be resolved by the law of Britain but by the law of Kenya as contained in a specific Kenya enactment. Before oral evidence which is clearly relevant and which does not in any way contradict or vary the lease can be said to be inadmissible the case must fall within s. 99, that is, the language of the lease must be "on the fact of it ambiguous or defective". To some extent, of course, what is ambiguous or defective must always be a question of degree. I consider that in determining the extent of that degree I can have regard to the use of the word "patent" in the marginal note to the section. While in Britain the courts will not normally have regard to marginal notes for assistance in construing the terms of a section, this is due to the historical reason that prior to 1850 marginal notes did not form part of the bill as presented to Parliament and they were only added after the legislation had been passed. It could not, therefore, at least as regards the earlier legislation, be said that the marginal note played any part in disclosing the intention of the legislature. The position in Kenya is very different. Marginal notes always form part of the bill as presented to Parliament for enactment. Indeed, there are a number of enactments, including the Acts amending the present Constitution of Kenya, in which marginal notes have been the subject of amendment by legislation. Further, a constitutional document (the Royal Instructions) prior to independence specifically required that a marginal note should appear on each section of a bill as presented to the legislature. Looking at s. 99 as a whole, including the word "patent" in the marginal note, I am satisfied that this section only precludes the admission of oral evidence when the ambiguity or defect is manifest and evident to general knowledge without regard being had to any other factor. For example, if the words of the lease were "I hereby demise" followed by a blank space, this would be an ambiguity or defect immediately manifest without regard to any other factor. If, however, the words of the lease were "I hereby demise my coffee farm at Kiambu" and extraneous evidence disclosed that this created an ambiguity because the lessor had two coffee farms at Kiambu, then this would not be a patent ambiguity. In the first case oral evidence could not be admitted to show an intention to demise a coffee farm at Kiambu; whereas in the second case oral evidence would be admitted to show which of the two coffee farms at Kiambu was the subject of the demise. In my opinion, the broad principle which should be followed in order to determine whether the case falls within s. 99 may be stated in this way: if the ambiguity or defect is manifest without any regard to extrinsic evidence then it is patent and falls within s. 99; if, however, the ambiguity results from extrinsic evidence then it falls outside s. 99 and the ambiguity created by extrinsic evidence may be resolved by extrinsic evidence. Applying that principle to the facts of this appeal, I do not consider that the case falls within s. 99. The words of the demise are quite clear in themselves and it is only by extrinsic evidence that it becomes known that there could be more than one area measuring 525 feet by 325 feet within plot 37. As this ambiguity is created by extrinsic evidence it can be resolved by extrinsic evidence and I consider that the evidence identifying the leased area was clearly admissible under s. 102. This interpretation of ss. 99 and 102 would enable the courts to

effectuate the intention of the parties and thus give effect to the well known rule of construction ut res magis valeat quam pereat. In *Fatuma v. Nurbhai Admaji & Co*. (7), the High Court of East Africa held that extrinsic evidence was admissible under s. 96 of the Indian Evidence Act, which section corresponds to s. 102 of the Kenya Evidence Act, 1963, to identify which parcel of land was intended to be the subject of an agreement to sell "a portion 30 × 33 feet of a plot of land which belongs to our maternal Aunt, and situated at Mambrui". As regards the submission that the identification of the leased area took place during the negotiations, I accept that evidence of prior negotiations would be inadmissible; but this was evidence, not of the negotiations, but to identify the subject-matter of the negotiations the final result of which was embodied in the lease. As Lord Halsbury, L.C. said when delivering the judgment of the Privy Council in *Van Diemen's Land Co. v. Marine Board of Table Cape* (8) ([1906] A.C. at p. 98):

> "All circumstances which can tend to show the intention of the parties whether before or after the execution of the deed itself may be relevant."

For these reasons I am satisfied that the trial judge correctly admitted oral evidence to identify the particular area which was the subject of the lease.

Turning now to the issues relating to damages, the original grounds of appeal claimed that the judge had erred in law in the principles which he had applied to measure both the special damages and the general damages; and in the additional grounds it is claimed that the judge erred in awarding the cost of fencing the whole area. I shall deal with the issues relating to damages by reference to the various heads under which damages were claimed in the plaint and awarded by the judge. The plaint claimed special damages under four heads and in addition general damages. I doubt whether all the four heads of what are described as special damages are truly such, but no point has been made of this so I shall not consider that matter further.

The first head of special damages related to damages for the use of the land outside the leased area, other than the excavated area. The judge awarded a sum of Shs. 2,846/- for the claim under this head, basing the award on the same rental value as that contained in the lease. Although this basis was originally challenged, counsel for the defendants later did not dispute the amount of the award if liability existed. I have already held that liability existed, thus it is unnecessary to consider further the objection of the award on this head of damages.

The second head of special damages related to the profit lost on the blacktrap stone wrongfully quarried. On this head of damages the judge awarded Shs. 91,115/-, which was the amount of the claim. In order to arrive at this figure the judge accepted the evidence of a witness that the amount of blacktrap quarried would have yielded 799,260 cubic feet of crushed stone, and this figure is not in dispute. The judge also accepted evidence that the average price in Nairobi of the crushed stone during the relevant period was Shs. 77/- per 100 cubic feet, from which was to be deducted Shs. 20/- per 100 cubic feet representing the cost of transport from the leased area to Nairobi, with a resultant value at the leased area of the wrongfully quarried crushed stone at Shs. 57/- per 100 cubic feet. These figures were challenged and there was evidence, which the judge did not accept, that they were wrong. Accepting, as the judge did, these figures, the result is that the total value at the leased area of the crushed stone wrongfully quarried was Shs. 455,578/-. The judge held that the trespass had been inadvertent and that the defendants were accordingly entitled to deduct from this sum the cost of production. This he did by accepting evidence that 20 per cent. was a reasonable profit; and as 20 per cent. of Shs. 455,578/- was Shs. 91,715/- he awarded this sum. I am not satisfied that, on the evidence accepted

by the judge, the result is quite accurate, but no point has been made of this as counsel for the defendants' challenge of the award relates to the basis of measuring the damages. Counsel submits that where, as in this case, the trespass was inadvertent the amount of the damages is to be measured by ascertaining the value of the stone in situ, to an owner who, as he submitted was the position in this case, could not work it himself. In support of this he relied on *Livingstone v. Rawyards Coal Co.* (9). He further submitted that the best evidence, and indeed the only evidence, of this value was that contained in the lease. Counsel for the plaintiffs, on the contrary, submits that the true principle to be applied is that set out in a passage from Halsbury's Laws referred to by the judge; this, he submits, is the value of the stone at the stacking grounds after it had been quarried and processed but allowing a deduction for the cost of production. He submits that this principle is set out in *Jegon v. Vivian* (10) and that the decision in the *Livingstone* case (9) depended upon the particular facts. In the result, he submits that the principle applied by the judge to measure the damage was correct.

It is, I think, necessary to bear in mind the basic principle that damages awarded in respect of all types of tort are, with two exceptions, compensatory in nature. The two exceptions are injury from oppressive acts by the government or its agents and injury deliberately inflicted with the object of the wrongdoer obtaining a profit from his wrongful act. This basic principle was clearly set out in Britain by the House of Lords in *Rookes v. Barnard* (11) and has been stated by this court to be the law of East Africa (see *Kiwanuka v. Attorney General of Uganda* (12). While damages in tort are very often at large, with the result that compensatory damages are not restricted to actual pecuniary loss, this, of course, is not the position where the damages are claimed as special damages. In such a case the plaintiff has to plead and prove his loss. Neither of the exceptions to the general principle that damages are compensatory are relevant, as the judge has found that the trespass was inadvertent. In the result the damages to be awarded in respect of the wrongful quarrying of the stone under this head of special damages must be the loss suffered by the plaintiffs as a result of the tortious act.

How is this loss to be ascertained? In accordance with general principles a person injured must, as far as is possible in terms of money, be put in as good a position as if the wrong had not been committed (see *Phillips v. Ward* (13)). This does not mean that the person injured is entitled to the cost of returning the stone to the excavation from which it was taken or is entitled to the cost of repairing the damaged article, though in very exceptional circumstances such cost might be the true measure of the damages (see *Darbishire v. Warran* (14)). What it does mean is that the person injured must receive such sum of money as would reasonably be said to put him in as good, but neither better nor worse, a position as he was immediately before the wrong was committed. As Vice-Chancellor Bacon said in *Re United Merthyr Collieries Co.* (15) ((1872), L.R. 15 Eq. at p. 49):

> "the plaintiff, although he has suffered a wrong, shall not have any more than he would have had if that wrong had not been committed."

It is not the profit which the wrongdoer makes that is the measure, it is the loss that the person injured suffers. Indeed, it is quite irrelevant, where the damages are purely compensatory, whether the wrongdoer made a profit or a loss (see the judgment of Rigby, L.J. in *Whitwham v. Westminster Brymbo and Coke Co.*, (16), [1896] 2 Ch. at p. 543). Applying these principles to the facts of this I consider that the loss which the plaintiffs suffered was the value to them of the stone at the moment before it was wrongly quarried (see *Livingstone's* case (9) ([1880] 5 A.C. at pp. 32 and 40), the minute of the judgment in *Jegon's* case

(10) and the judgment of Lord Blackburn in *Peruvian Guano Co. v. Dreyfus Brothers & Co*. (17) ([1892] A.C. at pp. 175, 176). This being so I am at once struck with the fact that the damages awarded under this head alone in respect of a wrongful trespass to a relatively small part of plot 37 and an even smaller part of plot 38 are in excess of the total value of plot 37. This cannot be right; surely the part cannot be greater than the whole! But it still remains to determine what is the value to the plaintiffs of the stone in situ. I understand both counsel to make their submissions on the basis that different principles were laid down in the *Livingstone* (9) and *Jegon* cases (10) and that this court must choose one or the other. I find myself unable to accept that such is the position. To my mind, both cases set out the principle I have already stated; but they also lay it down that in applying the principle regard must be had to the particular facts of the case, whether those facts arise from a state of things or a state of mind. For example, the value of the stone in situ to the plaintiffs will depend on whether they proposed to quarry it themselves, or to lease it to someone else to quarry, or not to quarry it at all, and thus avoid an unsightly scar. In the first case the value would be the profit they expected to make but have lost by reason of the trespass; in the second case it would be the return they would have received if they had let it out for quarrying; and in the third case it would be the value of the amenities lost and the consequential damage.

On the facts of this case the third form of measure is not relevant. In any event damages to be measured in this way would not, save possibly in respect of certain types of consequential damage, be the subject of a claim for special damages. Also, on the facts of this case, there was no suggestion that the plaintiffs proposed to quarry the stone themselves. Indeed the reverse is the position, as they had leased part of plot 37 to the defendants for quarrying purposes and they had disposed of such interest as they had in the quarrying machinery. This being so their loss is not to be measured by the profit which they might have made. It is quite clear that, in respect of this head of special damages, their loss is to be measured by the amount of rental they would have received if the area wrongfully quarried had been included in the leased area. This amount is quite clearly Shs. 1/- per month for each 325 square feet of the wrongfully excavated area. According to the evidence this area was, in respect of plot 37, 15,700 square feet, and in respect of plot 38, 3,000 square feet, making a total of 18,700 square feet. If this area had been included in the leased area the period in respect of which the rental would have been received would have been forty-eight months. I consider it would be wrong to remit the case to the trial judge to determine the amount of the damages on the principles and using the measure I have set out. Such a course would result in unnecessary cost as all the necessary evidence is on the record and the answer merely a requires simple arithmetical calculation. Making this calculation the result is very close to Shs. 2,750/-, which figure I would adopt as the amount of loss suffered by the plaintiffs under this head. I disregard, as I think has been conceded by counsel for the defendants should be the position, the fact that the claim is made in respect of loss of profit.

The third head of special damages claimed is no longer relevant as the judge rejected the claim and there is no cross appeal before the court in relation to it.

The fourth head of special damages claimed related to the cost of fencing the area excavated, which fencing the defendants failed to erect. In the original grounds it is stated generally that the judge had applied the wrong principles to measure the damages under this head. In the additional grounds it is stated specifically that the judge erred in awarding the cost of fencing and not, as he should have done, the depreciated value of the land as a result of the breach of the covenant; and also that the amount of such depreciated value had neither been pleaded nor proved in evidence. In the additional grounds it is also stated

that the plaint claimed only the cost of fencing the excavated area and not, as the judge has awarded, the leased area together with the excavation beyond the leased area. As regards this latter additional ground I would not give leave to argue it at this stage as the third agreed issue was: “Did the defendants fail to fence the land in question and the excavated area”? While an amendment should have been made to the plaint, in view of the wording of the third issue it is not now open to the defendants to raise this matter on appeal. As regards the other matter raised in the additional grounds, in effect it merely is a more precise way of setting out an issue which, I consider, was raised in the original grounds, and I would grant leave to argue it.

Where there has been a breach of a covenant such as a covenant to fence, the measure of damages is not normally the cost of erecting the fence, it is the loss which the owner has suffered as a result of the breach. That loss is normally the depreciated value of the land (see *Wigsell v. School for Indigent Blind* (18). In exceptional circumstances, such as where the owner has had to put up the fence himself consequent upon the breach of the covenant, it may be the cost of erecting the fence because that expense is the loss which the owner suffered. In this case the judge awarded the cost of fencing the entire leased area and in addition the excavated area outside the leased area, and in respect thereof he awarded the sum of Shs. 3,324/-. It would not seem that any submissions were made to the judge on the principles to be applied in measuring the damages for the breach of the covenant as the main contest seems to have been whether in fact the defendants had fenced the land. Apart from a potential danger due to the excavation and a somewhat uncertain reference to the requirements of the Nairobi City Council, there seems to be nothing which would require the plaintiffs to fence the whole of the area in respect of which damages were awarded. The evidence, however, shows that the excavated area is a potential danger and the judge referred to the quarry constituting a danger. I think a prudent landowner might well consider that such a danger spot should be fenced. With some hesitancy I consider that the plaintiffs are entitled to the cost of fencing the excavated area; as regards the remainder of the leased area they are entitled only to the depreciated value of the land as a result of the fence not being erected. There is no evidence of this depreciated value and I cannot imagine, in the light of the evidence as a whole, that it would be anything other than nominal. As regards the excavated area it was stated that the length of the perimeter of the whole quarry was 1,150 feet and this distance tallies with measurements I have made on the plans put in. The evidence was that the cost of fencing was Shs. 1/50 a foot. On the assumption that this figure is approximately correct, this would result in a total of Shs. 1,725/- for the cost of fencing. In respect of what is obviously a small amount I would not think it right to remit the case to the judge to determine the amount to be awarded on his head after applying the correct principles. Such a course would incur costs probably in excess of any difference. Accordingly I would award under this head in respect of both the cost of fencing the excavated area and the depreciated value of the leased area, a total of Shs. 1,800/-.

As regards the general damages, the judge awarded Shs. 2,000/-. Any award of general damages would be at large and I am not satisfied either that the judge has applied any wrong principle in arriving at his award or that the amount is so excessive that this court should interfere.

In the result I would vary the judgment and decree of the judge by reducing the total sum awarded as damages from Shs. 98,285/- to Shs. 9,396/- and, making a consequential variation in the interest awarded, but I would dismiss the appeal in other respects. As the other members of the court agree, it is so ordered. As regards the costs of this appeal, both counsel asked that an opportunity should be given to the parties to make submissions after the decision on the issues

raised in the appeal had been given and I would accordingly reserve my decision thereon until such submissions are made.

Sir Clement De Lestang JA: I have had the advantage of reading in advance the judgment of the learned Vice-President and I am in full agreement with his reasoning and conclusions. I cannot usefully add anything.

I agree with the order proposed by him.

Spry JA: I have had the advantage of reading in draft the judgment of the learned Vice-President and, except in one particular, I am in full agreement with his reasoning and conclusions.

The question which has occasioned me difficulty is whether or not parol evidence identifying the land demised to the defendants was properly admitted.

I agree with the general statement made by the learned Vice-President as to the effect of ss. 99 and 102 of the Evidence Act but, with respect, I do not share his views on the application of the law to the facts of the present case.

To me it appears that the parcels in the deed of lease were patently defective. What purported to be demised was a piece of land "measuring 525 feet by 325 feet or thereabouts" forming a portion of a larger area known as plot 37. A plan was attached to the lease showing plot 37 but not the land demised, but since this plan was not referred to in the deed, it would appear that it cannot be looked at as part of the deed. There is nothing on the face of the deed to show whether or not the area to be demised had been demarcated, or even whether it had been agreed between the parties or was to be agreed, or was to be selected by one or other party. It was assumed by counsel in argument that it was to be rectangular, but I can see nothing in the deed to justify this assumption, or even for assuming that it was to be a parallelogram.

Again, I do not think that s. 102 can properly be invoked. It appears to me that the section only applies where a document appears to refer to a specific thing but could equally well apply to two or more specific things, and not where there is an inadequate reference to a piece of land to be excised from a larger area.

I am, therefore, of the opinion that the deed should be regarded as void for uncertainty, since I do not think extrinsic evidence can be called to explain it.

Even if I am correct in this opinion, however, I do not think it effects the outcome of the present appeal. The plaintiffs were not seeking to enforce or even relying on the deed as such. They were suing in trespass. The defendants were clearly not trespassers in respect of such part of the land as they had occupied with the consent of the plaintiffs and in respect of which the plaintiffs had accepted rent. They were trespassers in respect of any other land of the plaintiffs on which they had entered without such consent. I can see no reason why oral evidence, inadmissible to explain the deed of lease, should not have been admitted to show the extent of the trespass, if any.

In all other respects, I concur in the judgment of the learned Vice-President.

Damages reduced to Shs. 9,396/-, *appeal otherwise dismissed.*

For the appellants:
EFN Gratiaen, QC (of the English Bar) and *VD Shah*

Veljee Devshi & Bakrania, Nairobi

For the respondents:
SC Silkin, QC (of the English Bar) and *DN Khanna*
Khanna & Co, Nairobi

Syed Abdulla Alawi Al-Jifri v Bint Abdulla Al-Safi and Syed Abubaker Al-Safi

[1965] 1 EA 800 (CAN

Division:	Court of Appeal at Nairobi
Date of judgment:	8 November 1965
Case Number:	54/1962
Before:	Crabbe, Sir Clement de Lestang and Spry JJA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Aden – Blandford, J

[1] Rent Restriction – Possession – Whether statutory tenant retains actual possession when allows part of the premises to be occupied by licensees – Whether court has jurisdiction to make a possession order as to part of premises – Rent Restrictions Ordinance (*Cap.* 136), *s.* 11 (2) (*g*) (*A*).

[2] Appeal – Regard to events happening after order of court below but before hearing of appeal – Rent restriction – Supervening facts disregarded.

Editor's Summary

In 1952 the appellant took over the tenancy of a two storey house and used the ground floor for his tobacco business till 1954 when import difficulties, thought to be temporary, brought it to an end. Thereafter he and his brother used the ground floor as a store for chairs, window frames and furniture. The upstairs rooms were used from time to time by a lawyer, a literary club and the South Arabian League as licensees. In 1957 the second respondent bought the reversion to the whole premises and transferred it in 1960 to his wife, the first respondent, who determined the appellant's contractual tenancy in January, 1961. The first respondent sued for possession of the whole building under the Rent Restriction Ordinance on the ground that the appellant had parted with possession with part of the premises; that he was not in occupation of the premises and that it would be reasonable to make a possession order, there being suitable alternative accommodation available. The trial judge held that the appellant was not in occupation of nor did he substantially use the upper floor but that he was in sufficient possession of the ground floor to be entitled to protection to the extent of his occupation. He refused to grant an order based on the transfer of possession of a very small portion of the whole building although he found that a case had been made out for it. He awarded possession to the first respondent subject to granting a tenancy to the appellant of the ground floor. An appeal and a cross-appeal were filed and while they were pending the first respondent sold her interests in the premises to her husband, the

second respondent, who was joined as a party to the appeal and cross-appeal by consent. The appellant made a preliminary objection that possession, being personal, could no longer be given to the first respondent whose interest had passed to the second respondent who was a stranger to the suit before the trial judge. The appellant further argued that the Aden legislation, unlike the English, gave statutory protection to tenants who had possession for other than personal purposes.

Held –

(i) the preliminary objection failed because the appellant's consent to the order including the second respondent created an estoppel and also because, although the change of ownership changed the basis of the suit, such supervening facts should be disregarded in both the appeal and cross-appeal in conformity with the Aden Rules of Procedure which preserved the position as at the time of judgment;

(ii) English legislation protected only the personal occupation of a dwelling house while the Aden Act also covered business premises occupied perhaps by the employees and licensees of a company for company purposes; as an individual the appellant had actual possession of both floors in this sense and to compare possession with substantial user or constructive possession was misleading;

(iii) if a tenant seeking statutory protection has parted with possession of a part of the premises that can be separately occupied his protection under the Act will not necessarily be lost for the part retained.

Appeal allowed. Cross-appeal dismissed.

Cases referred to in judgment

(1) *Davenport v. Stafford*, 8 Beav. 503.

(2) *A.-G. v. Tomline* (1877), 7 Ch.D. 388.

(3) *Huddersfield Banking Co., Ltd. v. Henry Lister & Sons, Ltd*., [1895] 2 Ch. 273.

(4) *Murgatroid v. Tresarden*, [1946] 2 All E.R. 723.

(5) *Crowhurst v. Maidment*, [1952] 2 All E.R. 808.

(6) *Thompson v. Rolls*, [1926] All E.R. Rep. 257; [1926] 2 K.B. 426.

(7) *Bhatt v. Luxmichand*, [1964] E.A. 414 (C.A.).

(8) *Robson v. Headland* (1948), 64 T.L.R. 596.

(9) *Skinner v. Geary*, [1931] 2 K.B. 546; [1931] All E.R. Rep. 302.

(10) *Gidden v. Mills*, [1925] 2 K.B. 713.

(11) *Shrimpton v. Rabbits* (1924), 131 L.T. 478.

(12) *Kelly v. Goodari*, [1947] 1 All E.R. 810.

(13) *Coplans v. King*, [1947] 2 All E.R. 393.

(14) *MacFoy v. United Africa Co., Ltd*., [1961] 3 W.L.R. 1405; [1961] 3 All E.R. 1169.

(15) *Goldthorpe v. Bain*, [1952] 2 All E.R. 23; [1945] 2 K.B. 445.

(16) *King v. Taylor*, [1955] 1 Q.B. 150; [1954] 3 W.L.R. 669; [1954] 3 All E.R. 373.

(17) *R. F. Fuggle, Ltd. v. Gadsden*, [1948] 2 K.B. 236.

November 8. The following judgments were read:

Judgment

Crabbe JA: This is an appeal against a decision by the Supreme Court of Aden in a suit for the recovery of possession. The suit was brought under the Rent Restrictions Ordinance (Cap. 136) (A). The respondents have also cross-appealed on several grounds.

Before considering the appeal on the merits it would be necessary to dispose of the preliminary objection raised by counsel for the appellant against the cross-appeal. It was contended by counsel that the second respondent in the appeal never established an interest in the subject-matter of the suit at the trial, his wife being then the plaintiff. She has, since the judgment, sold her right, title and interest in the suit premises to the second respondent. Counsel for the appellant, therefore, submitted that the plaintiff

was no longer entitled to possession, and that the second respondent who is a stranger to the proceedings cannot also claim in this appeal to be entitled to the right of possession. Counsel for the respondents maintained that the order to join the second respondent as a party to the proceedings was made by consent of the parties, and that the appellant is now estopped from challenging it. Counsel for the respondents further referred to rr. 330 and 331 of the Rules of Court (Cap. 25) (A), and contended that the second respondent has a locus standi in this appeal. These rules read as follows:

> "330. (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.
>
> (2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-r. (1) of this rule.

331. In the application of rr. 321 to 330 of these Rules, to appeals so far as may be, the word ‘plaintiff’ shall be held to include an appellant, the word ‘defendant’ a respondent, and the word ‘suit’ an appeal.”

Dealing first with the consent order, it would appear that whilst this appeal was pending an application was made on behalf of the first respondent by counsel to the High Court, Aden, for an order that the second respondent be joined as a party to the appeal, and that “he be also joined as party as respondent No. 2 to the cross-appeal.” The grounds for the application were that the first respondent had transferred by sale the suit property to the second respondent, and that the second respondent, being the husband of the first respondent had got equal interest as that of the first respondent in the appeal and cross-appeal. The application was not opposed by counsel, who was acting for the appellant at the trial, and the order made by the learned judge reads:

“*Order by consent*

Syed Abubaker Abdulla Hameed Al-Saffi be joined as a party to the appeal and cross-appeal as prayed. Costs in the cause.

Leave to amend appeal and cross appeal as consequentially necessary within fourteen days.

E. G. Blandford, J.”

The first question that arises is whether the appellant can now object to the second respondent being made a party to this appeal and cross-appeal. I have no doubt that he cannot. In my view a consent order cannot be set aside or varied except on the ground of fraud or upon any ground sufficient to invalidate an agreement between the parties (see *Davenport v. Stafford* (1); *A. – G. v. Tomline* (2); *Huddersfield Banking Co., Ltd. v. Henry Lister & Sons, Ltd*. (3) No such ground has been alleged by counsel for the appellant. So long as the consent order stands it has the force of an estoppel.

As regards the second question, whether the second respondent has sufficient interest in the suit premises or whether he is entitled to recovery of possession, I think that, apart from authority, rr. 330 and 331 of the Rules of Court (Cap. 25) (A) are clear answers to it.

For the foregoing reasons I would overrule the preliminary objection.

I will now deal with the appeal on the merits. This appeal has arisen out of a suit filed by the first respondent (hereinafter referred to as the plaintiff in which she claimed recovery of possession of premises No. 13/22–23 Jaffaran Road, Crater, Aden, against her former tenant, the appellant (hereinafter referred to as the first defendant), on the ground that since the expiry of a regularly served notice to quit he had not been substantially using the premises and was therefore unprotected by the Rent Restrictions Ordinance (Cap. 136) (A); alternatively, that he had parted with possession of various parts of the upper floor of the premises severally to two other defendants, who have not appealed, without obtaining written consent at that time, thus providing a ground for recovery of possession under s. 11 (2) (*g*) of the Rent Restrictions Ordinance; and in the further alternative that there was a suitable alternative accommodation available to the defendant within the terms of s. 11 (1) (*b*) of the same Ordinance. In her reply to the defence the plaintiff alleged that the second, third and fourth defendants were no more than licensees and so could not claim the protection of ss. 11 (5) and 13 (2) of the Ordinance, and she sought injunctions to restrain them from continuing to occupy or use parts of the suit premises which the first defendant had permitted them to occupy. The third defendant vacated that portion of the premises occupied by him before the date of judgment.

By his defence the first defendant alleged: (1) that the premises had been substantially used by him

since January 21, 1961, when the tenancy was determined

by notice; (2) that, without the plaintiff's consent, he permitted the other defendants to use certain parts of the upper floor of the premises, but denied that such permission amounted to parting with possession within the meaning of s. 11 (2) (*g*); (3) that suitable alternative accommodation was not available to him; and (4) that if it were found that the plaintiff had valid ground for recovery of possession under the Ordinance, it would not be reasonable to make an order accordingly.

The second and fourth defendants alleged in their pleadings that they were only the licensees of the first defendant, and, in effect, they stood or fell with him. Nevertheless, they claimed that they were entitled to consideration for alternative accommodation, if the suit was to be decided on that issue.

It would appear that the agreed issues at the trial were:

> "1. Does the plaintiff prove that at the date of expiry of the last notice to quit, viz. January 31, 1961, the first defendant was substantially using the suit premises or has not done so since – so as to lose the protection of the Rent Restrictions Ordinance?
>
> 2. If not, does the plaintiff prove that the first defendant has transferred possession of parts of the suit premises, the landlord's consent not having been obtained, contrary to s. 11 (2) (*g*), Cap. 136?
>
> 3. Alternatively, does the plaintiff prove that that suitable alternative accommodation is or will be available to the first defendant?
>
> 4. If the plaintiff is successful on issues 2 or 3, is it reasonable to make an order for possession?"

On the first issue the learned trial judge made a finding which was expressed concisely in the following passage from his judgment:

> "As to the first issue in this trial, I therefore find that the first defendant was not in occupation of, and was not substantially using, the upper floor of the suit premises and had no intention of occupying or using that part when the notice to quit expired but that he was in possession of, and using, the large room on the ground floor as a store for goods he intended to sell and that he intended, when the opportunity occurred, to recommence his tobacco business there."

The learned trial judge further held, by applying the English decision in *Murgatroyd v. Tresarden* (4) as explained in *Crowhurst v. Maidment* (5), that by failing to use the upper floor at the material time the first defendant had forfeited the protection of the Rent Restrictions Ordinance in respect of that part of the premises, but that he was entitled to the protection of the Ordinance in respect of his use of the ground floor. The learned judge accordingly made the appropriate order in respect of the first defendant, but limited it to the upper floor and the entrance and staircase leading thereto, and made orders for injunctions against the remaining defendants as prayed. The learned judge said that the question of the reasonableness of making this order did not arise, since he was not acting under s. 11 of the Ordinance.

On the second issue, the learned judge, following an earlier decision of the High Court of Aden, interpreted "transfer the possession" within the context of s. 11 (2) (*g*) of the Rent Restrictions Ordinance as meaning "transfer of legal possession". He accordingly held that of the three rooms on the upper floor the first defendant had established a case under s. 11 (2) (*g*) in respect of one. He found, nevertheless, that the first defendant retained some control over the building generally by keeping the outer door key, and "he did have duplicate keys of the rooms", but in the opinion of the learned trial judge that by itself was not sufficient 'to prevent those licences operating to transfer the possession

to the librarian of the "home" or to the league of a place to keep its confidential records'. He therefore made the following finding:

> "While the plaintiff therefore establishes a case under s. 11 (2) (*g*) it relates only to a very small proportion of the whole building, and to parts which are not physically separated from the rest of the upper floor or, at least, which have no separate entrance. I should not therefore regard it as reasonable (since it would substantially interfere with the tenant's enjoyment of the rest of the premises) to grant an order for possession under para. (*g*) of the sub-section, even limited to the two rooms in question."

On the third issue the learned trial judge considered the question of suitable alternative accommodation in relation to the upper-floor and ground-floor separately. As regards the upper-floor he did not think that the question arose, since the first defendant did not himself occupy it, and none of those who used it were entitled for consideration. As regards the ground-floor, which the first defendant said he used as a godown, the learned judge said:

> "I am not satisfied that any suitable alternative accommodation has been proved to be available outside the suit premises. The large number of chairs and other articles now stored require substantial space. The first defendant may be able to recommence his tobacco business and will require sufficient room for that. The plaintiff has made no real attempt to prove the availability of other premises suitable for these purposes."

He then made this definite finding of fact:

> "I accordingly rule that no suitable alternative accommodation has been proved to be available outside the suit premises in replacement for the lower part of these premises. In any event I should have ruled as to this part of the premises that it would not be reasonable to make an order for possession. The plaintiff only wants this part for use as a mubraz where her husband can entertain his friends. As against the first defendant's need for godown, such a desire weighs lightly in the balance and it would not be, I consider, reasonable to make the order as prayed for."

Consequently, the learned trial judge considered it reasonable to make an order for possession only in respect of the upper floor. But he accepted a submission by counsel for the plaintiff, based on the principle of *Thompson v. Rolls* (6), that the ground-floor room should be regarded as a suitable alternative accommodation for the part of the suit premises actually used by the first defendant and that an order for possession of the whole of the suit premises should be made, subject to the plaintiff's granting a tenancy to the first defendant at a suitable rent. Nevertheless, the learned judge preferred in the circumstances of the present case to make an order in accordance with the principle in *Crowhurst v. Maidment* (5) rather than *Thompson v. Rolls* (6). In *Crowhurst v. Maidment* (5) it was decided that if a tenant sub-lets as separate dwellings those parts of the house which he has never occupied or does not intend to occupy, the landlord is entitled to an order for possession against him.

Accordingly, the learned judge gave judgment for the plaintiff against the first defendant for possession of the upper floor of the suit premises and the entrance and staircase leading thereto. He also gave judgment against the second, third and fourth defendants respectively for an injunction restraining each from committing trespass on the upper floor of the suit premises or any part thereof.

Against this decision the first defendant has appealed to this court on the following grounds:

"1. That the learned puisne judge, having found that the tenant had retained possession within the meaning of the provisions of the Rent Restrictions Ordinance of a portion of the suit premises at the termination of his contractual tenancy, had erred in dispossessing the appellant of the remainder of the said premises.

2. That the learned puisne judge erred in law in splitting the premises into two portions and treating each portion as a separate and self-contained entity.

3. That the learned puisne judge erred in holding that the upper floor of the suit premises were not being substantially used in the manner and for the purposes to which it has originally been put, and in failing to appreciate that the appellant's intentions were of continuing his former activities therein in the future.

4. That the learned puisne judge erred in failing to consider the implications of s. 11 (2) (*d*) of the Rent Restrictions Ordinance and holding it reasonable for the court to grant possession of a portion of the premises.

5. That the learned puisne judge did not sufficiently direct his mind to the position of Muslim wives, customs and usages of Arab Perdah ladies and erred in taking into consideration the question of the respondent's position in the event of her husband pre-deceasing her as a factor for consideration of reasonableness in making the order for possession."

At various stages of the argument it was not clear what particular ground of appeal was being argued by counsel for the appellant. This made it extremely difficult to comprehend his arguments, which he otherwise advanced with commendable eloquence. I think that it is far better that counsel should argue his appeal ground by ground, or by combining grounds that can conveniently be taken together, instead of arguing it generally as seems to be the general practice in this court.

I now propose to deal with the appeal ground by ground. At the time of the judgment the learned judge, who obviously was unaware of this court's decision in *Bhatt v. Luxmichand* (7), interpreted "transfer the possession" as meaning the transfer of the legal possession, and accordingly held that the first defendant was in possession of a portion of the upper floor. This finding by the learned judge, though erroneous, has not been challenged in this appeal; indeed, it is immaterial to the final result of this appeal, and, therefore, I do not think it necessary to say anything about it. But in my opinion ground one of the grounds of appeal fails as it stands, because under s. 11 (2) (*g*) the learned trial judge had jurisdiction to make an order for possession of the whole premises if he was satisfied that the tenant had parted with a portion only of the premises. The question whether it was reasonable to make the order would be quite a different matter. He can be said to have been in error only if it can be shown that it was unreasonable for him to make the order. No such allegation is made in ground one, which, in my opinion, is devoid of any substance.

Counsel for the appellant did not press grounds 2 and 5 and therefore I do not consider it necessary to make any observations on them. He further did not address the court on ground 4, which must be taken as abandoned.

On ground 3 counsel for the appellant submitted that the appellant was in possession of the suit premises at all times and never abandoned it. He contended that the learned trial judge was not entitled to make an order for possession against the appellant on the ground that he himself was not in substantial use of the upper part of the premises. He submitted that the Ordinance did not specify what degree of possession was sufficient to afford protection under the Ordinance, and he submitted further that the proper test would be whether

the appellant had evinced any intention to abandon the upper floor. It is true to say that the Ordinance does not say what degree of possession was required, but in this case the question whether or not the appellant was substantially using the suit premises was one of the issues in controversy at the trial. There has been no appeal against the framing of the issue, and in this appeal counsel for the appellant did not seek to challenge the learned judges' finding of the primary facts on that issue. It seems to me that a substantial use of premises is a criterion by which the court can determine whether a tenant is actually in possession or intends to occupy the premises. Counsel for the appellant submitted that having found that the first defendant was in legal possession of the upper floor it was wrong to divest him of possession. But as Tucker, L.J. pointed out in *Robson v. Headland* (8) ((1948) 64 T.L.R. at p. 597) on a similar point in an identical rent legislation:

> "There is nothing in the actual language of the Rent Restrictions Acts, read literally, to deprive a tenant in legal possession of premises of the protection of those Acts by reason of non-residence, but there is a long line of decisions of this court to that effect, and the one most often referred to is *Skinner v. Geary* (47 *The Times* L.R. 597; (1931) 2 K.B. 546)."

Skinner v. Geary (9) decided that a tenant, to be entitled to the protection of the Rent Acts, must be in personal occupation of the premises in respect of which he seeks that possession. In *Bhatt v. Luxmichand* (7) this court held that a statutory tenant who is not in actual possession of the suit premises cannot claim the protection of the Rent Restrictions Ordinance. And the question whether or not a tenant is in personal occupation is one of fact and of degree. I have had the advantage of reading in advance the judgments of my brothers, de Lestang, J.A. and Spry, J.A. and although I respectfully disagree with their conclusions, yet I agree with de Lestang, J.A., that decisions of the English courts on problems arising out of the English Rent Restriction Legislation must be applied with caution by the Courts in Aden, especially in dealing with premises other than dwelling-houses. But it cannot be doubted that both in England and Aden the object of the rent legislation is to protect the tenant who "retains possession" and pays the rent fixed by law. A statutory tenant in possession of rent-controlled premises has only a personal right of occupation, and he falls outside the ambit of the Rent Ordinance if he ceases to retain possession. I agree with de Lestang, J.A., that a tenant retains possession within s. 13 (1) of the Ordinance by using the premises for his own purposes either by himself or through his agents or employees or licensees. It was common ground that all those who occupied the upper floor of the premises were the licensees of the first defendant who was not himself physically occupying any part of the premises. But merely installing a licensee in a rent-controlled premises is not, in my view, sufficient to afford protection under the Ordinance; the licensee must occupy the premises as the alter ego or representative of the tenant and he must be installed there with the primary function of preserving the premises for the non-occupying tenant. None of the licensees in this case performed such function for the first defendant. There is also no evidence that at the time of the expiry of the notice to quit the first defendant was contemplating a return to the suit premises.

In this case the learned judge found that possession of the upper floor by the first defendant was not sufficient to afford him protection under the Rent Restrictions Ordinance. There is a finding of fact and since, in my view, there is ample evidence to support it, there is no justification for disturbing such finding.

In my opinion there is no substance in any of grounds of appeal argued before us, and I would accordingly dismiss the appeal.

The cross-appeal is against that part of the judgment and decree whereby the learned trial judge

disallowed the plaintiff’s claim for possession of the

ground floor of the suit premises. The grounds of the cross-appeal were in these terms:

> "1. The learned judge having found that the tobacco business of the appellant having been closed down, and in the absence of any evidence (except his word only) of any genuine intention of the appellant to re-start the said business, or even to engage in any other business, the learned judge ought to have held in law that the ground floor of the premises were also not in substantial use, and as such the appellant was not protected in that respect.
>
> 2. The appellant had pleaded that he was dealing in chairs, machines, windows, cupboards, etc., but the said fact was not established by evidence, in that there was no regular business. The appellant held on to the possession only for purposes of dumping his unrequired things and articles. The appellant had not pleaded an intention to re-start his business.
>
> 3. The respondent No. 1 required the ground-floor premises for the use of her husband as a mabraz and the learned judge ought to have considered this factor in assessing the reasonableness, as against allowing the premises lying unused and idle. The respondent No. 2 still requires the said ground-floor premises for himself.
>
> 4. In considering the issue of reasonableness, the learned judge ought to have taken into consideration the whole attitude of the appellant and ought to have made an order for possession of the ground-floor premises, more particularly, as the appellant was a man of substantial means.
>
> 5. The suit premises, according to the evidence of the appellant himself, were taken on hire for the purposes of the activities of the Arab Literary Club; the said club having to be found to be 'moribund' (if not defunct), the original purpose of letting did not survive, and therefore the appellant was not entitled to retain possession for other purposes, namely: for business purposes.
>
> 6. On the evidence adduced before the court, the learned judge ought to have held that there was suitable alternative accommodation available to the appellant, for business-storage purposes and ought to have made an order for possession in favour of the respondent."

The case for the plaintiff, as far as it affected the ground-floor, was that the first defendant had made no use of the ground-floor for any business since January 31, 1961, when the tenancy was terminated. The first defendant called as his witness a Mr. Saleh Mohamed Daair, a merchant, who deposed that he and the first defendant were at one time in tobacco business, and that between 1953 and 1955 when Egypt placed an embargo on the importation of tobacco into that country, the tobacco business came to an end. The first defendant did not deny that his tobacco business stopped as alleged, but he said:

> "At present I use it as a store and I may re-start my old business. My servant keeps the key of the ground floor. The same as the one who keeps the key of the Club. I allow no one else to use the ground floor except that I let poor families use it for marriage ceremonies."

Later in his evidence the first defendant said:

> "I formerly had my tobacco business on the ground floor of the suit premises. It is not true that the export of tobacco to Egypt was stopped in 1952. I sent my last consignment there at the end of 1956 or in 1957. I have not traded in tobacco since then though I still have my scales and other equipment. I have no stocks of tobacco."

There was no other evidence that the first defendant did any other business in the ground-floor since he was compelled to close down his tobacco business. There was no evidence when the Egyptian embargo would be lifted. It seems to me, therefore, with respect to the learned judge, that there was no justification for holding that the first defendant intended "to re-establish his tobacco business as soon as he is able." In my view the actual use to which the premises is being put at the time when possession is sought by the landlord is the criterion for determining whether or not the tenant is protected: see *Gidden v. Mills* (10) ([1925] 2 K.B. at pp. 722, 727). In this case there was not a shred of evidence that the first defendant was, at the date when possession was sought, using the ground-floor substantially for his tobacco business, or for any other business. It is the de facto use of the premises that gives the statutory tenant the status of irremovability and not his hope for future use. If it were otherwise, no landlord can ever recover possession of his house from a tenant.

It seems to me that ground 2 of the cross-appeal must stand or fall with ground 1. In his pleadings the first defendant alleged as follows:

> "It is not true that this defendant has not been occupying the ground floor for more than eight years or any other period. The ground floor is not lying vacant but contains the chairs, the machines, cupboards, iron windows and the other commodities in which this defendant deals."

The case for the plaintiff was that the first defendant was not substantially using the ground-floor for any business. The second respondent, who gave evidence at the trial, testified that the first defendant was not engaged in any business in chairs, machines and cupboards. He said that the' ground floor was empty "except for mud and snakes". This was confirmed by other witnesses. The first defendant did not deny that he was not carrying on a tobacco business on the ground floor. According to the first defendant his tobacco business had ceased since 1957. He had no stock of tobacco, but only had 100 chairs there. He said:

> "They are a stock, they are for sale. I cannot remember the date when I imported them they were stacked in one of my friend's godowns and then I moved them to this place. I bought them for re-sale but could find no customers. I moved them to these premises about five or six years ago. They were in the other godown for a year or two. I may have had them in Aden for six to eight years.
>
> I originally bought more. These are what was left over. I have no other furniture for sale but I have metal window frames in stock.
>
> I cannot say why I could not find customers for the chairs. I got these chairs to see if I could sell them to coffee shop owners. I had not dealt in furniture before.
>
> I was not previously a builder's merchant. I got the steel windows as a trial order. That was the first time I tried to sell them. I never sold any of the windows. I sent brokers around but no customers came. I cannot say how many they are. They are still packed in cases. I bought them seven or eight years ago. The only other things stored there are the scales and things for the tobacco business. I got the chairs and window frames before the tobacco exporting was stopped."

What the first defendant had been saying was that since the closing down of his tobacco business he had had some chairs, machines, windows and other things stored in the ground floor, but there is no evidence that he ever sold any of these items during the seven or eight years that he had them. The first defendant's witness, Abdulla Ahmed Basudar, who had known the first defendant so

well for the past thirty years, and who knew that the ground floor was at one time used for tobacco business, also testified that he was unable to say what business the first defendant did since the closing down of the tobacco business. He said that the first defendant spent some of his time at Lahej. In my judgment the irresistible inference from Basudar's evidence is that the first defendant did not deal in chairs, machines, windows, cupboards, iron windows and other commodities as averred in his pleadings. The learned trial judge, nevertheless, decided this aspect of the case in favour of the first defendant, and his views are expressed in the following passage of his judgment:

> "In my view he has, since the expiry of the notice to quit, used the ground floor as a store in connection with these business ventures and he intends to use it again to re-establish his tobacco business as soon as he is able. I do not consider, therefore, that the plaintiff has made out a case that the first defendant cannot claim to be a protected tenant in respect of the ground floor of the suit premises."

With all due respect to the learned judge. I do not think that his finding is supported by the evidence. It is clear that the first defendant did not do any business on the ground floor, he only expressed a pious hope of re-establishing his tobacco business. An intention to re-establish the tobacco business was not pleaded and it was not one of the issues framed for trial. I think that there was a preponderance of evidence that the first defendant was not using the ground floor for any business, or substantially, and, in my view, the learned judge erred in his conclusion that the plaintiff had failed to make out a case in respect of the ground floor of the suit premises.

Dealing now with ground 3 of the cross-appeal, I think it is assumed in this ground that the learned trial judge did not consider the plaintiff's allegation that she required the ground floor of the premises for the use of her husband, the second respondent, as a Mabraz in determining the reasonableness of making an order for possession. I think he did, for after holding that no suitable alternative accommodation had been proved to be available outside the suit premises in respect of the ground floor the learned judge said:

> "In any event I should have ruled as to this part of the premises that it would not be reasonable to make an order for possession. The plaintiff only wants this part for use as a mabraz where her husband can entertain his friends. As against the first defendant's need for godown, such a desire weighs lightly in the balance and it would be, I consider, reasonable to make the order as prayed for."

The question whether it is reasonable to make an order for possession is eminently one of fact, and, unless the appellant can establish that the trial judge misdirected himself in some material particular, this court cannot interfere. It is clear from what I have said earlier in this judgment that the learned trial judge misdirected himself by holding that the first defendant needed the ground floor as a godown to continue or re-establish his business. The evidence as to the first defendant's desire to re-establish a tobacco business was rather nebulous and unsupported.

The ground on which the plaintiff required possession of the ground floor was virtually unchallenged, and consequently I hold, with respect, that the learned judge was wrong in holding that the desire of the plaintiff to use the ground floor weighed more lightly in the scales than that of the first defendant. What the court ought to have considered was not whether the desire of the plaintiff was reasonable, but whether it was reasonable to make an order for possession, for as Acton, J. pointed out in *Shrimpton v. Rabbits* (11) ((1924) 131 L.T. at p. 479):

> "Because a wish is reasonable, it does not follow that it is reasonable in a court to gratify it. There are two processes which have to be gone through. The first process is to ascertain whether the wish which the landlord has for the possession of the premises is a reasonable wish, and of course unless that is demonstrated there is an end of his claim. But after it has been ascertained that the desire or requirement, there follows a further question too often hitherto either ignored altogether or confounded with the question I have already mentioned, namely, is it in al the circumstances of the case reasonable that the court should grant or gratify that reasonable requirement."

On the fourth ground of the cross-appeal counsel for the respondents submitted that the trial judge failed to take into consideration (1) that the first defendant is a man of substance, (2) his adamant attitude in refusing to leave the premises and (3) the non-user of the premises by the first defendant. In my view, these are relevant matters which the court must take in account when determining whether "greater hardship would be caused by granting the order or judgment than by refusing it". The onus is on the tenant to prove greater hardship, and if the judge entertains any doubt the landlord's claim for possession must be granted. The circumstances to be considered are those which exist at the time of the hearing. With respect, I think that counsel for the respondents' criticisms of the judgment are well-founded, for nowhere in that lengthy judgment do I find any consideration given to the question of hardship by reference to the financial position of the first defendant (see *Kelly v. Goodari* (12) ([1947] 1 All E.R. at p. 812); or the first defendant's conduct, with the exception of the user of the premises which the learned judge erroneously held was proved.

With regard to ground five of the cross-appeal counsel for the respondents conceded, in answer to a question by the court that, having accepted rent for many years with full knowledge that the premises were not being used for a purpose which was never contemplated at the time of letting, the plaintiff must be deemed to have waived any objection to the user of the premises. There is therefore no merit on this ground.

The sixth ground of the cross-appeal is directed against the learned judge's finding on the issue of suitable alternative accommodation. On this issue the learned judge said:

> "Regarding the godown in the lower floor. I am not satisfied that any suitable alternative accommodation has been proved to be available outside the suit premises. The large number of chairs and other articles now stored require substantial space. The first defendant may be able to fecommence his tobacco business and will require sufficient room for that. The plaintiff has made no real attempt to prove the availability of other premises suitable for these purposes."

The learned judge later continued:

> "Her fundamental submission as to the contents of the lower floor was that the keeping of the goods there was solely for the purpose of frustrating her claim and, in effect, that no alternative premises need be found. Of the six defendants, properties mentioned by her husband only two were thought to contain spare room available for any purpose. One was the residence at Seera Island, to which I have referred, and which on the face of it would be unsuitable as a store and business house. The other was the business place at Street No. 4, Section A. The witness thought that might be suitable for the librarian but not for meetings of the league. It was not suggested that it would be of sufficient size and suitable for storing the goods now in the lower floor of the suit premises and for re-starting the tobacco business."

It is clear that once again, in considering the suitability of alternative accommodation, the learned judge proceeded on the basis that the alternative accommodation must be one suitable for re-establishing first defendant's tobacco business. I have endeavoured to show earlier in this judgment that the first defendant neither pleaded nor proved that he intended to re-establish his tobacco business. In my view accommodation suitable for a tobacco business does not arise in the case, because the first defendant at the date of judgment was not doing any tobacco business, and did not therefore require an accommodation for that purpose. All that he required was a place to store his chairs, machines, windows, cupboards and other things. It was submitted by Mr. Sanghani that the learned judge erred in holding that there was no suitable alternative accommodation, because there was evidence that the first defendant had got available space. I think there is some support for counsel for the respondents' submission in the following observations by the learned judge:

> "The first defendant said nothing about his office premises in Street No. 4, Section A, so it would seem that he does not deny that he has some rooms available there. The keeper of the keys resides there so there would seem to be no reason from the nature of the premises why the librarian, at least, should not join him and also the books, cupboards and other things, if in truth they belong to the first defendant."

The evidence of plaintiff's husband, the second respondent, to the effect that the office in Section A, Street 4, Crater belonged to the first defendant was not denied. As the learned judge himself has pointed in the passage quoted above from his judgment the plaintiff proved that there was indeed a suitable alternative accommodation available for the first defendant for the purpose of storing those things which he had in the ground floor of the premises. The onus, therefore, shifted on the first defendant to show that greater hardship would be caused to him by making the order for possession than by declining to make it. The learned judge, who heard the evidence was satisfied that the order ought not to be made. The question of suitability of accommodation is of course a pure question of fact, and the Court of Appeal, unless it is satisfied that the trial judge had allowed his decision to be influenced by irrelevant considerations, will not interfere. In this case the learned judge, unfortunately, allowed his decision to be influenced by consideration of the re-establishment of a tobacco business in futuro, a fact which was not even pleaded, and of which there was only very slight evidence. The plaintiff's evidence of alternative accommodation was uncontradicted, and since the evidence was all one way I think the only inference that could be drawn is that the plaintiff satisfactorily discharged the burden of proof that lay on her, and that the learned judge should have made the order for possession.

The further finding by the learned judge that it was not reasonable in any event to make an order for possession does not, with respect, appear to me to be justified. This finding was the result of the weighing of the balance of hardship. In *Coplans v. King* (13) it was decided that save in exceptional circumstances the question of comparative hardship is primarily one of fact for the trial judge, and his decision is to all intents and purposes final. But at the end of his judgment in that case Lord Greene, M.R., said ([1947] 2 All E.R. at p. 394):

> "Of course, if in a case there is evidence of hardship on one side and none on the other, the county court judge can come to only one conclusion, and if he finds hardship where the facts are not sufficient to constitute hardship in law – for example, something trivial, like the absence of a view of a neighbouring hill, river, tree, or something pleasant of that kind – he makes an error in law, but once there is evidence which in law can amount

> to hardship on two sides, Parliament has deliberately made the county court judge the conclusive judge of the fact which is the greater hardship."

The question raised in this appeal is substantially whether there was any evidence on which the learned trial judge could have justifiably come to the conclusion that it was not reasonable to make the order. It seems to me that the learned judge's two findings: (1) that there was no suitable alternative accommodation, and (2) that it was not reasonable to make an order for possession, were based on the main finding that the first defendant wished to re-establish his tobacco business. This main finding was the superstructure on which the learned judge based his decision, both on the issue of suitability of accommodation, and on that of reasonableness. As I have indicated earlier, this superstructure cannot be sustained, and if I may recall the homely words of Denning, L.J. (as he then was) in *MacFoy v. United Africa Co., Ltd.* (14) ([1961] 3 W.L.R. at p. 1409):

> "You cannot put something on nothing and expect it to stay there. It will collapse."

The judgment of the learned judge must therefore break-down once the superstructure upon which it is based is removed.

Both in his submissions in support of the preliminary objection, and in his final address, counsel for the appellant stressed that if this court came to the conclusion that the cross-appeal should be allowed, it could not make an order for possession, because an order for possession is personal to the landlord. He contended that the second respondent did not claim possession at the trial, and that the learned judge did not have the opportunity of considering whether it was reasonable to make the order in his case. I think that the argument is clearly misconceived. In *Goldthorpe v. Bain* (15) ([1952] 2 All E.R. at pp. 26–27) Jenkins, L.J., disposed of a similar argument in these terms:

> "It was not sought to be maintained in argument before us that every order for possession made under the Act is personal to the particular landlord who obtains it and does not enure for the benefit of his successors in title. I am not surprised at the disclaimer of this extreme position, for I think it would be most unreasonable and regrettable if, for example, in a case where an order was obtained for possession on the ground of non-payment of rent and time was allowed for the tenant to comply with the order, the death of the landlord during the interval between the date of the order and the date fixed for the tenant's compliance with it had the effect of putting the landlord's personal representatives to the trouble and expense of obtaining a fresh order for possession in new proceedings. Once it is conceded that in cases such, for instance, as that of non-payment of rent the order is not personal to the landlord who obtains it, I think it is impossible to draw a distinction between orders based on a default of the tenant, such as non-payment of rent, and orders based on the personal circumstances of the landlord. In both cases, as it seems to me, the circumstances on the strength of which the landlord is seeking possession, and, indeed, the overriding condition as to the reasonableness of making the order, must be considered with reference to the facts as they stand at the date of the hearing."

The case of *Goldthorpe v. Bain* (15) was explained in *King v. Taylor* (16) where it was held that in an appeal from an order for possession the Court of Appeal should consider the circumstances as they exist at the time of the hearing before the trial judge; but in an appeal from the refusal to make an order for possession, the Appeal Court can take into account a change of circumstances which occurred while the appeal was pending. It seems to me to be implied from the judgment

of Romer, L.J., that the Court of Appeal can, if it thinks that the judge was wrong in his refusal, make an order for possession, provided it is satisfied that the grounds of hardship on which the landlord had originally relied had not disappeared or substantially changed since the hearing. In my view the grounds on which the plaintiff relied for possession are still subsisting. The first defendant is estopped by the consent order from objecting to the second respondent as the person entitled to possession of the suit premises.

On the whole I think that the first defendant failed to prove that he was dealing in any business on the ground floor of the suit premises. The plaintiff proved that there was an alternative accommodation for the chairs, windows and other things which he stored there. This was accepted by the trial judge. The plaintiff alleged that she required the ground floor for use by the second respondent as a Mubraz. On the whole evidence I can see no other evidence adduced by the first defendant which can be put into the scale to counter-balance that. In these circumstances the one, and only irresistible inference, is, in my view, that the issue of greater hardship was in favour of the plaintiff, and that the learned trial judge should have made an order for possession. I would therefore allow the cross-appeal and set aside that part of the judgment of the court below in respect of the ground floor of the suit premises and also the order as to costs. I would give judgment for the second respondent for possession of the ground floor of the suit premises.

Since my two brethren take a different view on the result of this appeal, the order of the court would be in the terms proposed by de Lestang, J.A.

Sir Clement De Lestang JA: The material facts giving rise to this appeal and cross-appeal which I have culled from the judgment of the court below are as follows. The premises in suit are a double storey building. The ground floor is one large room. The upper floor consists of a large front room and three small rooms and a balcony or verandah. Its relevant history goes back to the year 1928 when it was rented by the Arab Literary Club. Soon afterwards the appellant became the president of the Club and at some unspecified time after that began to use the ground floor in connection with his tobacco business, the Club's activities being confined to the upper floor. In the course of time the Club's membership dwindled and it ceased to function actively. In or about 1952 the appellant who had apparently been paying the rent all along took over the tenancy. Subsequently the Club's sign board was removed and replaced by that of the South Arabian League, a political organisation and the name-plate of an advocate appeared over the door of the premises. The position then was that the Club was moribund, its membership consisted almost entirely of the appellant's relations and most of them were prohibited from entering Aden. The appellant, who had been subsidizing the Club for a long time, regarded it as his property and wanted to keep it alive. Being the tenant and in control of the whole premises he permitted the Club and the League to use the large room on the upper floor. Three or four members of the Club used it occasionally for reading and a small library consisting of some one hundred books and a few periodicals was kept in it for that purpose. There was a librarian in charge of that small library and he was allowed by the appellant to occupy one of the small rooms for sleeping. As for the League, it used the room for only a few hours in the afternoon and evening about once a fortnight for committee meetings and about twice a year for public political meetings and lectures. The appellant also permitted the League to use one of the two remaining small rooms referred to as a "kitchen" for keeping its confidential papers and for private meetings of its committee. He also permitted the lawyer to use the third small room as an office for a few hours daily: hence that lawyer's name-plate over the front door. The verandah or balcony and open parts of the upper floor were used occasionally

by the appellant to accommodate nakhoodas from his dhows and friends from Lahej when they were stranded in Aden overnight.

Access to the upper floor was had by a front door, the key of which was kept by an employee of the appellant who lived on other premises of the appellant close by. Any person permitted to use the upper floor had to fetch the employee to open the front door when it was locked. With the exception of the "kitchen" the appellant retained a key to each of the other rooms. There was a certain amount of furniture in all the rooms of the upper floor and this, together with the contents of the library, may have belonged to the appellant. The appellant charged no rent to any of the users of the upper floor, who it is conceded, were bare licensees.

As regards the ground floor the appellant carried on his tobacco business therein until about 1954 when it ceased owing presumably to the imposition of control on the importation of tobacco into Egypt. He kept in the room the scales and other equipment used in the business. He also permitted his brother, who was apparently a furniture dealer, to store temporarily his furniture in the room. Subsequently he used the room in connection with his own business venture, namely, to store a large quantity of chairs and metal frame windows which he had imported for sale. Meanwhile in 1957 the second respondent acquired the premises by purchasing the reversion with a view to occupying them with his family. He was, however, unable to obtain vacant possession from the appellant. With the consent of the appellant he caused the ground floor to be repaired. In 1960 the second respondent sold the premises to his wife, the first respondent, and it was she who subsequently gave several notices to quit to the appellant which finally determined his contractual tenancy on January 31, 1961. On his refusal to give up possession she instituted proceedings wherein she sought an order for possession on the following grounds:

> "(1) that the tenant was not in occupation of the premises and consequently was not protected by the Ordinance on the principle enunciated in *Skinner v. Geary* (9) and similar cases, his contractual tenancy having been duly determined,
>
> (2) that the tenant had parted with the possession of part of the premises, namely, the upper floor without the landlord's consent, thus entitling the landlord to an order for possession of the whole under s. 11 (2) (*g*) of the Rent Restrictions Ordinance, it being reasonable to make such an order. (I would point out here that the expression used in the section is 'transferred the possession' but nothing, I think, turns on this in the present case,) and
>
> (3) that suitable alternative accommodation was available for the tenant and consequently the landlord was entitled to an order for possession under s. 11 (1) (*b*) of the Ordinance, it being reasonable to make such an order."

At the trial the following issues were framed and on those issues the action proceeded to trial.

1. Does the plaintiff prove that at the date of expiry of the last notice to quit, viz. January 31, 1961, the first defendant was substantially using the suit premises or has not done so since – so as to lose the protection of the Rent Restrictions Ordinance?
2. If not, does the plaintiff prove that the first defendant has transferred possession of parts of suit premises, the landlord's consent not having been obtained, contrary to s. 11 (2) (*g*) Cap. 136?

3. Alternatively, does the plaintiff prove that suitable alternative accommodation is or will be available to the first defendant?

4. If the plaintiff is successful on issues 2 or 3, is it reasonable to make an order for possession?"

The learned trial judge in a careful and exhaustive judgment made the following findings:

As regards the first issue he found "that (the appellant) was not in occupation of and was not substantially using the upper floor of the suit premises and had no intention of occupying or using that part when the notice to quit expired but that he was in possession of, and using, the large room on the ground floor as a store for goods he intended to sell and that he intended when the opportunity occurred, to recommence his tobacco business therein". Applying the English decisions in *Murgatroyd v. Tresarden* (4) and *Crowhurst v. Maidment* (5), he concluded that the appellant was entitled to the protection of the Ordinance in respect of the ground floor but not in respect of the upper floor. He accordingly made an order for possession limited to the upper floor and the staircase leading thereto.

As to the second issue he held that the appellant had transferred the possession of two small rooms only, namely that occupied by the librarian and the "kitchen" occupied by the League and that consequently the first respondent had established a case under s. 11 (2) (*g*) of the Ordinance but since the transfer of possession related "to a very small portion of the whole building and to parts which are not physically separated from the rest of the upper floor", he did not regard it as reasonable to grant an order for possession under that paragraph.

As to the third issue he held that although no suitable alternative accommodation was proved to be available outside the premises, yet as the ground floor itself was suitable alternative accommodation for the part of the premises actually occupied by the appellant (none of the other occupiers requiring to be considered for alternative accommodation) the landlord was entitled for an order of possession of the whole premises subject to his granting a tenancy of the ground floor to the tenant, on the principle of *Thompson v. Rolls* (6). Consequently, if he was wrong on the first issue he would make an order in the alternative on the third issue.

The appellant appealed from the order for possession of the upper floor and the first respondent cross-appealed from the refusal of an order for possession of the ground floor. While the appeal was pending, the first respondent sold her interests in the premises to her husband, the second respondent and all the parties consenting, the second respondent was made a party to both the appeal and the cross-appeal and amended memoranda of appeal and cross-appeal, incorporating the joinder, were filed.

At the hearing of the appeal counsel for the appellant contended that the cross-appeal was incompetent both on the ground that, since the first respondent had no longer any interests in the premises, the basis for an order for possession of the ground floor in her favour had disappeared and because a right to possession being personal, before this court could allow the cross-appeal and make an order for possession in favour of the second respondent, It would have to consider his entitlement to possession which was not an issue at the trial and, therefore, could not be considered on appeal.

I agree with Crabbe, J.A., that, having regard to rr. 330 and 331 of the Rules of Court of Aden, in an ordinary case such an objection would be without substance. But it does make a difference that the case is one under the Rent Restrictions Ordinance where the personal status of the parties is all important to the decision? This difficult question was considered by the English courts.

In *R. F. Fuggle, Ltd. v. Gadsden* (17), it was laid down by Lord Greene, M.R., that on appeal regard should not be had to events happening after an order for possession was made which, if they had happened before the hearing, might have led to a different conclusion. That case was approved and followed in *Goldthorpe v. Bain* (15) where Somervell, L.J., after reading a substantial extract from *Fuggle* case (17), of which the above is a summary, said ([1948] 2 K.B. at p. 460):

> "It shows that this court will allow an appeal, and make an order for possession, when, on the facts as they have developed since the hearing, the basis of the application had disappeared."

i.e., notwithstanding the changed circumstances.

In *King v. Taylor* (16) a distinction was made between cases where the appeal was against an order for possession and the refusal of an order for possession. It was accepted that the case of *Goldthorpe* (15) established that in the former case supervening facts should be disregarded but it was suggested that in the latter case the Court of Appeal should take into consideration the changed circumstances. That suggestion was, however, obiter and made without specific reference to the case of *Fuggle* (17) which decided otherwise and was followed in the case of *Goldthorpe* (15).

I cannot myself see why the two situations should be treated differently and think that the cross-appeal, like the appeal, must be decided on the conditions obtaining at the time the decision was made. The objection accordingly fails.

I now turn to the appeal. The amended memorandum of appeal contains five specific grounds of appeal which three only were relied on, namely, grounds 1, 3 and 4, grounds 2 and 5 being expressly abandoned. Like my brother Crabbe, J.A., I had some difficulty in following counsel for the appellant's contention because in my view he strayed somewhat from his grounds of appeal. As I see it, however, two questions arise for decision. The first is whether the court below was right in holding that the appellant was not substantially using the upper floor of the premises at the material time. In deciding that question against the tenant the learned trial judge in my view applied the decision of the English courts in *Skinner v. Geary* (9) too strictly. It is clear that the Rent Restrictions Ordinance of Aden, though undoubtedly founded on the English Rent and Mortgage Interest Restrictions Act, 1923, is by no means identical with it. One fundamental difference is in the scope of the respective legislations. While the English Act applies to dwelling-houses only and is designed to protect tenants from being evicted from their homes the Aden Ordinance applies to all premises irrespective of their use. Consequently the decisions of the English courts on problems arising out of the English Rent Restriction legislation must be applied with caution by the courts of Aden especially when dealing with premises other than dwelling-houses. In particular in applying the decision in *Skinner v. Geary* (9) it must be borne in mind that that case was concerned with a tenancy of a dwelling-house and that its unqualified application to premises other than dwelling-houses, in regard to which different considerations apply give rise to difficulties. Consider, for example, the case of a company which has a tenancy of business premises. As it is not a physical person it cannot occupy premises personally as required by *Skinner v. Geary* (9) so as to have protection of the Act. Yet it has never been doubted in East Africa that companies were entitled to the protection of the local rent restriction legislation in respect of their business premises. It seems to me, therefore, that in Aden a tenant of premises other than a dwelling-house is protected so long as he "retains possession as required by s. 13 (1) of the Ordinance and while I am prepared to concede that to retain possession he must be using the premises for his own purpose, nevertheless, that user may be through agents or employees or even licensees.

Applying that principle to the facts of this case I consider that the appellant clearly retained possession of the upper floor of the premises. But even if the test expressed in the first issue is applied I am unable to agree that the appellant was not substantially using the upper floor. Not only did he have control of the whole floor and kept his furniture and other possessions therein but he also used the big room for what he considered to be his club, housed the librarian who to all intents and purpose was employed by him in one of the small rooms, allowed an advocate friend the use of another small room and used the balcony and other open spaces to house his nakhoodas and friends on occasions. I would accordingly respectfully disagree with the learned trial judge and decide this issue in the affirmative. It follows from this that the ground floor could not qualify as suitable alternative accommodation.

Having come to this decision it is strictly unnecessary to decide the other question which may be posed thus: Assuming the court below to be right that the appellant was not in occupation of the upper floor, having regard to the fact that the premises as a whole are a single letting was the court entitled to make an order for possession restricted to the upper floor? In deciding that such an order could be made the learned judge again applied the English decisions of *Murgatroyd v. Tresarden* (4) as explained in *Crowhurst v. Maidment* (5). As both these cases concerned dwellings, to which the principle of *Skinner v. Geary* (9) applied, it is not clear how far that circumstance affected their decision. Be that as it may I do not see why on principle an order for possession limited to the unoccupied part of the premises could never be made. The contractual tenancy being at an end the tenant is protected from an order for possession in respect of that part only of the premises of which he retains possession provided as in the cases mentioned that that part is physically separated and can be occupied independently of the rest. That was the position in the present case. The learned judge found as a fact that the tenant had physically separated the upper floor from the ground floor and this finding is not challenged by the appellant. Consequently on the assumption that the appellant was not in occupation of the upper floor I am not convinced that the order for possession of that floor was wrong.

I now turn to the cross-appeal which contains six grounds. As these are set out in Crabbe, J.A.'s judgment I will not repeat them. Suffice it to say that they attack the learned judge's findings,

(*a*) that the tenant was in possession of the ground floor.

(*b*) that it was not reasonable to make an order for possession of the whole premises and

(*c*) that there was no suitable alternative accommodation available to the tenant in regard to the ground floor.

As regards (*a*) the learned judge found that before the contractual tenancy was determined the tenant had started the business of importing chairs and window frames for sale and was storing those goods on the ground floor, that the goods were not left there merely to try and defeat the landlord's claim to possession and moreover that the tenant intended to use the ground floor again to re-establish his tobacco business as soon as he was able to do so. These are findings of fact which in my view the learned judge was entitled to make on the evidence. I cannot accept the landlord's contention that because the tenant was not actually trading on the premises he was not using them. Once it is accepted that the tenant was using the ground floor the learned judge's decision that it was not reasonable to make an order for possession, cannot be questioned since there is nothing to show that he applied any wrong principle. There is, therefore no substance in (*b*), as regards to (*c*) it was contended that the tenant had other premises in which he could have stored his chairs and window

frames. It is true that the tenant has other premises but there was no satisfactory evidence that there was room in them to store those goods which, as the learned judge pointed out, required substantial space.

It was also contended in the cross-appeal that the tenant was not entitled to retain possession of the ground floor because the premises were originally let for a different purpose. This was never suggested in the course of the trial and it was not made a ground for obtaining possession. In any event it is common ground that the original letting contained no restriction on the user to which the premises could be put and it is clear from the evidence that the use to which the premises were being put at the time of the action had remained substantially unaltered for years, at all events since 1954, and that both the landlord and the predecessor in title had acquiesced in such user. I would accordingly allow the appeal and dismiss the cross-appeal. I would set aside the order and decree of the court below and substitute an order and decree that the plaintiff's suit be dismissed with costs.

Spry JA: The facts out of which this appeal arises, the issues and the grounds of appeal and cross-appeal are set out in the judgments of Crabbe and de Lestang, JJ.A., which I have had the advantage of reading and it is unnecessary for me to repeat them.

As regards the preliminary objection, I agree with the views expressed by Crabbe, J.A., and I can therefore pass at once to the appeal itself.

The first point taken by counsel for the appellant, was that while the learned trial judge noted the difference between the rent restriction legislation of Aden and that of England, he allowed himself to be unduly influenced by decisions of the English courts. I think, speaking generally, that there is merit in that submission. Although the Aden Rent Restrictions Ordinance (Cap. 136) is derived from the English Acts, it differs very materially from them and although there is guidance to be found in English decisions, they must, in my view, be followed in relation to Aden only with the greatest caution.

There are four sections of the Ordinance with which this appeal is concerned: s. 2, the definition section, and in particular the definition of "premises" as "any building or house or any part of a building or house"; s. 3, which applies the Ordinance to "all premises situate within the Colony of Aden which are now in existence or shall come into existence hereafter"; s. 11, which lays down the only circumstances in which an order or judgment may be made for possession of any premises to which the Ordinance applies or the ejectment of any tenant therefrom; and s. 13, which provides generally that the terms and conditions of a former contractual tenancy shall subsist during an ensuing statutory tenancy.

It is common ground that there had been a contractual tenancy and that it had been determined by notice on or before January 31, 1961. The contractual tenancy appears to have been a verbal monthly tenancy, with no condition restricting the user of the premises.

The first and perhaps the essential question of fact with which the trial judge was concerned was whether the appellant was in possession of the suit premises when the suit was filed: if he was, he was *prima facie* entitled to the protection of the Ordinance, whereas if he was not in possession, he clearly could not invoke its provisions. It was part of the plaintiff's case that the appellant had not been in occupation of the premises and did not use them, although, as seems to have become usual in such cases, the prayer asked for his ejectment from the premises.

The learned judge decided that the suit premises could properly be regarded as two separate tenements, the ground floor and the upper floor, on the basis

that they had separate entrances and that the door which communicated between them could be and in fact had for a considerable period been locked. He found that the appellant "by failing to use the upper floor at the material time" had forfeited the protection of the Ordinance in respect of it and that an order for possession should be made, but that he was entitled to the protection of the Ordinance "in respect of his use of the ground floor". As regards the order for possession of the upper floor the learned judge observed:

> "The question of the reasonableness of making this order does not arise since it would not be an order made under s. 11 of the ordinance."

The learned judge based his decision regarding the upper floor on the English case of *Murgatroyd v. Tresarden* (4), as explained in *Crowhurst v. Maidment* (5), but with respect I think he failed to give sufficient weight to the emphasis placed by Evershed, M.R., in the latter case on the importance of the purpose of the English Acts, as judicially interpretated, being "to protect occupants in the occupation of their homes and no more". That is where the laws of England and Aden are so vitally different, since the Aden legislation protects all tenants, whatever the nature or purpose of the tenancy. When that distinction is borne in mind, the judgment of Evershed, M.R. supports, obiter dicta, the case of the appellant rather than that of the respondents.

I must therefore consider in more detail the primary facts found by the learned judge. He found that there were four rooms, one large and three small, and a verandah on the upper floor and that the ground floor comprised a single large room. Of the rooms on the upper floor, the large one was occasionally used as a library and reading room by the members of an unincorporated and more or less moribund body known as the Arab Literary Club and also by the members of a political club known as the South Arabian League. These were licensees of the appellant. One of the small rooms was used as a committee room by the South Arabian League and for storing the confidential papers of the League. Another small room was described as an office: at successive times the appellant allowed two advocates to use this room, again as licensees. The fourth room was occupied by a person who was allowed to live there in return for looking after the books in the library: he also was a licensee. The verandah was occasionally used for sleeping purposes by guests and employees of the appellant. The large room on the ground floor was used by the appellant for the storage of a large number of chairs and some cases of window frames. The appellant had keys of all the rooms except the committee room and had the only keys of the outer doors.

The learned trial judge sought to apply the principle enunciated in the English case of *Skinner v. Geary* (9), that is to say that the true scope of the English Acts is to protect a person residing in a dwelling-house from being turned out of his home, to the law of Aden by substituting for the requirement of personal occupation a requirement of personal use, but he qualified this on the one hand by saying that the personal use might be actual or constructive and on the other by saying that it must be substantial. Thus he was prepared to allow that a man might be said personally to be using premises if he carried on business there, even though the conduct of the business was left to a manager and the tenant himself never visited the premises. On the other hand, he was not prepared to hold that the use of the upper floor by the Club, the League, the advocates or the "librarian" was even constructively user by the appellant. He took the view that when the appellant visited the upper floor, he did so as a member of the Club and not "in his personal capacity of tenant".

With some hesitation, I have reached the conclusion that this approach is not correct. The English courts, faced with statutes that related only to residential

premises, were able without difficulty to infer an intention on the part of the legislature to afford protection only to tenants in personal occupation. As regards Aden, where protection is given to all tenants in respect of all classes of premises, I find it difficult to arrive at any comparable inference. This court had already held, in *Bhatt v. Luxmichand* (7) (a decision which was not available to the learned trial judge when he delivered his judgment), that "possession" in s. 11 (2) (*g*) of the Ordinance means actual, as distinct from legal, possession and I think that it has the same meaning in s. 13. I think also that the possession must be evidenced by something more than mere token visits or the maintenance in the premises of token articles of furniture. Further than this, I do not feel prepared to go. I can see no justification in the Ordinance for saying that there must be "substantial" use made of premises (unless substantial is merely used as the reverse of nominal), nor do I think that a requirement that the use be "personal", qualified by the words "actual or constructive", really has any meaning where the user of the premises is unrestricted. The fact that the appellant allowed certain licensees, including the members of a club which he had apparently subsidised for years, gratuitously to use the premises does not seem to be any less "personal" than if he had run a proprietary club, through a manager, for profit. Also, it is to be borne in mind that this manner of user had been going on throughout the period of the contractual tenancy, and it was never suggested that it constituted any breach of the terms of that tenancy. I think, therefore, with respect, that the learned judge was wrong in holding that the appellant was not in possession of the upper floor and therefore not *prima facie* entitled to the protection of the Ordinance.

As I have said, the learned judge found that the appellant was in possession of the ground floor room and I entertain no doubt that the decision was correct. It was challenged in the cross-appeal, on the ground that no substantial use of the room had been proved but as I have already indicated, I think that is putting the standard too high. I think that once the learned judge found, as he was clearly entitled to do, that the room was used for the storage of a considerable number of articles, that was enough to establish possession.

It follows that in my view the appellant established possession of the suit premises and that the learned judge erred in finding that part of the premises was outside the scope of the Ordinance.

The plaintiff had, however, an alternative claim under the Ordinance, and this alternative claim falls into two parts. First, it was alleged that the appellant had parted with the possession of parts of the suit premises without the consent in writing of the plaintiff, thereby empowering the court to make an order under s. 11 (1) (*a*) and (2) (*g*) of the Ordinance; secondly, it was alleged that the appellant had suitable alternative accommodation available to him and that this empowered the court to make an order under s. 11 (1) (*b*) of the Ordinance. In either case, of course, the court had a discretion in the matter, as it had to be satisfied that it would be reasonable to make such an order.

On the first of these points, the learned judge, not having had the opportunity to read the judgment in *Bhatt v. Luxmichand* (7) interpreted "possession" as meaning legal possession, but even on that basis he held that the appellant had parted with the exclusive possession of two rooms, the committee room and the room occupied by the "librarian". He went on, however, to say that as those rooms represented only a very small proportion of the whole building he

> "should not therefore regard it as reasonable (since it would substantially interfere with the tenant's enjoyment of the rest of the premises) to grant an order for possession under para. (*g*) of the subsection even limited to the two rooms in question."

Against that finding, there has been no cross-appeal.

The second question was whether it has been shown that suitable alternative accommodation was available to the appellant. The learned trial judge held that it was unnecessary for him to consider alternative accommodation in respect of the upper floor, as the appellant did not occupy it personally and the licensees were, in the judge's view, not entitled to consideration. As regards the ground floor he held that the onus was on the plaintiff to prove the existence of alternative accommodation and that she had failed to do so.

This latter finding was attacked in the cross-appeal and counsel for the respondents argued that here was evidence given by the plaintiff's husband, of other premises belonging to the appellant where there was sufficient space for the storage of the appellant's goods then in the suit premises. This evidence referred to three offices and a godown in Section A, Street No. 4, Crater. The witness is recorded as saying:

> "He could not use the office for the meeting of the League but he could move the old man (defendant No. four) to that place."

The witness does not appear to have been asked whether there was space for the chairs and window frames stored in the suit premises. I can see nothing in that evidence to justify interfering with the learned judge's finding of fact, which was based on an examination of that evidence.

It was a ground of appeal that the learned trial judge erred in law in holding that the suit premises should be regarded as two separate entities, and counsel for the appellant argued that the English cases that had been cited were inappropriate, as being based on facts that were materially different. He submitted that the tenancy was one and indivisble. I think this is essentially a matter of fact and I see no reason to disagree with the finding of the learned judge that there had been a de facto division, which entitled the court to treat the two floors as separate tenements for the purposes of the Ordinance.

The second, third and fourth defendants have not appealed and their position does not therefore call to be considered. The only question is whether it had to be shown that there was suitable alternative accommodation available to the appellant in respect of his user of the upper floor. As I have already said, I do not think the manner of user needs to be "personal". The use of the upper floor was not in breach of the terms of the former contractual tenancy and had, apparently, continued substantially unchanged from the beginning of that tenancy. (Section 13 of the Ordinance is not irrelevant in this connection.) I think, therefore, that the appellant was entitled to regard user by his licensees as vicariously his own and that alternative accommodation had to be shown to exist. I have considered whether the proceedings ought to be remitted to the trial judge to make an express finding whether or not such alternative accommodation was available but after considering the very inadequate evidence on the subject, and the learned judge's comments on it, I think he must inevitably have come to the conclusion that the plaintiff had failed to discharge the onus on her. I do not therefore think the delay and expense of remitting the proceedings would be justified.

To sum up, in my view, the plaintiff failed to establish that the appellant was not in possession of the premises, so as to entitle her to an order for possession outside the scope of the Ordinance; the learned judge held that it would not be reasonable to make an order under s. 11 (1) (*a*) and (2) (*g*) of the Ordinance and there has been no appeal against that decision; it has not been established that suitable alternative accommodation was available to the appellant, so that no order could be made under s. 11 (1) (*b*). It follows that, in my view, the suit

should have been dismissed. I would accordingly allow the appeal and dismiss the cross-appeal.

Appeal allowed. Cross-appeal dismissed.

For the appellant:
Satish Gautama
WH Ansari, Aden

For the respondents:
PK Sanghani
PK Sanghani, Aden